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Terminating an employee on medical leave? Ask the right questions to avoid a pitfall

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There is a right way and a wrong way to end an employment relationship with an employee who is away from work for medical reasons and who you believe is unlikely to ever return to active employment. Needless to say, doing it the right way gives an employer a much stronger defence if an employee later claims to have been wrongfully dismissed or subject to discrimination. Fortunately, the right way doesn't have to be difficult, despite the sound of the legal doctrine, frustration of contract, on which your rights, as an employer, rests. Before we drill down a bit into this, to avoid actual frustration, listen to this story about a man named John. Then we'll tell you about the questions you need to ask to get it right.

John missed work off and on over the course of several years. None of the absences were his 'fault' and he was recently a regular participant in his employer's absenteeism management program. Still, he just never seemed to be able to attend work regularly. But, just when it looked like John was on the road to better attendance, and in a stroke of bad luck, he was diagnosed with a medically debilitating illness that kept him from work entirely.

Luckily for John, his employer had a long-term disability (LTD) plan and he was able to get benefits. Better yet, he would continue to receive LTD benefits regardless of whether he continued to be employed. As time passed, it had been three years since John had performed any work for his employer. Eventually, management decided there really wasn't any point in continuing the employment relationship because John had not been actively employed for such a long time and was going to be receiving LTD benefits going forward anyway.

So, John's employer sent him a letter informing him that his employment was over, (as he couldn't do his job or attend work). They wished him well in the future and commiserated about how sorry they were to have to end the employment relationship. In response, John's lawyer sent the company a harshly worded letter. John's boss and the owner of the company were shocked! Despite their care and attention, they now faced a legal claim. That was a pitfall. And they stepped right into it.

What more could they have done, they asked themselves. What more indeed. And yes it has something to do with the questions to which we referred earlier. Here's a clue: it wasn't so much what they did or didn't do as what they didn't…ask. Can you guess? If not, you're not alone. John's employer, along with many others, obviously didn't know either.

In some circumstances, the law permits an employment relationship to be considered over when an employee's medical statuses make him or her incapable of performing work for a lengthy period of time. In fact, that is what frustration of contract is all about. Remember that legal doctrine we mentioned at the outset? It states: where there is no reasonable prospect in the foreseeable future of the employee being able to return to meaningful employment, the relationship is considered to be frustrated. Clear enough. But, where are the questions in all of this?

Here's another clue. While it's true that employers have a duty to accommodate disabled workers under human rights law, the BC Court of Appeal and the Supreme Court of Canada have recognized that "work for pay…is an essential feature of the employment relationship" and "it is not discriminatory to terminate an employee who is unable to comply with this fundamental bargain, provided the employer has met its

obligation to accommodate that employee." Some might argue that in John's case the employer did meet its obligation to accommodate John by providing him with an LTD plan. Not so, according to human rights law and the doctrine of frustration of contract.

In a nutshell employers wanting to rely on frustration of contract must ask the following kinds of questions: What are the employee's limitations and restrictions that are keeping him or her from work? Are there things that the employer can do to accommodate those limitations and restrictions so the employee can return to work? What is the employees short, medium and long term medical prognosis to return to work and is that likely to change? When relying on frustration of contract, an employer must first obtain the right medical information from the employee and his or her physicians. This means it's critical that an employer gets clear confirmation whether, in the foreseeable future, the employee will not recover sufficiently from their medical situation such that he or she will be able to perform meaningful work that is available with the employer.

The real challenge here is to obtain unambiguous information from the employee's physicians about what the employee can and cannot do and what the prognosis is for productive work. This can be tricky but not impossible. It requires crafting letters to the employee and to his or her physician that will illicit specific information, rather than vague generalities, upon which the employer can assess the continued viability of the employment relationship.

How is it then that employers, even those who have good intentions regarding obligations to their employees, miss this critical step, which on one level seems reasonably intuitive and simple? Perhaps it's because employers simply assume they're doing the right thing without asking the questions necessary to understand the employee's medical reality. Their decisions are based on assumptions, which can often be wrong. Regrettably, in John's case, his employer hadn't even bothered to ask any questions, let alone the right ones. As a result, their troubles had just begun and would likely result in an expensive resolution, either through litigation or with a significant monetary settlement. Obtaining legal advice before embarking on the termination of an employee on medical leave usually results in less costly and more satisfactory outcomes.

Asking the right questions to get the right information is key in avoiding the perils and pitfalls of ending an employment relationship with an employee on medical leave of absence.

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