

Long Term Leaves, Frustration and Termination: Strategies in Dealing with Absent Employees

Jeffrey P. Mitchell and Sabrina Serino
Dentons Canada LLP
416-863-4660/4385
jeff.mitchell/sabrina.serino@dentons.com

06 November 2015

Absenteeism

Absenteeism: Overview

- Absenteeism: Culpable vs. Innocent
- Requesting Medical Information
 - Employer Rights
 - Employee Obligations
 - Additional Considerations
- Medical Information and The Duty to Accommodate
 - *Complex Services Inc. v O.P.S.E.U., Local 278*

Absenteeism: Culpable vs. Innocent

- Culpable Absenteeism
 - Lateness or absence problems within the employee's power to address
 - For example: arriving late because alarm didn't go off, leaving work early, improper use of leave of absence
- Innocent Absenteeism
 - Failure to attend work due to circumstances deemed to be blameless
 - For example: a legitimate personal illness

Absenteeism: Culpable vs. Innocent, cont'd

- It is within the employer's rights to gather information if it is unclear whether absenteeism is culpable or innocent
- The SCC confirmed in *Honda v. Keays*:

“...the need to monitor the absences of employees who are regularly absent from work is a bona fide work requirement in light of the very nature of the employment contract and responsibility of the employer for the management of its workforce.”

Requesting Medical Information: Employer's Rights

- Employers have a right to proactively request and receive appropriate medical information to determine whether an employee has been properly absent from work or is fit to return to work

However, this right is not absolute.

- Employer may only request information to:
 - Provide justification for the absence
 - Confirm prognosis and timeline for recovery
 - Understand the likelihood of achieving regular attendance in future
 - Understand the employee's ongoing medical restrictions in order to manage its accommodation and return to work obligations

Requesting Medical Information: Employee Obligations

- Employees have a duty to justify unexplained absences
- With respect to medical information, employees have an obligation to co-operate by:
 - Providing sufficient information to substantiate the need for accommodation
 - Identifying his or her medical restrictions in order to permit employer to understand what accommodation is required
 - Actively participating and co-operating in the accommodation and return to work process
 - Not refusing reasonable accommodation (i.e. there is no requirement for the employer to provide a “perfect solution”)

Requesting Medical Information: Additional Considerations

- A balance must be struck between an employee's privacy and the employer's need for information.
- The medical evidence that may be required will be dictated by the factual circumstances in each case.
 - E.g. A request for medical evidence assessing an employee's mental state was considered unreasonable following an absence taken for a physical surgery (*ONA v. St. Joseph's Health Centre*, 2005 CarswellOnt 2981(Ont. S.C.J. (Div. Ct.))).
- Employer can take steps to ensure employee privacy is protected, for example:
 - Information to be shared only with designated employer representative
 - Limit requests to only information required to run business operations
 - Only request information on a need-to-know basis

Innocent Absenteeism and the Duty to Accommodate

- If medical information demonstrates that absenteeism is related to a *bona fide* disability, it will trigger a duty to accommodate to the point of undue hardship
- Employer should assess whether employee can perform pre-disability position either in existing form or with appropriate modifications that will enable employee to work
- In cases where chronic absenteeism is linked to a disability, an employer will likely be required to tolerate some reasonable level of absenteeism

The Duty to Accommodate: *Complex Services Inc v O.P.S.E.U., Local 278*, 2012 CarswellOnt 3177(ON LA)

- The duty to accommodate may require employees to disclose confidential medical information regarding their disability in order to help facilitate the accommodation process.
- Employee brought a grievance against employer for failing to accommodate upon her return from a lengthy medical leave of absence.
- The Employee:
 - Failed to provide employer with supporting medical documentation
 - Refused to disclose exact nature of her disability
 - Refused to meet with an independent medical examiner for the specified purpose of accommodating her disability
- Employer placed employee on second medical leave of absence until employer could be sure that she was fit for employment and be safely accommodated.

Complex Services, cont'd.

- Grievance dismissed:

“An employer is entitled to request and receive an employee’s confidential medical or other information to the extent necessary to answer legitimate employment related concerns, or to fulfill its obligations under the collective agreement or legislation, including the human rights or health and safety legislation (for example)” (para 93).

Complex Services, cont'd.

