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When Does Illness Justify Termination of Employment?

An employee's permanent or temporary incapacity to return to work due to illness can trigger the termination of the employment contract.

When illness strikes, the farthest thing from most employees' minds is a concern over being terminated. Long term disability benefits are a lifeline for a sick employee who is able to receive a portion of their income while away from work on medical leave. However, if the medical leave of absence continues for too long, the employee risks being terminated for frustration of contract.

Frustration of contract occurs when an employee becomes ill to the point of being permanently or temporarily incapacitated and unable to return to work to perform their regular duties contemplated by the employment contract or that it would be unreasonable for the employer to wait any longer for the employee to recover. The onus rests on the employer to establish that the contract of employment has been frustrated. If the contract is frustrated, that employee's notice entitlement is limited to the statutory notice provided in the Employment Standards Act, 2000 and no common law notice is generally provided.

In a recent Ontario case, *Dragone v. Riva Plumbing Ltd.*, heard on September 21, 2007, Justice Perell held that Ms. Dragone, an office clerk who was on a medical leave of absence for approximately 14 months while undergoing treatment for metastasized breast cancer, had not frustrated her contract because a "permanent incapacity to return to work" had not been established. The Court stated that although Ms. Dragone was still receiving treatments and was uncertain as to when she will be able to return to work, there remained the possibility that she would be able to return. Justice Perell did note that a temporary illness could constitute a frustrating event depending on the circumstances.

Several factors are considered in assessing whether a contract has been frustrated by an employee's illness or incapacity. Of considerable weight is whether the employer offers its employees long term sick leave and disability benefits. By providing these benefits, the employer has anticipated the possibility that their employees may take sick leave. The Courts have interpreted this as meaning that these employers should be more tolerant when an employee is absent and a greater period of time should elapse before frustration is deemed to have occurred. Other

important factors to consider are the seniority of the absent employee, how integral that employee is to the success of the employer's business and whether a prolonged absence will be harmful to the employer. For example, a relatively short period of incapacity may frustrate a contract of employment if the absent employee is a senior executive, whose absence is causing harm to the company, whereas a longer period of time would be allowed to elapse before frustration occurs for an employee with a lesser role in the company.

Thus, a contextual analysis is crucial to an understanding of the issue of frustration of contract. While an employer is entitled to terminate an ill and incapacitated employee after a period of absence from work for frustration of contract, employers should carefully consider the above factors before taking action, including whether the termination violates the Human Rights Code. **MB**

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