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**Assurant Group v. Fillion**

By Thomas J. Gorsky

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*Question: When is 32 weeks' pay less than 19 weeks' pay?*

*Answer: When it's the Employment Standards Act (Ontario)!*

**The issue**

In Ontario, provincially regulated employers are required to pay statutory termination pay of up to eight weeks to termin  
Many larger businesses are also required to pay statutory severance pay to employees with more than five years' serv  
severance pay accumulates at the rate of one week per year, to a maximum of 26 weeks. Is there any device an empl  
this *Employment Standards Act* obligation?

The *Employment Standards Act* prescribes a variety of mandatory minimum standards, such as vacation pay, minimur  
etc. The *Act* does provide that something other than a minimum standard can be contractually agreed upon if the alter  
overall "greater benefit."

**The facts**

In *Assurant Group v. Fillion*, Assurant Group was relocating its Toronto offices to Kingston. In order to ensure sufficien  
day of its Toronto operations, the employer devised a "stay bonus incentive," by which it gave employees six months o  
a bonus of 25 per cent of that amount, provided the employee stayed until the end of the six month period. Although Fi  
agreement to these terms, she later disputed its validity.

It could be argued that Fillion was better off under the terms of the "stay bonus incentive," because she received a total in the form of combined working notice and bonus. On the other hand, she was only entitled to 19 weeks of combined severance. In other words, the 32 weeks' pay allotted under the bonus was more than the required 19 weeks of total severance. Therefore Fillion had received a "greater benefit," and was not entitled to any further payments.

#### **The decision**

Both the Ministry of Labour, and, on judicial review, the Ontario Divisional Court, took Fillion's side. They reasoned that pay must be paid regardless of "mitigation." Thus, if employment is terminated, even if the employee finds a better-paying job following termination, the employee still is paid 100 per cent of severance pay. As such, the court rejected the argument that working notice could reduce the employee's right to statutory severance pay.

Furthermore, no credit was allowed to the employer against its severance pay obligations for the 25 per cent stay bonus. The reasoning was that the amount of the stay bonus bore no relationship to the length of service. The stay bonus was not devised in a manner analogous to the calculation of statutory severance pay, and therefore should not be looked upon as payment toward that obligation.

#### **Lessons learned**

An employer will not be able to claim a credit for working notice as against its statutory severance pay obligations. The employer should ensure that a stay bonus will be credited against the obligation to pay statutory severance pay, if the stay bonus is based on length of service.

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Contents