

MANAGING EMPLOYEES ON DISABILITY

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One of the most frustrating aspects of managing an employee on a disability leave is the uncertainty surrounding the employee's return to work. Either the employee's doctor may not be able to predict a return to work date, or the disability leave is extended one or more times. Faced with this uncertainty, employers often ask us if and when they are entitled to terminate the employee. The answer to this question is dependent on whether or not the employer has accommodated the employee's disability to the point of undue hardship.

Two recent cases, one from the Supreme Court of Canada in *Hydro-Quebec v. Syndicat des employe-e-s de techniques professionnelles et de Bureau d'Hydro-Quebec, section locale 2000 (SCFP-FTQ)* released in 2008, and the second released in May 2010 by the *British Columbia Human Rights Tribunal in Ford v. Peak Products Manufacturing and another (No. 3)*, confirms that whether or not an employer has met its obligations to accommodate the employee to undue hardship thus enabling it to terminate the employee, is largely dependent on the facts and history between the parties. We have included a detailed description of these cases below, to help to understand the tribunals' analyses.

Hydro-Quebec v. Syndicat des employe-e-s de techniques professionnelles et de Bureau d'Hydro-Quebec, section locale 2000 (SCFP-FTQ)

The employee had a number of physical and mental problems, and ultimately ended up missing over 950 days of work in a 7 1/2 year period. Over the years, the employer had adjusted the employee's working conditions to accommodate her various limitations (including light duties, gradual return to work after a depressive episode, and assignment to a new position when her own was abolished). The employee was ultimately terminated in July 2001, after being completely off work for a 6 month period.

One of the significant challenges for the employer in this case was the employee's diagnosed personality disorder. As a result of this disorder, the employee had difficult relationships with supervisors and co-workers, requiring the employer to move the employee to a new work environment from time to time. The employer's psychiatrist noted that the employee would not be able to work on a regular and consistent basis without repeated recurrences of absenteeism.

The Tribunal agreed that in this case, the employer had met the "undue hardship" standard in its efforts to accommodate the employee, and had lawfully terminated the employee. The decision included the following findings:

- Rigid rules regarding an employer's obligation to accommodate an employee's disability were to be avoided because of the individualized nature of the duty and the variety of circumstances that may arise.

- If a business could, without undue hardship, offer the employee a variable work schedule or lighten his or her duties – or even authorize staff transfers – to ensure that the employee can do his or her work, it must do so to accommodate the employee.
- Hydro-Quebec was credited with the fact it had tried for a number of years to adjust the employee's working conditions with a modification of her workstation, part-time work, assignment to a new position, etc.
- In a case involving the chronic absent employee, if the employer demonstrated that, despite measures to accommodate the employee, the employee will be unable to resume his or her work in the foreseeable future, the employer will have discharged its burden of proof and established undue hardship.
- The test for undue hardship is not total unfitness for work in the foreseeable future. Rather, if the characteristics of an illness are such that the business operations are excessively hampered, or if an employee remains unable to work for the reasonably foreseeable future even though the employer has tried to accommodate him or her, the employer will have satisfied the "undue hardship" test.

Ford v. Peak Products Manufacturing and another (No. 3)

In this case, the employee suffered from mood disorders, including post-partum depression which worsened after the birth of each of her three children. Approximately 6 months after starting work with the employer, the employee began experiencing anxiety attacks and depression. Her condition worsened over the next couple of months to the point where she was advised by her physician to go on a 2 month disability leave. As the date for her return to work approached, the employee's condition persisted and she was advised by her physician to take further time off work.

The employer was frustrated by the uncertain return to work date. In addition, the employer was unhappy about the lack of detail in the medical notes being provided by the employee and made a request for further information. In response, the employee's physician wrote:

[The employee] has been unable to return to work since May 27, 2008, and has been actively followed by our office in regards to depression and anxiety ...

She is having difficult coping with regular activities of daily living, so at present is not fit to return to work at any capacity ...

I am unable to provide a return to work date for this patient at this time.

In the absence of a clear return date from the employee's physician, the employer decided to terminate the employee. By this point, the employee had been on medical leave for 3 months. At the Tribunal hearing, the employer tried to justify its dismissal of the employee based on the Court's comments in the *Hydro-Quebec* case.

