ISSUE 40- MARCH 2014

WL UPDATE

WHITTEN & LUBLIN
Employment Lawyers

Whitten & Lublin is a team of legal experts who provide practical advice and advocacy for workplace issues.

ENCOURAGING NEWS FOR FRUSTRATED EMPLOYERS

We are often approached by employers wondering how long they have to put up with an employee who has been absent for months and even years from the workplace as a result of a disability. These companies are sensitive to the unfortunate circumstances of their employee, but want to know when they are allowed to end the employment relationship without risking legal exposure – especially based on allegations of discrimination.

A recent decision of the Human Rights Tribunal of Ontario has provided a glimmer of clarity in this otherwise murky area of law known as "frustration of contract."

As background, legal frustration refers to the right to terminate a contract where an event unforeseen by either party has occurred. In the employment setting, the unforeseen event is often the disability of an employee resulting in an extended leave of absence, from which the employee has confirmed he or she is unlikely to return in the foreseeable future.

In Gahagan v. James Campbell Inc., the Human Rights Tribunal was asked to find that the respondent company discriminated against Ms. Gahagan by terminating her employment following a two-and-a-half year absence in the wake of a workplace injury. The application suggested that James Campbell Inc. failed to accommodate the employee's disability to the point of undue hardship.

Of importance to the Tribunal's ruling that there was no discrimination, Ms. Gahagan herself had stated as part of her application for disability benefits that she was unable to perform her job as a result of a "severe and prolonged disability" which appeared to be permanent in nature. Even with accommodation, the Tribunal found she was unable to return to the workplace as a result of the disability, and that therefore it was reasonable to declare her employment frustrated.

This decision represents a breath of fresh air for employers inclined to throw up their hands in these challenging circumstances.

Nevertheless, the case must be treated with caution, since both the Tribunal and a court will engage in a contextual analysis of the unique circumstances applicable to the case at hand. In addition, companies must be forewarned that they are still required to pay out the employee's termination pay and severance pay entitlements under the Ontario Employment Standards Act, 2000 – even where the employee's employment has been frustrated.

This assessment is far from cut-and-dried. For instance, a Costco employee disabled for five years was found to be wrongfully dismissed because the evidence established he was seeking out new psychiatric treatment at the time of termination. As a result, the frustration defence didn't fly in that case.

As such, employers should discuss with legal counsel the following

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considerations, among others, before drawing any conclusions:

- The length of the employee's continuous absence from work;
- The potential impact of long-term disability benefits offered by the company;
- The extent to which objective medical evidence reveals a permanent incapacity;
- The employee's position and, more specifically, the extent to which the employee is "replaceable" (i.e. distinguish between an assembly line worker and a CEO); and
- Whether there is any possibility the company itself contributed to the employee's inability to return to work, thereby potentially negating the frustration defence.

LATEST NEWS

David Whitten is now a Global News contributor where he writes about his area of expertise. David's articles can be found on the Global News website.

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Daniel Lublin and Ellen Low wrote an article originally published in the Lawyers Weekly. The article can be read here.

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