Employment & Labour Relations Bulletin

February 2007

Montreal General Hospital: Supreme Court Approves Use of Deemed Termination Clause

Managing an employee who has been unable to perform modified duties or return to work after a long absence is a very difficult issue for employers. Under human rights legislation, an employer has a duty to accommodate disabled employees and there is a significant risk to an employer who dismisses an employee unable to work because of a long-term disability or illness. However, employers have just received some assistance from the Supreme Court of Canada in justifying the use of "deemed termination" clauses to bring an end to the employment of an employee who cannot be accommodated.

On January 26, 2007, the Court ruled that a three-year "deemed termination" clause contained in a collective agreement was properly applied when the employer treated the employment of a disabled employee as terminated and further, that the employer had met its duty to accommodate the employee.

In *McGill University Health Centre (Montreal General Hospital) v. Syndicat des Employés de l'Hôpital General de Montréal*, the hospital terminated the employment of an employee who was unable to return to full duties and was largely absent for three years. Under the terms of its collective agreement, an employee's seniority and employment would terminate after thirty-six months of absence on disability. While the employee was able to return to work for brief periods on modified duties, the collective agreement defined disability as an incapacity that "renders the employee totally incapable of performing the usual duties of his or her job or of any other comparable, similarly compensated job." The employee's modified duties (which she ultimately was unable to maintain) did not "stop the clock" on the thirty-six month time period. The employee was unable to establish that she would be able to return to full duties in the foreseeable future.

Writing for the majority of the Court, Justice Deschamps found that the terms of the collective agreement played an important role in assessing the employer's duty to accommodate a disabled employee. The Court determined that in this case, the three-year period was a significant factor to consider when assessing the duty of reasonable accommodation. Justice Deschamps did not go so far as to say that after expiry of the three-year period the employee would automatically be dismissed or that a straight application of the clause is acceptable. It is still incumbent upon the employer to consider the individual circumstances of the employee in determining the scope of the duty to accommodate. In this case, the employee remained totally disabled following the three-year period and no evidence of a likely return to work in the foreseeable future was presented. Therefore, as long as the deemed termination clause is longer than what would be provided for under applicable human rights or employment standards legislation, it can be treated as a clear indication of the parties' intention with respect to reasonable accommodation.

A minority of the Court concurred in the result, but for different reasons. Writing for the minority, Justice Abella held that deemed termination clauses negotiated by employers and unions balance an employer's legitimate expectation that an employee will perform work with an employee's expectation that a disability will not cause arbitrary discharge. In this case, there was no *prima facie* discrimination which the employer had to justify.

What this Means to Employers

For unionized employers, the *Montreal General Hospital* case provides support to an employer in applying a deemed termination clause in a collective agreement. While employers are required to examine the individual circumstances of each case, if the employee is unable to return to work within the time period established in the collective agreement the employer can point to the clause as a significant piece of the accommodation puzzle.

⋙

The Court also noted that for unionized employees these types of clauses are the result of negotiation between the employer and the union and should be seen as an agreement by the parties of the appropriate time period for an employee to establish his or her ability to return to work. It is important to remember that the duty to accommodate lies not only on the employer, but also on the employee and the union. The employee has an obligation to accept suitable accommodation arrangements, and the union must also be an active participant in determining what arrangements can be made. A unionized employer may be able to point to such a clause and argue that the arbitrator should recognize that if no accommodation has been possible within the agreed-to timeframe and there is no evidence of a recovery in the foreseeable future, the employee's employment should be terminated.

While the Court did not discuss whether similar clauses could apply in the non-union setting, for non-union employers, this case may also be of assistance if an employment agreement provides for deemed termination after a prolonged absence. Particularly in an executive employment agreement, a well-drafted agreement that provides for a termination after a lengthy period can assist an employer in satisfying the duty to accommodate, if the agreement also stipulates what will be considered to be a disability by the parties. The case also raises the issue of whether a non-union employer is justified in terminating the employment relationship of an employee on a long-term disability leave, where the employee is unlikely to return to the employer's workforce and no reasonable accommodation can be made.

Ontario employers should also be aware that there will still be an obligation to provide statutory pay in lieu of notice and severance pay (if applicable) following such a termination given amendments made to the *Employment Standards Act, 2000* in 2005. For more information on this requirement, please see the Employment and Labour Relations Group's bulletin from May 2005, available at:

www.mcmbm.com/Upload/Publication/Severance_Pay_0505.pdf.

Any member of our Employment and Labour Relations Group will be pleased to advise you of your obligations in accommodating disabled employees or the implications of dismissing an employee who is on a disability leave.

The Supreme Court of Canada's decision is available at:

http://scc.lexum.umontreal.ca/en/2007/2007scc4/2007scc4.html

Written by Dave J.G. McKechnie

The foregoing provides only an overview. Readers are cautioned against making any decisions based on this material alone. Rather, a qualified lawyer should be consulted.

For further information on these or other labour and employment matters, please contact one of the lawyers listed below:

David Elenbaas	416.865.7232	david.elenbaas@mcmbm.com
Darryl R. Hiscocks	416.865.7038	darryl.hiscocks@mcmbm.com
Ivan A. Luksic	416.865.7923	ivan.luksic@mcmbm.com
Dave J.G. McKechnie	416.865.7051	dave.mckechnie@mcmbm.com
Karen Shaver	416.865.7292	karen.shaver@mcmbm.com
Lyndsay Wasser	416.865.7083	lyndsay.wasser@mcmbm.com
David Wentzell	416.865.7036	david.wentzell@mcmbm.com
Marc Cantin	514.987.5034	marc.cantin@mcmbm.com