When Does a Long-Term Absence Justify Termination?

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An employee sustains a back injury while shelving product. After three months off work, the employee returns on modified duties. Two days into her return, the employee complains of back pain and is unable to work. Eighteen months later, and after several requests for medical documentation, it appears unlikely the employee will ever be able to return to work.

Can the employer terminate the employee's employment? If so, is the employee entitled to termination or severance pay? What if the employee works for a unionized workplace? The answers are addressed below.

"Frustration of Contract" in Employment

Frustration is a legal doctrine by which a contract is terminated due to an unforeseen circumstance that:

- prevents achievement of the contract's objectives
- makes execution of the contract (nearly) impossible
- renders contractual performance illegal

Because employment is a contract between an employer and employee (written or not), the act of employment can become frustrated. The most common way is by illness or incapacity of the employee.

To determine whether a contract of employment has been frustrated by illness or disability, a court will ask: is there a reasonable prospect the employee will be able to return to work in the foreseeable future? More recently, courts have put this question another way: is there a reasonable prospect the employee will be able to return within a reasonable time? If the answer is "no," this will generally justify termination of employment on the basis of frustration of contract.

Frustration and the Duty to Pay: Termination and Severance

Termination for frustration of a contract of employment will relieve an employer of the obligation to provide notice, or pay in lieu, under an employment contract or at common law. However, it does not necessarily relieve an employer of its obligation to pay termination or severance under applicable employment standards legislation. For example, in Ontario, under the Employment Standards Act, 2000 (the "ESA"), termination pay and severance pay (if any) remain payable. By contrast, employment standards tribunals in some other jurisdictions (e.g., British Columbia) have held that frustration discharges an employer from its obligation for termination pay.

Innocent Absenteeism in the Unionized Workplace

Some arbitrators have held that the doctrine of frustration (in contract) does not apply to a unionized employee because no contract of employment exists between the employee and his or

her employer – the contract is between the employer and the union. However, arbitrators will apply a similar idea (just not in contract) if the employee is absent due to "innocent absenteeism." When deciding whether innocent absenteeism justifies termination of employment, arbitrators, like courts, focus primarily on whether there is a reasonable prospect the employee will return to work in the foreseeable future. To this end, arbitrators will evaluate medical evidence, the grievor's conduct, and the persistence and pattern of the absenteeism. In addition, an arbitrator may also consider:

- the impact, or lack thereof, of earlier attempts by the employer to respond to the situation
- The handling of other employees with similar infirmities and/or restrictions
- The employer's establishment, or lack thereof, of clear attendance objectives and/or warnings to the employee that his or her employment is at risk if attendance is not improved

An example of termination for innocent absenteeism is *Mitchell's Gourmet Foods Inc. v. U.F.C.W. Local 248-P*. This decision addressed the termination of a long-term employee absent from work for approximately five years following a workplace injury. Prior to going off work, the employee had intermittent absenteeism related to the injury. His employment was ultimately terminated and the employer relied on the doctrine of frustration of contract, as well as innocent absenteeism, to justify the termination. The arbitrator upheld the discharge, stating:

"… based on the Grievor's history of extensive intermittent absenteeism prior to 1998, his continual absence from work for a period in excess of five years and his own view that he was unable to return to work in the future, as expressed to the Company both verbally and by conduct, the Company was justified in terminating the Grievor's employment due to frustration of the employment contract and based on the principles of innocent absenteeism."

Concluding Thoughts

It is not always clear how to determine when an employee's absenteeism justifies termination due to frustration of contract or innocent absenteeism. In most cases, an employer must have clear evidence to support its position that there is no reasonable prospect the employee will return to the workplace in the foreseeable future. When in doubt, consult with experienced employment counsel who will help you navigate this tricky issue. ■

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