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REPRINT

Walking a fine line with terminations

When can an employer safely terminate an employee who is on disability leave without breaking the law?

BACKGROUND

HUMAN RIGHTS legislation across Canada makes it clear that disability is a protected ground from discrimination. This means that employers can`t use a disability as a reason for dismissing an employee. However, it isn`t impossible to end the employment relationship in such circumstances. Employment lawyers Alan Riddell and Kyle Van Schie explain when exactly a disabled employee can be sent packing.

BY ALAN RIDDELL AND KYLE VAN SCHIE

There are few questions which create as big a headache for employers as when, and how, to safely terminate the employment of an employee who is either still on disability leave, or who has just returned from such leave. For many, this question raises difficult issues of conscience as well as the worry of being sued by the employee.

The cost of wrongfully terminating the employment of a disabled employee is exponentially greater than for wrongfully terminating someone who is able-bodied. If an employer wrongfully terminates the employment of a disabled employee, a court or tribunal may publicly declare the organization to have committed a breach of the applicable human rights legislation and may order reinstatement of that disabled employee to her job. The employer may also have to pay both damages for breach of the employee's human rights and back pay running all the way back to the day of termination — a sum which can easily run into the six figures — over $600,000 in the 2016 Ontario Court of Appeal decision in *Hamilton-Wentworth District School Board v. Fair*, for example.

The general legal prohibition

In Ontario, for example, the province's Human Rights Code prohibits employers from terminating sick or disabled employees, except in very limited circumstances. Not only is it illegal to terminate an employee because of sickness or disability, but also because of any extended absence from work or problems in her work performance which arise directly or indirectly from that sickness or disability.

In practice, this means an employer normally cannot terminate someone's employment because the employee:

- Is away from work due to a disability or serious illness
- Has been performing poorly at work due to a disability or illness
- Historically has a poor attendance record due to a disability or illness.

Even if the termination of the disabled employee's employment was principally for legitimate business reasons, a court is nonetheless legally obliged to set aside the termination as contrary to the code if the employee's poor performance or attendance record, arising from the disability, played any role whatsoever in the decision to terminate, no matter how minor.

Legally terminating a sick or disabled employee

In Ontario, there are only four limited situations where the law permits an employer to terminate the employment of a sick or disabled employee.

The termination has nothing to do with absenteeism or disability-related work performance. Employers can terminate the employment of a sick or disabled employee if the reasons for doing so are totally unrelated to the employee's disability-related absence from work or to work performance problems arising from her illness or disability.

When terminating the employment of someone who has a disability or serious illness, there is a rebuttable presumption that the disability or illness played at least a minor role, directly or indirectly, in the termination decision.

That said, if the employee is part of a group of several able-bodied employees who are all being laid off, then the fact that she happens to be sick or disabled would not necessarily prevent the layoff, given that the probability of such layoff being found to be for reasons that are wholly unrelated to his disability or illness.

The employee's illness or medical condition is not a recognized disability. The code only precludes employers from terminating someone's employment due to problems arising from a "disability." Under the code, not all illnesses or medical conditions are serious enough to amount to a recognized "disability" and accordingly an employer may terminate the employment of any employee whose sickness is not recognized as such.

Generally speaking, the code does not recognize as a disability any illness which is both temporary in nature and common place. For example, the flu, the common cold, gastroenteritis, sinusitis and many types of mild allergies are not recognized disabilities protected under the code. As a result, employers may lawfully terminate an employee for absenteeism or performance problems arising from any one of these relatively common, and transitory, medical conditions.

The employment contract is 'frustrated' by the employee's sickness or disability. An employer can also terminate an employee where that employee's illness is of such a serious and permanent nature that it will likely prevent her from ever carrying out the principal duties of her job. In such situations, the contract of employment with that disabled employee is deemed to have been legally "frustrated." Subsection 17(1) of the code expressly permits employers to terminate the employment of any person who "is incapable of performing or fulfilling the essential duties or requirements" of her job.

