When Can You Terminate An Employee On A Lengthy Absence Due To Disability?

Can you fire an employee who has been away from work for a lengthy period of time due to an illness or disability? If so, when? These are difficult questions many employers face when managing lengthy absences.

Sometimes employers may look to the doctrine of frustration of contract. When a contract is frustrated, then the employer can terminate the employee without providing any common law notice or pay in lieu of notice.

The decision to dismiss an employee due to frustration is fraught with risk. Not only will an employer owe common law severance if a court decides that the contract is not, in fact, frustrated, but could also face a claim that it has breached an employee's human rights by failing to accommodate their disability.

Last month, the Human Rights Tribunal of Ontario found an employer did not discriminate against an employee who was fired because of frustration of contract after missing two and a half years of work due to an injury.

In *Gahagan v. James Campbell Inc.*, the employer owned a number of fast food restaurants. The employee worked at a grill station. The employee injured her back lifting a pan and missed nearly two and a half years of work before being dismissed. The employer took the position that the employee could not return to work, even with accommodation, and the employment contract had been frustrated. The employee claimed she was discriminated against on the basis of a disability.

The Human Rights Tribunal sided with the employer and dismissed the complaint. The employee's own evidence was that her physical restrictions impeded her ability to do her job on the grill assembly-line. This evidence, her two and a half year absence and receipt of both LTD and CPP disability benefits supported the conclusion that the employee was not able to return to her job. The employee argued that the employer could have had another employee help her perform her duties, or created a job that existed in another location but did not at this location because of the small size. The Human Rights Tribunal rejected this argument and held that the duty to accommodate does not require an employer to provide "make work" or to create a job that is not productive or that, in the employer's view, does not need to be done.

The *Gahagan* decision should not be taken to stand for any hard and fast rule, but rather only as an example of a successful application of the frustration of contract

doctrine. Other instances will always depend on the facts of the particular case, including, the likelihood that the employee will return to work in the reasonably foreseeable future and questions of reasonable accommodation.

Article by Ryan Berger, Herbert Isherwood, Taryn Mackie, Marino Sveinson, Elizabeth Allan, Katie Cobban, Rochelle Pauls and Andrew Schafer

Bull, Housser & Tupper LLP