Frustration of the Employment Contract: What the Employer needs to know

Mosey & Mosey asked Allison Taylor, an employment law expert from Stringer Brisbin Humphrey, to comment on this topic. Here are her thoughts ...

Terminating an employee who has been on disability for a prolonged period is one of the most difficult issues facing employers. It also raises a variety of questions:

• When is an employment contract frustrated?
  • What are the employer’s obligations under the Employment Standards Act to a disabled employee whose contract of employment is frustrated?
  • What are the employer’s obligations to an employee on disability with respect to the continuation of benefits?
  • What are the employer’s obligations at common law to a disabled employee upon termination for frustration of contract?

When Is An Employment Contract Frustrated?

Five factors determine whether an employment contract has been frustrated:

• terms of the contract, including provisions regarding sick pay or disability benefits;
• how long employment was likely to last in the absence of illness;
• nature of employment;
• nature and length of illness and prospects for recovery;
• period of past employment.

A significant issue in all cases is the employee’s medical state: the nature of illness/injury, how long it has continued and the employee’s prospects for recovery. As a result, an employer must get a medical opinion as to whether the employee is expected to be permanently disabled from working. My counterparts in the medical profession emphasize that they do not have the expertise to determine whether an employee is disabled from working at his or her job, so this necessary reliance on medical evidence can be a double-edged sword. Nonetheless, some assessment as to whether the employee will ever be able to return to the employment must be made.

Short and long-term disability plans are generally structured to cover the employee’s “own occupation” for two years, plus the waiting period, and any occupation thereafter. This structure reflects the fact that disability from one’s own occupation for a period of two years or so is not uncommon, whereas longer disabilities generally preclude any meaningful return to work. Once an employee has been off work for more than two years, plus the waiting period (often covered by short-term disability, sick pay or E.I.) and is being paid disability benefits due to being disabled from performing any occupation, medical evidence generally indicates the employee will never return to any employment, much less the original employment. In these circumstances, the above test may well be satisfied, and the employment contract frustrated.
However, in *Antonacci v. Great Atlantic and Pacific Co. of Canada*.

Madam Justice Swinton held that the employer’s argument that the contract of an employee who had been off for a significant time had been frustrated was without foundation. She stated: “This is not a case in which it is appropriate to find that the contract of employment was frustrated, if only because the Defendant offered its employees sick leave and long-term disability plans. This is consistent with the conclusion that the contract of employment contemplated a lengthy period of absence by the employee, especially one with long service and who is injured on the job.”

Madam Justice Swinton appears to suggest that if an employer has a long-term disability plan, it can never argue that employment has been frustrated since a long-term disability is contemplated. However, long-term disability benefits continue to age 65 under disability insurance policies in most cases, regardless of termination of employment. The employee is, therefore, not prejudiced by the termination. Consequently, if medical evidence determines that a return-to-work will never occur, the employer may be successful in asserting that the contract of employment has been frustrated.

It is never appropriate to establish a standard timeframe after which a contract of employment is “deemed” to be frustrated. In several cases involving collective agreements, arbitrators found provisions deeming frustration of contract to have occurred after a fixed period of disability to be discriminatory under Human Rights law. This is because they treat all those with disabilities identically, regardless of their actual abilities. The same argument applies to treating an employment contract as frustrated as soon as the “any occupation” threshold is reached. To avoid a Human Rights violation, it’s necessary to do an individual analysis of whether a particular employment relationship is frustrated or not.

**Employer Obligations under the Employment Standards Act to An Employee Whose Contract Is Frustrated**

Under pre-2001 Employment Standards Act regulations, employers were not obliged to provide pay in lieu of notice or severance pay when a contract of employment was terminated due to frustration of contract arising from disability. In 2001, the regulations were amended to preclude payment of severance pay only in circumstances where termination was not in breach of the Human Rights Code. In other words, if the employee were entitled to accommodation under the Human Rights Code because he or she could perform work with accommodation, he or she would be entitled to severance pay for the termination allegedly resulting from frustration of contract.

In October 2005, the regulations were further amended to eliminate frustration as a result of disability from the list of exclusions. Now, an employee terminated due to frustration of contract because of disability will still be entitled to pay in lieu of notice and severance pay. Since these costs accrue over time and are based on the original hire date, it may be in the financial interest of the employer to terminate the frustrated contract as early as possible.

This latest amendment is the result of the May 2005 decision of the Ontario Court of Appeal in *ONA v. Mount Sinai* case. The Court held, in very strong language, that the pre-2001 legislation before it in this case was discriminatory and unconstitutional. The Court stated: “Disabled persons as a group suffer from pre-existing disadvantage and stereotyping. There is no correspondence between the ground of denial and the actual needs, capabilities and circumstances of the grievor and others in the claimant group. The differential treatment has the effect of perpetuating the view that ... they are not likely to be members of the workforce in the future. The denial affects an interest crucially important to one’s dignity, namely, equal treatment and equal compensation in employment. I conclude that the denial of severance pay under Section 58(5)(c) is discriminatory.”