The following, otherwise confidential, medical information will generally be required for accommodation purposes:

1. The nature of the illness and how it manifests as a disability (which may include diagnosis, particularly in cases of mental illness).
2. Whether the disability (if not the illness) is permanent or temporary, and the prognosis in that respect (i.e. the extent to which improvement is anticipated, and the time frame for same).
3. The restrictions or limitations that flow from the disability (i.e. a detailed synopsis of what the employee can and cannot do in relation to the duties and responsibilities of her normal job duties, and possible alternative duties).
4. The basis for the medical conclusions (i.e. nature of illness and disability, prognosis, restrictions), including the examinations or tests performed (but not necessarily the test results or clinical notes in that respect).
5. The treatment, including medication (and possible side effects) which may impact on the employee's ability to perform her job, or interact with management, other employees, or "customers" (para 95).

Frustration

Frustration as a Concept

Where:

- Employee has been on long-term leave; **and**
- Medical prognosis is that the individual, *even if reasonable accommodation is provided*, is unlikely to return to work in the foreseeable future

Then:

- Employment contract is “frustrated”, meaning that at common law, both parties are released from further obligations, **UNLESS** the employment contract contemplates otherwise
- NOTE: An “undefined date of return” is **NOT** the same as being unlikely to return in the foreseeable future...

Frustration as a Concept

BUT:

Ontario *Employment Standards Act, 2000*, O.Reg. 288/01

- An employee is entitled to both termination pay and severance pay if the employment contract is frustrated by illness or injury

Section 2(1), clause 4; 2(3); 9(1), clause 2; 9(2)(b)

Before Looking at Frustration....

Ensure you have the information you need:

- What is the duration of the absence?
- Do you have sufficient information to establish frustration?
 - If someone has been absent for a lengthy period, do **not** rely on old medical reports
 - If needed, request a medical report, to ensure you are satisfied that medically, there is no way to accommodate, and that there is no reasonable prospect of a return to work in the foreseeable future
 - Ask for the prognosis, restrictions and whether there is a return to work date, NOT the diagnosis
 - Consider including a Job Description/Requirements Summary

Drimba v. Dick Engineering Inc. (Ont. S.C.) 2015

Facts:

- Mr. Drimba began working in 1996
- May 22, 2013: advised he would be away for 6 months
- June 7, 2013: commenced leave of absence
- Diagnosed with terminal cancer
- Dick advised insurance company that Mr. Drimba was applying for LTD and critical illness

Drimba v. Dick Engineering Inc. (Ont. S.C.) 2015

Facts (cont.):

- August 29, 2013: Dick confirmed in writing that Mr. Drimba's employment would continue until such time as he was well enough to RTW
- Upon his RTW, Dick would arrange for an interview with the new owner of the business
- September 17, 2013: Mr. Drimba died

Drimba v. Dick Engineering Inc. (Ont. S.C.) 2015

- Mr. Drimba's estate sued claiming, among other things, amounts owed under the ESA by virtue of "frustration of contract"
- Argued that Dr. Drimba's illness was sufficiently serious that when it became clear that he was unlikely to RTW, the employment contract was frustrated
- Employer argued that where both parties expect that the employee will return to work following his illness, there can be no frustration of contract

Held

- Despite the fact that the Employer offered to keep his position open for him in the event that he recovered, because of the severity of Mr. Drimba's illness, it should have been apparent that it was highly unlikely that he would ever RTW
- It was impossible to say exactly when the employment contract became frustrated, but it was clear that this occurred sometime between the date he commenced his leave and September 17, 2013 (the date of his death)
- As such, Mr. Drimba's employment contract became frustrated *before* his death
- *At that point*, he became entitled to payment of both termination pay and severance pay under the *ESA*, and the Employer was ordered to pay these amounts to his estate

Ramifications of *Drimba*

- Either the employer or the employee can trigger frustration
- Employees who know they won't be able to RTW may demand payout of their ESA entitlements because of frustration
- Even if the employee doesn't request it, the question remains whether employers have a proactive obligation to pay out these amounts when it appears the employment contract has been frustrated

Key Takeaways

- When dealing with absent employees it is important for employers to:
 - Request just enough information to understand the employee's restrictions and manage accommodation and/or return to work;
 - Ensure the medical information relied upon is current and accurate; and
 - Review each employee's case in light of its own particular circumstances in order to strike a balance employee's privacy and the employer's need for information.

Thank you!



Dentons Canada LLP
77 King Street West, Suite 400
TD Centre
Toronto, ON M5K 0A1