
Three-year automatic termination clause is reasonable accommodation, Supreme Court rules

The Supreme Court of Canada has upheld the termination of a disabled employee who was dismissed after a long period of innocent absenteeism. On January 26, 2007, the Court ruled 9-0 that the dismissal of the employee pursuant to a collective agreement that provided for the automatic dismissal of employees absent more than three years due to illness or accident was a reasonable accommodation.

The case, *McGill University Health Centre (Montreal General Hospital) v. Syndicat des employés de l'Hôpital général de Montréal*, involved the grievance of an employee with 15 years' seniority who went on a leave of absence after a nervous breakdown. Following unsuccessful attempts to return to work on reduced hours, her employment was terminated some three years after she first went off sick. The union grieved the termination, asking that she be offered reasonable accommodation.

The arbitrator dismissed the grievance, pointing out that the employer had already accommodated the grievor by granting her rehabilitation periods more generous than those provided for in the collective agreement, and that she was still unfit for work at the end of the three-year period provided for in the agreement. After finding that the employer had accommodated the grievor, the arbitrator concluded that the employer had treated the grievor in a way that was "just and non-discriminatory in correctly applying an express rule set out in the collective agreement."

The arbitrator's decision was upheld on judicial review. But the Quebec Court of Appeal reversed the lower court's decision. The appeal court held that the arbitrator failed to assess the issue of reasonable accommodation on an individualized basis and had instead merely applied the collective agreement in a mechanical way. The appeal court sent the case back to the arbitrator to reconsider the accommodation issue and, if appropriate, award compensation.

THE PARTIES' POSITIONS

The employer appealed to the Supreme Court of Canada on the issue of the scope of the duty to accommodate and on the possibility of agreeing on the accommodation in advance in the context of a collective agreement.

The employer argued that a collective agreement could, in advance, establish the scope of the duty to accommodate and provide for a maximum period of time beyond which any absence would constitute undue hardship.

The union asserted that the employer cannot rely on employee benefits granted under a collective agreement as a substitute for the duty to accommodate. In the union's view, the duty to accommodate arose when the period provided for in the collective agreement expired.

SUPREME COURT: NEGOTIATED ACCOMMODATION POSSIBLE

The Supreme Court of Canada decided unanimously in favour of the employer. Although all nine judges allowed the employer's appeal, they gave two sets of reasons for doing so. A majority of six judges expressed the view that it was possible to negotiate a termination clause that was consistent with the duty to accommodate:

“[T]he conclusion to be drawn from the case law is that a termination of employment clause will be applicable only if it meets the requirements that apply with respect to reasonable accommodation, in particular the requirement that the measure be adapted to the individual circumstances of the specific case. If the period provided for in the termination of employment clause is less generous than the one to which the employee is entitled under the principles applicable to the exercise of human rights, the clause will have no effect against the employee and the employer will have to propose further measures to accommodate him or her.”

From this standpoint, the Court stated, the negotiated termination clause is not meant to be a threshold representing the minimum period to which an employee is entitled but rather should provide for a generous accommodation likely to meet the needs of as many employees as possible. The three-year period provided for in the agreement at issue was longer than those provided for in a number of statutes and collective agreements that had been scrutinized by the courts.

The Court said it could not be concluded that the accommodation provided for in the collective agreement is a complete answer to the complaint of an employee claiming a more generous accommodation measure. However it is no more appropriate to say that the benefit incorporated into the collective agreement should not be taken into account in the overall assessment of the accommodation granted by the employer. In this case, the arbitrator did not simply automatically apply the clause in order to arrive at his conclusion. Rather, he viewed the clause as an important piece of evidence which acquired a particular significance in demonstrating the employer's willingness to accommodate the grievor during her rehabilitation periods, despite the lack of any indication that she could return to work in the foreseeable future.

CONCURRING MINORITY: CLAUSE NOT DISCRIMINATORY

A minority of three justices held that the issue was not whether the employer reasonably accommodated the grievor, but whether the employer discriminated at all. In the minority's view, the grievor failed to demonstrate that she was disadvantaged by the employer's conduct based on stereotypical or arbitrary assumptions about people with disabilities.

The minority stated that it should not be presumed that automatic termination clauses are always discriminatory. Such a conclusion would make all such negotiated or legislated time limits vulnerable, no matter how reasonable their length. In this case, wrote the minority, the collective agreement clause at issue was beneficial to disabled employees:

“Far from representing discrimination on the basis of disability, the length of this termination clause represents, in purpose and effect, extensive protection from job loss caused by disability. Through clause 12.11.5 of the collective agreement, the union has negotiated exemplary protection for employees who are absent due to illness or accident unrelated to work (work-related accidents or illnesses are covered by a different provision). For 36 months, the employee's job and seniority are protected. [...] This does not target individuals arbitrarily and unfairly because they are disabled; it balances an employer's legitimate expectation that employees will perform the work they are paid to do with the legitimate expectations of employees with disabilities that those disabilities will not cause arbitrary disadvantage. If the employee is able to return to work, the same or an analogous job remains available. If not, he or she lacks, and has lacked for three years, the ability to perform the job.”

As a result, the employer's appeal was allowed.

In Our View

While lengthy automatic termination clauses will attract less intense judicial scrutiny than shorter automatic termination clauses, in terms of compliance with human rights standards, the specific circumstances must always be considered before relying on such clauses in terminating an employee. That said, it is unlikely that human rights standards would require that an employee with no prognosis of recovery after three years' absence be kept on staff.

For further information, please contact Lynn Harnden at (613) 940-2731..

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