

# Failure to communicate leads to wrongful dismissal damages award against employer

**Date :** November 1, 2004

A recent decision of an Ontario court demonstrates the importance of taking a pro-active approach to reintegrating employees who have been off work due to injury or illness into the workplace. The decision, *Mitri v. Weidmuller Ltd.* (June 14, 2004), involved an employee with 10 years of service who had incurred injuries in an automobile accident in May 1999. She had been off work for two years when her employment was terminated. Three months after her accident, the employer's benefits carrier had advised her that she was ineligible for long-term disability benefits because she was not so disabled as to be totally incapable of performing the essential duties of her position.

The insurer also told the employee that she should return to work on a gradual basis; and the employer followed up by offering her a part-time position. The employee did not feel able to return to work but did keep the company advised of her progress on a regular basis.

Two years after the accident, the employee was contacted by the employer and advised that, if she did not return to work by June 15, 2001, it would assume that she had resigned her position. This letter was based on an assertion by the employer that the employee had advised it that she would be returning to work on June 1, 2001. The employee denied this assertion. When the employee did not return to work on the specified date, the employer terminated her employment.

## **COURT: NO FRUSTRATION OF EMPLOYMENT CONTRACT**

At the trial of the employee's wrongful dismissal action, the employer argued that it was entitled to treat the employee's failure to return to work as a frustration of her employment contract. The Court disagreed. It found that the employee had not, in fact, indicated that she would be returning to work on June 1 and, pointing to a disability assessment completed in August 2001, that she was not permanently disabled from performing her job. That assessment, which the employee had not told the employer she would be undergoing, had revealed that only minor accommodative measures were required for her to resume her position.

The Court went on to express the view that, given the employee's length of service, the employer had an obligation to offer her a specific plan for her return to work. It found that the employer's offer of part-time work was not sufficient:

"The references to the offers of part-time work ... do not persuade me that viable part-time work was in fact offered to [the employee]. A letter offering a gradual return to work should

have been sent to [the employee]. [The employee] should have been given an opportunity to comply with a reasonable plan of reintroduction to her employment."

As a result, the Court awarded the employee damages in lieu of seven months' notice.

### **In Our View**

This case appears to be marked by several failures of communication: the employer's erroneous impression that the employee had given a firm date for her return to work, its failure to offer detailed accommodative measures, and the employee's failure to advise the employer that she was obtaining an assessment. All this despite the fact that the evidence showed that she had been in regular contact with the employer regarding the progress of her recovery.

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