The Tribunal dismissed the employer's argument that the mere absence of a definitive return date was sufficient to establish "undue hardship", noting:

*Peak did not have any information before them which indicated that Ms. Ford would not be able to return to work in the reasonably foreseeable future. Rather, the medical information indicated that she was not able to return to work at the time the information was provided, and that her physician was unable to provide a return to work date at that time. **This is not the same thing as a statement that Ms. Ford would not be able to return to work in the reasonably foreseeable future.** As noted by [the employee's doctor] in his testimony, in the context of a mood disorder, it can take some time to determine the appropriate combination of medication. In such cases, the prognosis may be excellent (in other words, the doctor is confident that the individual will be returning to work), but the precise timing of that return cannot be specified. This was the situation with [the employee] in August 2008. (emphasis added)*

In accepting the employee's complaint, the Tribunal criticized the employer for its failure to give the employee a warning before it decided to terminate her and rejected the argument that the employer had no duty to make further inquiries once it had received the physician's note:

There are sound reasons for requiring employers to give such a warning and provide employees with an opportunity to provide relevant medical evidence before terminating their employment. First, the warning and opportunity may open a dialogue between the employer, the employee and their medical advisors, through which the employee may be able to return to work, with or without modifications. Second, it ensures that the employer, in making termination decisions, which have a profound effect on the employee, will do so with the best available information, which should lead to better decisions.

... even in a case where the employee is unable to return to work within a reasonable period of time, and the employer is ultimately justified in terminating their employment, the warning and opportunity to provide medical information gives the employee a valuable opportunity to be heard in respect of this crucial decision. Doing so helps to ensure that disabled employees are treated with dignity. Further, the warning may provide the employee whose employment is ultimately terminated with some opportunity to prepare themselves, which may tend to avoid or reduce ... negative consequences.

The Tribunal found that had further information been requested of the employee, the employee could have followed up with her general physician or the psychiatrist that she had recently been referred to.

The Tribunal rejected the employer's argument that the employee's absence was posing a hardship for the employer. (In that regard, another employee had been transferred to cover many of the employee's duties, while some of her others had been distributed to other staff.) The Tribunal made specific reference to the fact that the employer provided long-term disability coverage once any employee had been away from work for 4 months:

... I find that there would have to be substantial evidence of operational, financial or other cost to [the employer] resulting from an employee's absence in order to establish that continuing to employ an individual to the point where they can apply for long-term disability benefits would amount to undue hardship.

The Tribunal did acknowledge that the employer was inconvenienced to some degree by the employee's absence and the lack of certainty regarding her return, and further that the employer, being a small to mid-sized company, did not have unlimited resources to facilitate an accommodation. Ironically, it was the company's ability to distribute the employee's duties amongst her co-workers and the employer's decision not to hire a temporary replacement that persuaded the Tribunal that accommodating the employee's absence was not imposing an undue hardship on the employer. In that regard, the Tribunal held the employer had failed to establish that there was any pressing operational or financial need for it to terminate Ms. Ford's employment when it did.

Conclusion

It is clear that uncertainty as to the date of the employee's return to work is not, in and of itself, sufficient to demonstrate "undue hardship". What then can an employer do when faced with an accommodation request involving an uncertain return date? The following provides some guidance:

- Avoid making precipitous decisions, particularly with respect to the decision to terminate an employee on disability;
- Be flexible and creative in the search for a reasonable accommodation;
- Ask for more information from the employee or from experts (such as medical or occupational experts) if unsure about what the employee is asking for or what the employee's situation is. In the Ford case, the employer could have asked the employee's physician additional questions about the employee's condition and its prognosis, such as:
 - do you expect the employee to return to work?
 - when will you next be re-evaluating the employee's condition?
 - is the employee undergoing any treatment that may improve the employee's condition?
- Treat the employee with dignity and not as a problem (safety, financial, operational, etc.) to be dealt with.
- Be aware that, if the employer offers short- and long-term disability benefits, the onus to prove "undue hardship" associated with the employee's absence may increase.

- In cases where the employer is not satisfied with the responses given by the employee or their physician, the employer must give the employee a warning before terminating the employee.
- If the accommodation request would place an undue hardship on the employer, explain to the employee why this is the case.
- Be aware that the duty to accommodate may evolve with the employee's condition or because the original accommodation is no longer working.
- All discussions regarding the accommodation request and the employer's efforts to provide accommodation should be documented in writing.

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