

Lengthy Illnesses Frustrate Employers

By J. Geoffrey Howard

Every few months, I receive a call from an employer who explains that a particular employee has been off work sick for many months and sometimes years. The employer invariably then asks: how long do I have to keep this employee on payroll?

Unfortunately, the answer to that question is never short and simple and the cost of getting it wrong can be high. In fact, the answer involves a review of two of the most complex and unpredictable areas of employment law: the contract law doctrine of “frustration” of employment by reason of disability and the human rights law duty to “accommodate” disabled employees to the point of “undue hardship”. This article will focus on the doctrine of frustration.

Lengthy absence due to disability places enormous strains on employers. Not only must the employer hire and train a temporary replacement or arrange for other employees to “cover” the absent employee’s work, but the employer cannot offer a permanent position to the replacement. In the current tight labour market, it can be very difficult to find someone who is prepared to accept a short term position or one of indefinite duration. At the same time, disabled employees are often heavy users of company benefit plans, sometimes to the point where premiums for the entire group are affected. But these costs pale in comparison with the costs of prematurely advising an employee his job is gone. The courts treat such cases as a wrongful dismissal and can award as much as 24 months severance to a long service employee.

Given that sickness and disability have been with us forever, employers are often surprised to learn that the B.C. Employment Standards Act does not even mention illness of the employee. The courts have stepped into the breach by applying the general contract doctrine of frustration. Under this doctrine, the courts have treated disability as an “Act of God” which, if it continues beyond a certain point, is deemed to put an end to the employment contract without imposing any liability on the employer to provide notice or severance. The doctrine is based on the common sense economic proposition

that employers hire employees to work. Once the employee has been unable to work for a lengthy period and there is no prospect of the employee resuming work in the near future, employers should be released from the obligation to continue the employment.

Surprisingly, given how commonplace lengthy illness is in the workplace, there are relatively few cases providing guidance on the key question: when does frustration occur?

The recent B.C.. Court of Appeal decision in *Wightman Estate v 2774046 Canada Inc.* reviewed the law of frustration. In that case, Mr Wightman had been employed for 28 years with the same business under different owners. After several short term disability leaves, in February, 2003, he went off work with a series of serious health problems and remained off work on disability benefits until he was terminated 22 months later when the business was sold. Although he subsequently died, his estate sued for wrongful dismissal, arguing that because the long term disability plan was part of his terms of employment, this implied that the employment contract should continue as long as the employee was receiving disability benefits.

The Court of Appeal disagreed, finding that providing long term disability benefits for employees did not preclude frustration of the employment contract occurring before the benefits ran out. The Court pointed to some terms of the disability policy itself, which clearly contemplated the possibility that an employee could continue receiving benefits after termination of employment.

Quoting a leading English decision, the Court confirmed that five factors had to be considered in determining if frustration had occurred by the time of Wightman's termination:

- a) The terms of the employment contract governing disability and disability benefits: employees with no sick or disability pay or plans will reach the point of frustration sooner. On the other hand, if an employer offers long term disability

- insurance after 6 months of illness, frustration cannot occur earlier, since this would deprive the employee of the disability coverage;
- b) How long the employment was to have lasted absent the disability: a short term contract will be frustrated sooner than an indefinite hire contract;
 - c) The nature of the employment: frustration will occur earlier for employees in critical hard to replace jobs than for those who are interchangeable with a large number of co-workers in the same job;
 - d) The nature of the illness, how long it has continued and the prognosis for recovery at the time of termination: this factor recognizes that frustration will be more likely where the employee suffers from a permanent or long term severe illness like cancer than a transitory illness such as pneumonia. The prognosis for returning to work is also critical. It makes no sense to find frustration has occurred if the employee will be ready to return to work within 2 weeks; and
 - e) The length of pre-disability employment: in recognition of employees' expectations, the longer the employee's service, the longer it will take before frustration occurs.

In reviewing the earlier cases applying the five factors above, the Court of Appeal noted that in several of them, the contracts of long-serving employees who had been absent 20 to 24 months with no prospect of promptly returning to work were found to have been frustrated. Turning to Mr Wightman's case, the Court upheld the trial judge's finding that after 22 months of absence with no prospect of returning to work according to his doctor, his employment had been frustrated and the employer was under no liability to pay severance.

So what assistance does *Wightman Estate* provide to other employers? While the five factors must be considered in each case, for long-serving employees, there would appear to be consensus emerging that after approximately 20 to 24 months absence, if there is no prognosis for a speedy return to work, frustration will be found to have occurred. Logically, the threshold of absence should be lower for employees with less service, but few cases deal with such employees. What also emerges is that the fifth factor, the

severity of the disability and the prognosis for returning to work, will always be critical. In practice, one of the employer's first steps before making a decision is to get an up-to-date report from the employee's doctor on when the employee can be expected to return to work. Unless that report indicates the employee will not be able to return to work in the near term, it is premature to terminate for frustration.

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