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Deemed Termination Provisions vs the Employer's Duty to Accommodate

by Leanne Standryk¹

In our March 2006 Corporate Bulletin we reviewed an employer's duty to accommodate as required by the Ontario Human Rights Code. There is no question that managing an employee who has been unable to perform his or her workplace duties and responsibilities or return to work after a long absence is a very difficult issue for employers. Employers and Unions have attempted to deal with lengthy employee absenteeism due to disability by providing for "deemed termination" clauses in employment contracts and collective agreements. The "deemed termination" clause predetermines the maximum amount of time that an employee can be absent from work due to illness or injury before the employment relationship will be terminated. Can an employer and/or union blindly apply such a clause without evaluating the specific circumstances of each employee? The answer to this question is a resounding "NO". However, such a clause is a significant factor in evaluating an employer's accommodation efforts.

On January 26, 2007 the Supreme Court of Canada in *McGill University Health Centre (Montreal General Hospital) v. Syndicat des employés de l'Hôpital général de Montréal* considered the legality of a thirty-six (36) months automatic termination provision contained in a collective agreement. The Supreme Court of Canada acknowledged that while "deemed termination" clauses have been negotiated by parties who are intimately familiar with the workplace and the nature of employees' duties (and therefore are "a form of negotiated accommodation") and are a significant factor to consider when assessing an employer's duty of accommodation, they do not definitively determine the specific accommodation measures to which an employee is entitled, since, each case must be evaluated on the basis of its particular circumstances.

The Supreme Court confirms the long standing jurisprudence requiring an employer to assess its duty to accommodate an employee on an individualized basis and, provides some practical guidelines for employers seeking to understand the scope of their duty to accommodate and how the absences of employees should be managed. The Court recommended that the duty to accommodate and the undue hardship that can sometimes stem from this duty should be assessed globally. Start from the beginning of an employee's absence. Consider all of the measures taken by the employer, and the employee's overall state of health. Furthermore, the Court acknowledged that an employer cannot be expected to continue to employ someone who has been declared disabled for an indeterminate period and that an employee also has a role to play in the accommodation process by facilitating the disclosure of medical information relevant to a determination of an appropriate accommodation. The employee must provide evidence that s/he will be able to return to work within a reasonable period of time.

For employers, this case recognizes the importance of contractual language. It signifies support to an employer in applying a deemed termination clause (in the context of a collective agreement). While employers are required to examine the individual circumstances of each case, if the employee is unable to return to work within the time period established in the agreement the employer can point to the clause as a significant piece of the accommodation puzzle. A word of caution - the risk involved in terminating a disabled employee remains significant and it is always appropriate to contact counsel for assistance in these matters in order to reduce the potential liability.

The foregoing is provided to you for information purposes only. We caution you to obtain legal advice specific to your situation in all circumstances.

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