We are unaware of any similar case law under the 2001 amendment, which was in place until October 2005. However, the addition of a reference to the Ontario Human Rights Code does not really address the issue that the Court of Appeal emphasized in its decision. The Court was not concerned with whether the employee could or could not be accommodated under the Code. Rather, the Court indicated that since the future is unknown, the dignity of every individual requires that he or she be treated the same as other employees. This, the Court stated, is regardless of whether the employee can return to work with accommodation, and therefore is entitled to be paid compensation in the same manner as other terminated employees.

The October 2005 regulation has clarified the law – when there is a termination due to disability which frustrates the employment contract, Employment Standards Act notice and severance must always be paid.
What Are The Employer’s Obligations To An Employee On Disability With Respect To The Continuation Of Benefits?

In *ONA v. Orillia Soldiers Memorial Hospital*, the Court of Appeal held that it was not discriminatory for an employer to terminate benefits for employees on disability, per se. As a rule, when an employee is not providing services, he or she is not entitled to compensation, including benefit coverage. The Court was of the view that, unless disability coverage was provided to other employees who were not working for reasons other than disability, the termination of benefits for employees on disability was not discriminatory.

The continuation of benefits for employees on maternity and parental leave is obligatory under the Employment Standards Act. It would be arguably discriminatory against those on disability to cease their benefits before the expiry of one year, since their colleagues on maternity and parental leave have benefits in place for that time by statute. Accordingly, it would be safe to assume that benefits could cease after one year from the date of termination, as long as benefits are not provided beyond a year to an employee on a leave of any other nature. Otherwise, a case for discrimination can be made.

What Are The Employer’s Obligations At Common Law To Disabled Employees Upon Termination For Frustration Of Contract?

The Ontario Court of Appeal’s decision in *Mount Sinai* with respect to statutory severance pay could, arguably, be applied to common law notice. The Court of Appeal rejected the Hospital’s argument that employees whose contracts have become frustrated due to illness may be equated with employees who will not work again, stating that this assumption was discriminatory, being based on a stereotype. This concept applies equally to the common law. The Court of Appeal did not provide any opinion on this subject, but there is no reason in principle why a similar decision relative to common law notice could not result in an appropriate case. At present, no such decision has been made and the Courts have been willing to accept that in certain circumstances, disability will frustrate the employment contract. This means the employee is not entitled to common law notice.

For example, in *McAlpine v. Econotech Services Ltd.*, a decision of the British Columbia Court of Appeal, McAlpine had been away from her full-time position for three-and-a-half years due to disability. During that time, the company maintained her position, provided her with benefits, attempted a gradual return-to-work for her, which had been unsuccessful. The company also made considerable efforts to ensure that the insurance company restored her LTD benefits. Despite all of this, McAlpine was unable to perform major portions of her job. She sued, alleging constructive dismissal by the company for failing to provide her with a minimum of nine hours of work per week in accordance with the graduated return-to-work program. At trial, her claim was dismissed based on a finding that she was wholly unable to perform major portions of her job. The British Columbia Court of Appeal ruled that despite efforts to accommodate her, she was unable to provide the services required of her by the terms of the employment contract. The Court agreed that the employment contract had been frustrated.

Summary

The law of frustration of contract remains a thorny area, and continues to develop. For now, employers may wish to consider whether to continue benefits for those on leaves of any nature. They must apply the policy equally regardless of the reason for absence. To ensure that termination based on a frustration of contract can withstand a court’s review, sufficient individualized medical evidence must be obtained. Each case should be considered individually and Employment Standards obligations must be respected. Time will tell, however, whether the common law concept of frustration of contract in employment cases will continue to have any validity.

Allison Taylor practises employment law with Stringer Brisbin Humphrey.

Mosey & Mosey
A Look at ... 2006 Government Benefits

This chart summarizes the Canada and Quebec Pension Plan contributions and benefits data effective January 1, 2006.

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<thead>
<tr>
<th></th>
<th>CPP</th>
<th>QPP</th>
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<tbody>
<tr>
<td><strong>Yearly Maximum Pensionable Earnings (YMPE)</strong></td>
<td>$42,100.00</td>
<td>$42,100.00</td>
</tr>
<tr>
<td><strong>Yearly Basic Exemption (YBE)</strong></td>
<td>3,500.00</td>
<td>3,500.00</td>
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<tr>
<td>Maximum Contributory Earnings (YMPE – YBE)</td>
<td>38,600.00</td>
<td>38,600.00</td>
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<tr>
<td>Maximum Annual employee / employer contributions</td>
<td>1,910.70</td>
<td>1,910.70</td>
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<tr>
<td>Contribution rate (employee / employer)*</td>
<td>4.95%</td>
<td>4.95%</td>
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<tr>
<td>Maximum Self-Employed contributions</td>
<td>3,821.40</td>
<td>3,821.40</td>
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**Maximum Monthly Retirement Pension**

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<thead>
<tr>
<th>Age</th>
<th>CPP</th>
<th>QPP</th>
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</thead>
<tbody>
<tr>
<td>At age 65</td>
<td>844.58</td>
<td>844.58</td>
</tr>
<tr>
<td>At age 60</td>
<td>591.21</td>
<td>591.21</td>
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</table>