There are two conditions for the employee's employment contract to be frustrated by sickness or disability:

- Where the sickness or disability is sufficiently permanent that the employment contract is frus-

trated. Contrary to popular belief, an employment contract will not be deemed to be frustrated simply because the employee has been absent from work for several years. In *Naccarato v. Costco*, the court ruled that an employee's continued absence from work for five consecutive years was not sufficient to justify his termination on the grounds of frustration of contract. Instead, the court stated that an employment contract can only be said to be frustrated if there is evidence that shows that there is little likelihood of the employee ever being able to return to work within the foreseeable future.

In *Yeager v. R.J. Hastings Agencies Ltd.*, the court articulated several considerations when assessing whether frustration of contract really exists:

- The length of time that the employee has been employed
- Whether the employment was of temporary or permanent nature
- The length of time that the employee has been absent
- Whether the employee's job can be temporarily filled by someone else
- The likelihood of the employee recovering from his disability.

- When the employee is unable to carry out her essential job duties. Even if the employee is able to return to work, the employment contract can be frustrated when she can no longer permanently carry out the "essential" duties of the position, due to her disability. While employers have a legal duty to accommodate disabled employees by relieving them of their core duties on a temporary basis, and by providing them with modified duties on a permanent basis, their duty to accommodate does not extend to permanently relieving disabled employees of the core duties of their job.

Once it becomes clear that the disabled employee is permanently unable to discharge the essential duties of her position, the employment contract is deemed to be frustrated.

The employee's disability or illness is causing genuine 'undue hardship.' Even where an employee's sickness or disability does not permanently prevent her from carrying out the essential duties of her position, her employment may nonetheless be terminated where her disability-related performance problems, or continued absence on sick/disability leave, would cause the employer "undue hardship."

In practice, it is extremely difficult for employers to terminate an employee on the basis of undue hardship. Proof of some hardship is not sufficient; rather what is required is evidence that the hardship is so great that it has become unsustainable.

As stated by various courts and tribunals, business inconvenience, reduction in employee morale and customer preference will never be sufficiently "undue" to justify the termination of someone's employment. According to the Ontario Human Rights Commission, significant financial costs to the employer will only amount to "undue hardship" if they are "so substantial that they would alter the essential nature of the enterprise, or so significant that they would substantially affect its viability."

Precautions before terminating a sick or disabled employee

There are two essential precautions which all employers should take before attempting to terminate the employment of a sick or disabled employee:

Don't terminate the employee until some effort has been made to investigate and then accommodate the disability. Employers should never try to terminate the employment of a sick or disabled employee unless and until there has been some effort to investigate and accommodate her illness or disability. This is because, pursuant to the code, it is illegal to terminate a sick or disabled employee unless and until the employer has unsuccessfully tried to accommodate that illness or disability to the point of undue hardship. As stated by the Ontario Divisional Court in *ADGA v. Lane*, an employer cannot be said to have unsuccessfully tried to accommodate the illness or disability if it has not made any accommodation efforts at all.

Don't terminate the employee without gathering the necessary evidence of her future inability to work, or of your own undue hardship. A court or tribunal will declare the termination of a disabled employee to be unlawful unless the employer has either medical evidence that she is unlikely to return to work at any point in the foreseeable future or objective evidence that further attempts to accommodate her will likely be unsuccessful or will cause the organization undue hardship.

As stated by the Ontario Superior Court in *Naccarato*, the onus of proof is on the employer to produce medical evidence that the employee's inability to return to work has frustrated the employment contract. Furthermore, courts have repeatedly stated that an employer must have evidence of undue hardship that is objective, real, direct, and quantifiable, as a subjective belief of undue hardship will not suffice.

In view of the serious consequences of illegally and prematurely terminating employees who are sick or disabled, prudent employers would be wise to proceed with extreme caution whenever attempting to terminate such employees.

For more information see:

- *Hamilton-Wentworth District School Board v. Fair*, 2016 CarswellOnt 8904 (Ont. C.A.).
- *Naccarato v. Costco Wholesale Canada Ltd.*, 2010 CarswellOnt 4108 (Ont. S.C.J.).
- *Yeager v. R.J. Hastings Agencies Ltd.* 1984 CarswellBC 768 (B.C. S.C.).
- *Lane v. Adga Group Consultants Inc.*, 2008 CarswellOnt 4677 (Ont. Div. Ct.).