

## Twenty-two months of absence frustrates employee's contract, B.C. court rules

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The British Columbia Supreme Court has ruled that an employee with 28 years of service who was terminated following an illness of 22 months was not wrongfully dismissed. Rather, the court ruled, the employee's contract had been frustrated by his lengthy illness. The court came to this conclusion despite the fact that the termination coincided with staff reductions related to the sale of the employer's business.

Wightman Estate v 2774046 Canada (October 18, 2005) concerned an employee who was described by the court as "hard-working, competent and valued" but who, after a series of health problems, was forced to stop working in February 2002 due to the failure of his transplanted kidney. In the fall of 2003, the employer negotiated a contract to sell the business. It was a term of the contract that the employer would terminate the employment of some 30 employees, including Wightman.

Wightman was terminated in December 2003 and was given \$13,700 in severance, but no notice damages. He died in March 2004, and his estate sued for wrongful dismissal in June of that year.

### **FRUSTRATION**

At trial, the employer pleaded the defence of frustration. The court noted that frustration is the legal doctrine according to which an employee's permanent and total inability to perform his or her work by reason of injury or illness will justify an employer's termination of the employment contract. Even though an employee's disability from illness may not be total and permanent, if it is of sufficient duration and seriousness to elevate it beyond the category of a temporary illness, it may result in the frustration of the employment contract. This would depend on a number of factors, such as

- the terms on which sick pay is payable;
- the duration of the employment contract;
- how vital it is that the employee be replaced;
- the prognosis for recovery; and
- the employee's years of service.

Ultimately, the test of frustration is whether the employee's incapacity at the time of dismissal was likely to continue for such a period that further performance of the employee's obligations in the future would be either impossible or something "radically different from that undertaken by him and agreed to be accepted by the employer under the agreed terms of his employment".

## **POST-DISMISSAL EVIDENCE OF INCAPACITY ADMISSIBLE**

Wightman's estate had objected to the admission of evidence showing that Wightman's health had continued to deteriorate after his dismissal until his death a few months later. The court rejected this objection, choosing to follow decisions in which it had been held that admitting post-termination medical evidence was analogous to the rule of law under which an employer may justify a dismissal by proving pre-dismissal misconduct that was unknown to the employer at the time of dismissal.

However, the court did not need to rely on the post-dismissal evidence to find that the employment contract had been frustrated. In this case, the court stated, the key issue was the nature of Wightman's illness and the prognosis for recovery:

“At the time of his dismissal, Mr. Wightman had been totally disabled from working for more than 21 months. His prospects for recovery from the conditions that disabled him from working were uncertain at best. I infer, on the balance of probabilities, that his disability, at the time of his dismissal, was likely to continue for such a period that further performance of his obligations in the future would either be impossible or would be a thing radically different from that undertaken by him and agreed to be accepted by the employer under the agreed terms of his employment. ... In my opinion, as of the summer or fall of 2003, there was no reasonable possibility that Mr. Wightman would be able to return to work by the end of 2004.”

Accordingly, the court dismissed the estate's wrongful dismissal action.

### **In Our View**

The common law doctrine of frustration of the employment contract may have to be reconsidered in light of the human rights doctrine of reasonable accommodation to the point of undue hardship. While it is doubtful that permanent and total disability would have to be accommodated through continued employment, this may not be the case when the disability results in the employee being capable of performing some productive work, even if that work is different from his or her original duties.

Readers should also bear in mind the decision of the Ontario Court of Appeal in *Ontario Nurses' Association v. Mount Sinai Hospital* concerning the treatment of severely disabled employees on termination (see [“Impermissible stereotypes”: Court of Appeal upholds ruling that ESA severance provision is unconstitutional](#) on our Publications page). In that case, the Court held that a statutory provision that disentitled employees whose employment contracts had been frustrated by illness or injury from receiving severance was based on the “impermissible stereotype” that disabled persons are incapable of participating in the workplace and was, therefore, unconstitutional.

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