**Death Benefits**

<table>
<thead>
<tr>
<th>Lump Sum</th>
<th>CPP</th>
<th>QPP</th>
</tr>
</thead>
<tbody>
<tr>
<td>Maximum Monthly Spouse’s Pension</td>
<td>2,500.00</td>
<td>2,500.00</td>
</tr>
<tr>
<td>Under age 55</td>
<td>471.85</td>
<td>714.30</td>
</tr>
<tr>
<td>Age 55 to 64</td>
<td>471.85</td>
<td>716.31</td>
</tr>
<tr>
<td>65 or older</td>
<td>506.75</td>
<td>506.75</td>
</tr>
<tr>
<td>Monthly Orphan’s Pension (each child)</td>
<td>200.47</td>
<td>63.65</td>
</tr>
</tbody>
</table>

**Disability Benefits**

| Maximum Monthly Contributor’s Pension | 1,031.05  | 1,031.02  |
| Monthly Child’s Pension (each child) | 200.47    | 63.65     |

* In 2006 the employee and employer contributions for the CPP and QPP are equal to 4.95% of employment earnings (for a total of 9.9%) up to the YMPE minus the YBE.

**Employment Insurance (EI) premium reduction for 2006**

• The EI premium rate for employees has been reduced to $1.87 from last year’s level of $1.95 per $100 of insurable earnings.

• The EI premium rate for employers has been reduced to $2.62 from last year’s level of $2.73 per $100 of insurable earnings.

• The EI premium rate for Quebec will be $1.53 for employees and $2.14 for employers. These rates are lower than in the rest of Canada because of the new Quebec Parental Insurance Plan that took effect January 1, 2006. Quebec now offers its own parental benefits.
Mandatory retirement at 65 banned in Ontario

By mid December, it will be illegal for Ontario companies to force workers out the door at 65. But the new law banning mandatory retirement has its critics. They complain that companies still won’t have to pay benefits to employees over 65, even if younger staff members are entitled to benefits.

“Clearly, the government supports ongoing discrimination against workers 65 and over,” said New Democrat Peter Kormos (Niagara Centre), whose party voted against the law supported by the Liberals and Progressive Conservatives.

Labour Minister Steve Peters said the government wanted to avoid an "undue impact and burden" on the business community. "We had to strike a balance," he said, adding that employees can try to negotiate benefits on their own.

Several provinces and countries have already eliminated mandatory retirement in an era where people are living longer and wish to continue their careers, often in fields with skills shortages. Many workers — including women who took time away from the workforce to raise families — and immigrants who arrived later in life also need to keep working to pay the bills and accrue pension benefits.

“These workers have a great deal to contribute,” said Peters.

Based on trends in other jurisdictions, only two per cent of Ontarians are expected to work past 65.

The average retirement age across Canada has been steadily falling and is now 61. There are about 1.5 million Ontarians over 65, a number expected to grow to 3.5 million in the next 15 years.

GREY POWER

Today 13.1% of the population is over the age of 65. By 2026, seniors will make up 21% of the population.

Did you know?

- That one-third of working Canadians say they plan to work past the age of 65.

- Some 25% plan to work part-time, while 8% plan to work full-time.

- Almost three-quarters say they plan to do so by choice rather than necessity.

Source: Statistics Canada

Source: 2005 TD Waterhouse RSP Poll
Coming soon to a city near you ...

Due to popular demand, Mosey & Mosey will take its Duty To Accommodate seminar on the road this year. First held in Mississauga in December, the event was so successful that we’ll be offering it in various locations in Ontario.

Dates and locations have not been finalized, but the seminar will focus on the key issues surrounding an employer’s obligation to accommodate disabled employees in the workplace. Duty to Accommodate will be presented by:


Dr. Douglas Gat is a medical disability management consultant and occupational health physician who works in the insurance industry and private sector. He serves as national medical director for Manulife Financial Group Disability and Benefits. He also administers EAP programs, provides psychiatric rehabilitation to individuals with anxiety and depressive disorders and has a special interest in the treatment of individuals with Obsessive Compulsive Disorder. Doug serves on several medical associations and councils, is a lecturer at the University of Toronto and speaks frequently on topics of medical impairment assessment, accommodation and psychiatric disability.

Chris MacDonald has worked in the field of disability management for over 25 years, specializing in case management and rehabilitation intervention. Throughout her career, she has provided employers with strategies and tools for managing absence costs. She has held varying roles in managing disability operations, as well as a disability practice lead for a major insurer. In addition, she has received accreditation specific to the NQI Healthy Workplace framework. She joined Manulife last fall as Assistant Vice-President, Integrated Absence Solutions/Early Intervention Services.

Stay tuned for more details ...

We appreciate your business

Mosey & Mosey is pleased to announce these new clients to our portfolio of business: The Town of Pelham; The City of Thorold; The City of Mississauga; The County of Elgin and all participating Municipalities – Town of Aylmer, Township of Malahide, Township of Southwold, Municipalities of Bayham, Central Elgin, Dutton/Dunwich and West Elgin.