DISMISSING THE DISABLED OR ILL EMPLOYEE

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October 2012

[1] An earlier version of this paper originally appeared in the March 2004 edition of the TLABC journal, The Verdict. See also, Delaney, Dismissing the Disabled or Ill Employee, 56 The Advocate 865. The author wishes to thank Jonathan Fung for his helpful research and comments.

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By Timothy J. Delaney

INTRODUCTION

This paper will address some of the legal issues that arise when an employee is absent from work due to an illness or disability.

The medical prognosis for many illnesses and disabilities can be very uncertain. This is especially the case with some conditions like depression, stress-related illnesses or chronic pain syndrome, etc. This can also be the case with a host of other illnesses like some cancers or arthritic conditions. When an employee is absent from work with one of these kinds of uncertain conditions this can create difficulties in the workplace. The employer may not know whether to hire a temporary or permanent replacement for the absent employee. The employee who has replaced the absent worker may not know if their position will be eliminated and when. Even the absent employee may have concerns whether he or she has a job to return to.

Unfortunately, just like the prognosis for many of these conditions, the legal rights and obligations of both employers and employees in this area of the law remain far from certain.

TERMINATION OF THE EMPLOYMENT CONTRACT DUE TO AN ILLNESS OR DISABILITY

Frustration of the Employment Contract

Ordinarily where an employee is absent from work because he or she is suffering from an illness or disability, the employer does not have just cause to summarily terminate the employment relationship, simply by reason of the employee's absence. Mere absence from work due to illness or disability does not breach the contract. However, the employment contract may become "frustrated" and the parties' respective obligations under the contract may be discharged.

Frustration of contract refers to situations where the assumed background to the transaction has changed after the parties have started to perform the contract. In the case of an employment contract, it is assumed the employee will be fit and able to report to work. Where an illness or disability prevents the employee from reporting to work the contract may be "frustrated". If the court finds a contract has been frustrated then both parties to the contract are excused from further performance. That is, the employee is excused from reporting to work and the employer is excused from continuing to employ the employee.

In cases where an employee suffers an obvious permanent illness or disability, and the condition will prevent the employee from ever returning to work, frustration of the employment contract is clear: see *Atlantic Provinces Special Education Authority v. Parks*, (1992), 39 C.C.E.L. 155 (N.S.C.A.); *MacLellan v. H.B. Contracting Ltd.* The more vexing question is: when is an employer justified in treating the employment contract as frustrated where an employee is absent from work due to a temporary, but prolonged, illness or disability?

There is no easy answer to this question. There is no uniformly accepted length of time by which the parties may determine that an employee's absence from work brings the employment contract to an end as frustrated.

The test for when an employment contract has been frustrated was considered in the British Columbia Supreme Court decision of *Yeager* v. *R.J. Hastings Agencies Ltd.* [1985] 1 W.W.R. 218, where Mr. Justice Wood said:

> "Whether or not the incapacity of an employee due to illness will result in the frustration of a contract of employment will depend, in each case, on the relationship of the term of the incapacity or absence from work to the duration of the contract itself. In *Jackson* v. *Union Marine Ins. Co.* (1874), L.R. 10, that relationship was described by Bramwell B., in the following terms:
>
> > 'Thus, A enters the service of B, and is ill and cannot perform his work. No action will lie against him; but B may hire a

> fresh servant, and not wait his recovery, if the illness would put an end, in a business sense, to their business engagement, and would frustrate the object of that engagement: a short illness would not suffice, if consistent with the object they had in view.'"

Courts have clearly accepted the illness need not be permanent, in the ordinary sense of the word, to put to an end, in the business sense, to the employment contract. Frustration may arise where a temporary illness is of significant duration.

For example, the court in the case of *Demuynck v. Agentis Information Services Inc.*2003 BCSC 96 considered this problem. In that case the plaintiff had injured her elbow in a slip and fall unrelated to her employment. Over the course of the next six years she never returned to work (aside from a few weeks) and there was no evidence she would ever be able to return to work. She sued the employer for wrongful dismissal. The court dismissed her lawsuit and found the employment contract had been frustrated so she was not entitled to damages.

