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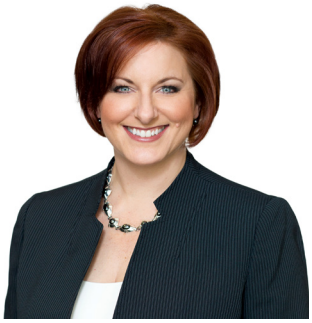
Employment and Labour Law Update

SHERRARD KUZZ LLP
Employment & Labour Lawyers

The question of whether an employment relationship has been frustrated is a question of fact (the relationship is either frustrated or it's not). This means an employee can trigger their own termination for frustration, giving rise to an employer's obligation to pay ESA entitlements.

Out of Sight - Out of Mind is NOT a Winning Strategy - Ignoring an employee on a long-term medical leave can be unnecessarily costly for employers



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Some employers believe if an employee is absent from the workplace for medical reasons, there comes a point when their employment effectively ends and no further action is required. This is not only a mistaken belief, but it can prove extremely costly.

Defining disability

In most disability insurance contracts, an employee must meet certain requirements to receive benefits. For a period, often two years, the employee must show they are medically unable to perform the duties of their own occupation ('Own Occ' coverage). Thereafter, most policies change the definition of 'disabled' and the employee must show they are medically unable to perform the duties of any occupation to continue to receive disability benefits ('Any Occ' coverage).

A common error made by many employers is believing an employee who qualifies for Any Occ coverage ceases to be employed and there are no steps required from the employer to end the employment relationship. Moreover, many believe no payment to the employee is required to formally terminate employment.

This can be a very costly error.

An absent employee continues to accrue service

When an employee is off work and in receipt of disability benefits, they remain employed and continue to accrue service until they either resign (rare, as there is no incentive to do so), or the employer terminates their employment. Put another way, even if an employee is medically unable to perform their job (or any job), the employee continues to accrue service until the employment relationship formally ends.

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In the event the employee is unable to return to work the employment relationship is often considered 'frustrated.' That is, due to an unforeseen event, the employee is unable to hold up their end of the employment bargain - provide work to their employer. This is one of the few scenarios in which an employer is not required to provide common law notice (or pay in lieu of notice) when employment is terminated.

However, this does not mean the employer is entirely off the hook. Separate and apart from the employer's common law obligations, the Ontario *Employment Standards Act, 2000* ("ESA")[1] still requires the employer to provide notice (or pay in *lieu* of notice) and, if the employee qualifies, severance pay. Although there is an exception in the case of frustration, this does not apply if employment is frustrated due to illness or injury.

Consider a scenario where an employee with one year of service goes off work due to a disability, meets the Own Occ and Any Occ disability definitions, and the employer opts not to address their employment status. It is not only possible, but common, for an employee to accrue several years of service while in receipt of disability benefits before the employer realizes they have an accruing liability. At that point, if the employer is a severance pay employer, that employee could be owed several months of combined notice and severance pay. Under the ESA, the maximum combined amount of notice and severance pay is 34 weeks, so the longer the employer ignores the employee on leave, the closer the employee is to receiving eight months of wages.

You may ask, 'don't we solve that problem by just never terminating the absent employee?'

If only it was that simple. The question of whether an employment relationship has been frustrated is a question of fact (the relationship is either frustrated or it's not). This means an employee can trigger their own termination for frustration, giving rise to an employer's obligation to pay ESA entitlements.

An employer has a right to ask for medical information

Some employers have been led to believe that, if an insurance company is involved, an employer is not permitted to ask the employee or their doctor for medical information in relation to the employee's absence and must rely on the meagre information provided by the insurer. This is inaccurate. In fact, adjudicators expect an employer to seek information from the employee's own doctor, and not rely only on information from the insurer.

What steps should an employer take to manage long-term absences and reduce liability?

First, actively manage absent employees, including requiring them to provide updated medical information. This will mean different things in different circumstances. For instance, if an employee is expected to be off work for an extended period, updates every few months may be sufficient, whereas more frequent updates should be required if a period of expected absence hasn't been provided.

Second, don't accept a medical note saying 'Harley is absent for medical reasons' to substantiate an ongoing absence. Although it's generally not permissible to request a diagnosis, an employer is entitled to receive sufficient information to understand the general nature of the medical issue, its expected duration, prognosis, and relevant restrictions, *etc.*

Finally, review the status of employees on medical leave on a regular basis. If it appears there is no reasonable prospect of the employee's return to work in the foreseeable future, with or without accommodation, consult counsel to determine whether the employment relationship has been frustrated and it's time to formally end the relationship.

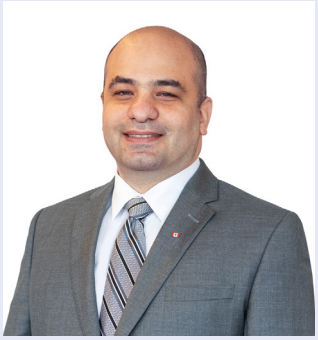
Bottom line: While it's easy to ignore an employee on a long-term medical leave, an employer does so at its peril and, ultimately, its cost.

