Termination of the Contract of Employment by Reason of Illness/Incapacity - 2018

The contract of employment can be terminated in relation to illness / incapacity in two ways:

(1) termination for misconduct in cases of abuse of sick leave; or

(2) by reason of "frustration" of the contract in serious, genuine cases of illness or injury.

Termination for Misconduct (abuse)

Intermittent instances of absence for illness /injury are, of course, acceptable within reason.

Section 14(1) of the Employment Act 2000 ("the Act") mandates that an employee who completed at least one year of continuous employment is entitled to 8 paid days for sick leave at his normal hourly wage. The contract or Employee Handbook may provide for a more generous entitlement.

Section 14(2) provides that an employee is not entitled to be paid in respect of an absence of 2 or more days unless, where the employer requests it, the employee provides a medical certificate certifying that the employee is unable to work due to sickness or injury.

When absenteeism becomes persistent and appears unjustified, the employer's disciplinary procedures should be invoked pursuant to the employer's written policies and procedures.

Usually the process will commence with informal discussions about the perceived problem. Such discussions and their outcome should be recorded. If the problem does not improve and the employee is proven (on a balance of probabilities) to be abusing sick leave, the employee should be issued with a formal written warning for misconduct under section 26 of the Act. The written warning is legally required before the employer can dismiss for misconduct that is not as serious as "serious misconduct".

If within 6 months of the written warning the employee again engages in the same misconduct (persistent absenteeism due to unjustified illness) then the employer is entitled to dismiss the employee without notice and without the payment of any severance allowance.

If the misconduct is serious (for e.g. the employer can prove that the employee was lying about being ill), then the employee can be summarily dismissed for serious misconduct (s. 25) and no previous warning need be given.

Frustration of Contract through persistent illness/ incapacity

In cases of genuine persistent illness or injury, the employment contract can be terminated by the employer by reason of "frustration" of contract. This is a drastic conclusion for an employer to reach.

Frustration of a contract occurs when either party to a contract becomes incapable of performing their obligations under the contract – the contract becomes impossible to perform. The parties are then released from their obligations under the contract.

The classic text book case examples of frustrated contracts are:

-When a contract to hire a music hall was entered into and the music hall subsequently burned down, the contract was frustrated. (Taylor v Caldwell (1863)).

-When the processional of King Edward VII was cancelled due to the King's illness, the Court held that the contract that a person had entered into to rent a hotel room to watch the processional was frustrated because the purpose of the contract could not be fulfilled. (Krell v Henry [1903]).

In cases where an employee is rendered incapacitated by a serious illness/injury that causes them to miss work, when can the employer fairly say that the employer-employee relationship has ended through frustration? Up to what point must the employer continue to hold the employee's position until they are able to return?

The test was established in 1972 in Marshall v Harland & Wolff Ltd. namely:

> Whether a contract of employment has been frustrated by the employee's illness/incapacity depends on whether the illness or incapacity was of such a nature, or likely to continue for such a period, that future performance of his contractual duties would be either impossible or radically different from that undertaken by him and agreed to be accepted by the employer by the agreed terms of his employment In short, considerations are given to the nature of the illness, the period of time involved and what performance of the contract would look like in the future.

The cases show that in applying the test, the Court will look at the following considerations:

1. Terms in the contract (having an express term is recommended so as to avoid legal disputes later). Sample clauses from real life employment contracts include:

> *(A) Disability means the Executive's inability, due to physical or mental incapacity, to substantially perform his duties and responsibilities under the Agreement for 180 days out of any 270 consecutive days.*
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> *The Company may terminate the Executive's employment with the Company in the event of a Disability upon 30 days' prior written notice, in which case the Executive shall be entitled to payment, within 30 days of the Termination Date, of any Base Salary and accrued vacation that is earned but unpaid through the Termination Date.*
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> *(B) Disability means those circumstances where the Executive is unable to continue to perform the usual customary duties of his assigned job or as otherwise assigned in accordance with the provisions of this Agreement for a period of 6 months in any 12 month period because of physical, mental or emotional incapacity resulting from injury, sickness or disease. Any questions as to the existence of Disability shall be determined by a qualified, independent physician selected by the Company and approved by the Executive (which approval shall not be unreasonably withheld). The determination of any such physician shall be final and conclusive for all purposes of this Agreement.*
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> *If the Employment period shall be terminated as a result of the Executive's Disability, the Executive shall continue to receive Base Salary and the benefits set forth in this Agreement through the Date of Termination.*

(C) Disability shall mean any physical or mental disability or infirmity that has prevented the performance of Employee's duties for a period of 90 consecutive calendar days or 180 non-consecutive calendar days in any 365 day period. Any question as to the existence, extent, or potentiality of Employee's Disability upon which Employee and the Company cannot agree shall be determined by a qualified, independent physician selected by the Company and approved by Employee (which approval shall not be unreasonably withheld). The determination of any such physician shall be final and conclusive for all purposes of this Agreement. The Company may terminate Employee's employment upon the occurrence of a Disability, such termination to be effective immediately upon Employee's receipt of written notice of such termination.

