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**COURT OF APPEAL FOR ONTARIO**

**RE: CATALDO VANELLI (Plaintiff (Appellant)) – and – SOBEYS  
CAPITAL INC. and 1464167 ONTARIO LIMITED c.o.b. as  
ALBION PRICE CHOPPER (Defendants (Respondents))**

**BEFORE: FELDMAN, CRONK and LAFORME J.J.A.**

**COUNSEL: Bram A. Lecker  
for the appellant**

**Michael McFadden  
for the respondent**

**HEARD &  
RELEASED**

**ORALLY: February 18, 2005**

**On appeal from the order of Justice R. Echlin dated November 18, 2003.**

**ENDORSEMENT**

[1] The appellant argues: (i) that the respondent employer's requirement that his work hours and duties include closing the store one night per week and one weekend per month, without additional pay, was a fundamental breach of his employment contract; and (ii) that the employer's delayed payment of its share of the appellant's disability benefits was also a fundamental breach of the agreement. He submits that the legal effect of these actions by the employer was to repudiate the employment contract and to constructively dismiss the appellant, effective November 5, 2001.

[2] We disagree. The trial judge held that, unlike the situation in *Hilton v. Norampac Inc.* (2003), 176 O.A.C. 309, leave to appeal to the Supreme Court of Canada dismissed [2003] S.C.C.A. No. 459, the employer here was not asking the appellant to work extra hours or closing hours without pay. This finding was open to the trial judge on the evidence. On our reading of the evidence of the employer's representative at trial, the appellant's working hours were to be adjusted to take into account the closing hours and he was to be compensated for this work in the normal course. Counsel for the appellant was unable to point to anything on this record establishing the assertion that the employer

was intent on requiring extra hours of work without compensation. Accordingly, we reject the appellant's first ground of appeal.

[3] We are also not persuaded that the employer's delayed payment of its share of the appellant's disability benefits constituted a breach or repudiation of the employment contract. The applicable benefits insurer denied the appellant's benefits claim for some time and subsequently accepted it. The appellant's counsel was informed by the employer's president that the employer would recommence payment of its share of the appellant's disability benefits as soon as the insurer approved the claim. Shortly thereafter, upon learning of the insurer's approval of the claim, the president of the employer, as promised, instructed his staff to promptly resume payment of the employer's share of the benefits. The evidence at trial indicated that the employer's subsequent delay in paying its share of the benefits was attributable to an administrative error on the part of one of its benefits staff, who subsequently left the employ of the employer.

[4] The appellant, after the approval of his claim by the insurer and the commencement of receipt of benefits payments from the insurer, never informed the employer that he was not receiving the employer's share of the benefits. Moreover, as found by the trial judge, the appellant ultimately received the full benefits owing to him from the employer.

[5] For these reasons, we conclude that the appellant's appeal must be dismissed. The respondent employer is entitled to its costs of this appeal, if sought, on the partial indemnity scale, fixed in the amount of \$4,500, inclusive of disbursements and Goods and Services Tax.

“K. Feldman J.A.”

“E.A. Cronk J.A.”

“H.S. LaForme J.A.”