For assistance managing absenteeism in your workplace, contact your Sherrard Kuzz LLP lawyer or our firm at info@sherrardkuzz.com, 416.603.0700 (Main), or 416.420.0738 (24 Hour).

[1]Unlike the employment standards legislation in other Canadian provinces

DID YOU KNOW?

For many **federally regulated organizations,** the deadline to post a **pay equity plan** is just one month away? If you are a **federally regulated employer** and would like more information in advance of the September 3rd deadline, contact your Sherrard Kuzz lawyer or info@sherrardkuzz.com. Our briefing note on this topic can also be found here.



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A Deal is a Deal A forfeiture clause is enforceable – says Human Rights Tribunal of Ontario

In an employment dispute, settlement documents often include a confidentiality and/or non-disparagement clause limiting what the parties can say about the dispute, the settlement, and each other. But what happens when a party breaches this clause? Is there a remedy for the employer? According to a recent decision[1] of the Human Rights Tribunal of Ontario ("Tribunal"), if properly drafted, these important clauses will be enforced, and a party may be required to return whatever settlement funds it received.

What happened in the recent decision?

An employee filed an application with the Tribunal against a former employer and colleague alleging discrimination in employment on the basis of sex. The parties engaged in mediation and arrived at a settlement that included a confidentiality clause and non-disparagement clause.

The confidentiality clause permitted the employee to respond to an inquiry about the resolution of the application, or conclusion of the employee's employment, by simply stating, "all matters have been resolved."

The non-disparagement clause required the parties to refrain from making any disparaging or derogatory comment about the other, or acting in a manner that would likely damage the other's reputation, including on social media, unless required by law.

If the employee breached either clause, the employee would be required to pay back any funds paid under the settlement as liquidated damages (a pre-estimate of damages that provides certainty to the parties in the event of a breach).

Fast forward and the employee posted the following to their LinkedIn account: "To all those inquiring, I have come to a resolution in my Human Rights Complaint against [the former employer] and [the former colleague] for sex discrimination."

When the employer discovered this post, it brought an application before the Tribunal alleging the employee had breached the settlement and seeking repayment of the settlement funds.

The decision

The Tribunal found the employee had breached both the confidentiality and non-disparagement clauses and ordered the employee to return the full amount of funds received under the settlement.

The confidentiality clause was breached because it imposed specific restrictions on how the parties could respond to any inquiry about the resolution of the application - "all matters have been resolved." The employee's LinkedIn post did not fit within this restriction because the post proactively communicated to a broad audience – not merely in response to those who inquired – and provided more detail than the confidentiality clause permitted, particularly including the reference to sex discrimination. Said the Tribunal: "The Applicant's LinkedIn post does not fit within the spirit of the exceptions set out in the confidentiality provision and therefore the applicant's posting breached the confidentiality clause."

The non-disparagement clause was breached because the LinkedIn post connected the former employer and former colleague to serious and unproven allegations of discrimination on the basis of sex, creating the potential for reputational harm:

> I am of the view that, from the perspective of an objective, reasonable person, placing such information on social media serves to publicize it and create a reputationally damaging link between the names of the parties and the serious unproven allegations of human rights violation of sex discrimination—precisely what the wording of the confidentially and non-disparagement clauses, taken together, was intended to prevent.

As for the liquidated damages, the Tribunal held the amount had been agreed to by the parties and was neither punitive nor a penalty clause:

> As these damages are in a liquidated damages provision in a freely entered into contract agreed upon and executed by fully represented parties, they are damages consistent with the intentions of the parties and not punitive. The purpose of such provisions in contracts is to provide certainty and save the parties from having to prove damages, not to impose a punishment or a penalty.

Lessons for employers

In appropriate circumstances, a properly drafted confidentiality and/or non-disparagement clause can be a useful tool to protect an employer's legitimate business interests. But remember these two things:

1. In most cases, a *properly drafted* anything, requires the assistance of an experienced lawyer – in this case, an experienced employment lawyer. At the risk of this being a shameless plug, the marginal cost of legal advice today will be more than worth it down the road.
2. While the thought of a former employee "lawyering up" may send shivers down an employer's spine, sometimes the fact the employee had a lawyer to advise them through the termination process, means a court is more likely to enforce a settlement. This is because neither party will be seen to have had greater power than the other; both had legal advice.

To learn more and for assistance, contact your Sherrard Kuzz LLP lawyer or, if you are not yet our client, info@sherrardkuzz.com.

[1] *LCC v MM.*, 2023 HRTO 1138

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1. **The new age**
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3. **An employer's right to speak**
   - How to communicate within the bounds of the law
4. **The unexpected application**
   - What to do when you receive an Application for Certification
5. **Running a successful campaign**
   - It is never too late to create engaged employees so they realize they don't need a union
6. **Updates from the Ontario Labour Relations Board, Canada Industrial Relations Board, and select decisions from across the country**
   - Current union activity and trends by industry

DATE: **September 18, 2024, 9:00 a.m. – 10:30 a.m.**
WEBINAR: **Via Zoom** (registrants will receive a link the day before the webinar)
COST: Complimentary
REGISTER: **Here by September 11, 2024.**

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