In the event Employee's employment is terminated due to his Disability, the Employee shall be entitled to be paid his Base Salary and accrued but untaken holiday through the Date of Termination.

2. How long the employment was likely to last in the absence of sickness

3. Nature of the employment

4. Nature of the illness or injury, how long it has continued and the recovery prospects

5. Period of past employment, a long standing relationship being less easily destroyed

6. The need of the employer for the work to be done and the need for a replacement employee to do it

7. The risk to the employer of acquiring obligations in respect of redundancy payments or compensation for unfair dismissal to a replacement employee:

8. Whether wages have continued to be paid

9. Acts and statements of the employer in relation to future employment

10. Whether in all the circumstances a reasonable employer could be expected to wait any longer

If an employer has dismissed an employee due to persistent illness/incapacity, the courts will consider if the dismissal was fair. Relevant considerations will include whether there was fair consultation with employee for the true medical position and whether the employer sought a reliable medical opinion before making his decision.

Post-termination the employer must keep the employee covered under the basic statutory standard Hospital Benefit cover for 4 weeks.

The employer's disability insurance policies (if any) will come into play when an employee becomes disabled from working due to illness or injury.

After sick leave is exhausted (e.g. 8 days), or instead of paid sick leave, the employer may offer a Short-Term Disability policy in respect of illness/injury lasting up to 6 months. The employee must be unable to perform the duties of his position and be under the care of a doctor during this time. It is usual for an employee to remain employed whilst on Short Term Disability (either on

full pay or part pay or unpaid depending on the terms of the policy) and enjoy continued full employee benefits (health insurance, life insurance etc.).

In the event of long term illness or injury for eligible employees, the employer's Long-Term Disability policy kicks in after the sick leave / STD benefit expires, usually 6 months after the employee goes of sic/injured. The LTD benefit is a % of monthly base salary up to a maximum monthly benefit. The employee on LTD will either remain employed or will be terminated by the employer in cases of severe injury / illness due to their inability to carry out their job function (the contract has been frustrated).

The LTD benefit continues throughout the duration of the disability. If the employee remains employed, then he gets full regular benefits (health insurance, life insurance, etc.). If terminated, then the employee loses these other regular benefits unless exceptions are made in the policy. This can be quite a blow to the employee who is now disabled but will have to pay the full costs of prescriptions because he is without major medical insurance.

When considering their position in relation to the above issues, employers must take particular care not to discriminate against an individual because of his or her disability, which conduct would be in violation of the Human Rights Act 1981. The 1981 Act prohibits the treatment of a person less favourably or differently than one treats or would treat other persons because of a disability. In addition, the Act prohibits an employer from dismissing or refusing to employ or continue to employee an employee on the basis of his or her disability.

The 1981 Act defines "*disability*" as "*the condition of being a disabled person*," which in turn is defined as:

> *"(a) a person who has any degree of physical disability, infirmity, malformation, or disfigurement that is caused by bodily injury, birth defect or illness, including diabetes, epilepsy, acquired immune deficiency syndrome, human immunodeficiency virus, paralysis, amputation, lack of physical coordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment, or physical reliance on a guide dog, wheelchair or other remedial appliance or device;*
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> *(b) a person who has, or has had, a mental impairment and the impairment has, or has had, a substantial and long-term adverse effect on that person's ability to carry out normal day-to-day activities."*

Under the 1981 Act:

> *"A disabled person shall not be considered disqualified for an employment by reason of his disability if it is possible for the employer, or prospective employer, to modify the circumstances of the employment so as to eliminate the effects of the*

> *disabled person's disability in relation to the employment, without causing unreasonable hardship to the employer, or prospective employer*."

"Unreasonable hardship" is defined in Schedule 1 of the Act as:

> *"Unreasonable hardship arises in circumstances where modification of a disabled person's employment or prospective employment to eliminate or reduce the effects of the disabled person's disability would be unreasonably –*
> *(a) costly*
> *(b) disruptive; or*
> *(c) extensive,*
> *or where making such a modification would unreasonably alter the nature or operation of the employer's business."*

Whether a modification is an unreasonable hardship is determined on a case-by-case basis, with the following factors being considered:

(i) the composition and overall size of the workplace with respect to the number of employees, structure of the workforce, number of specialized jobs performed by employees, number and type of facilities, and employer's turnover; and

(ii) financial implications with respect to the nature and cost of the modification, which shall be considered unreasonable where it is so high that it affects the survival of the employer's business; and

(iii) the impact on safety with respect to the disabled employee, other employees and the general public

At the end of the day, when deciding whether to dismiss for illness, the employer is posited between the humanitarian dynamic and the commercial demands of work.

For the Court/Tribunal, it is a question of fact and degree as to whether the circumstances are that drastic for there to be a finding of frustration.

Legal advice is recommended before terminating on this ground.

For further information please contact one of the directors of Canterbury Law limited, Ms, Juliana Snelling at +1 441 296 8444 or jsnelling@canetrburylaw.bm of Mr. Paul Harshaw at +1 441 296 8444 or paul.harshaw@canterburylaw.bm