In order to determine whether a temporary illness or disability is sufficient to bring the employment contract to an end, regard must be had to the considerations outlined in the leading decision of the English Court of Appeal in *Marshall* v. *Harland & Wolff Ltd*. [1972] 2 All E.R. 715. That case established that a court should consider:

(a) *The terms of the contract*. Arguably, if a contract provides for sick pay the contract cannot be frustrated so long as the employee returns to work, or appears likely to return to work, within the period during which the sick pay is payable. Sick pay as discussed here should be contrasted with long term disability benefits. For example, an employment contract may provide that the employee is entitled to 12 sick days a year, a short term disability plan, and a long term disability plan. Clearly, in such circumstances, an employment contract cannot be frustrated if the employee is absent from work due to illness for 12 days or less. On the other hand, the employment contract of an employee who becomes entitled to long term disability

benefits may be considered to be frustrated: *Wightman Estate v. 2774046 Canada Inc*. 2006 BCCA 424.

(b) *The length of the fixed term employment contract*. If the employment agreement is inherently temporary, then the illness or disability will be more likely to frustrate the contract than a contract of indefinite hire which was expected to be long term. For example, if an employee was hired on a six month contract and during the first month it was determined that he or she would be absent from work due to an illness for the next four or five months, the parties' contractual obligations would more likely be discharged as the contract has been frustrated.

(c) *The nature of the employment*. The court in *Marshall* noted that the employment relationship is more likely to survive the period of incapacity if the employee is one of many employees in the same category than if the employee occupies a key post which must be filled on a permanent basis if the absence is prolonged. In *White* v. *Woolworth Canada Inc.* (1996) 22 C.C.E.L. (2d) 110 (Nfld. S.C.A.D.) the Court noted the argument by the employer that the employee occupied an important position which had to be replaced was a two edged sword. The court said the importance of the employee's position would also heighten the employer's interest in continuing the employment relationship during his absence to retain the value of the expertise of a long term employee.

It is submitted that the correct approach is that, subject to the other considerations, a senior executive can be absent from work for a significant length of time before the employment contract will be frustrated. A junior employee, who holds a position where he or she is one of many employees in the same position, will also be entitled to be absent from work due to an illness or disability for a significant length of time (although less time than the executive), since his or her absence from work usually will not seriously disrupt the work environment. On the other hand, where a junior employee is the only employee in the firm who occupies a certain position, then his

or her absence from work will give rise to frustration of the contract sooner since the employer must hire and train a new employee to fill the position.

(d) *The nature of the illness or injury*. This involves a consideration of how long the illness or injury has already lasted and the employee's prospects for recovery. The greater the degree of incapacity and the longer the period over which it has persisted and is likely to persist, the more likely it is that the employment relationship has been frustrated.

(e) *The period of past employment*. A relationship which is of long standing is not so easily frustrated. For example, the British Columbia Supreme Court in *Yeager* applied the *Marshall* decision and ruled that even though Mr. Yeager's illness lead to his absence from work for two years, this was not long enough in the circumstances to frustrate the employment contract. This was primarily because Mr. Yeager had worked for his employer for 30 years.

Another consideration, although not referred to directly in *Marshall*, is the age of the employee. An older employee may have a greater expectation of continued employment: *Yeager*, supra at 243.

The Court in *Marshall* noted that the various factors which should be taken into account above are interrelated and cumulative but not necessarily exhaustive.

It has been argued that when an employment arrangement includes a long term disability plan the contract cannot be frustrated by the employee's absence due to disability. The argument is that because of the LTD plan, the contract contemplates the employee may be absent from work for a significant length of time. This argument was rejected by the British Columbia Court of Appeal in *Wightman Estate v. 2774046 Canada Inc.*, supra. In that case, a long term employee was absent due to serious health problems. The Court of Appeal examined the contract and held that although the contract provided that the employee would be entitled to receive long term disability benefits until he ceased to be disabled, until he

reached age 65, or until his earlier death, it did not provide that the employment contract would continue indefinitely despite his disability. The Court of Appeal rejected the argument that the existence of long term disability benefits was a bar to an employer's defence of frustration.

Nevertheless, employers who advise an ill or disabled employee that they no longer have a job face significant risks. One problem is at the time the employer advises the employee the contract is being terminated, it may not yet have become apparent the illness or disability will prevent the employee from returning to work. Then even if at a later date it becomes apparent the illness is permanent the employer may not be able to argue the contract was frustrated. For example, in *Bohun* v. *Similco Mines Ltd*., [1995] 6 W.W.R. 552 (a case which was part of a trilogy of decisions released by the Court of Appeal at the same time in 1995. The other decisons being *Sylvester v. British Columbia* [1995] 6 W.W.R. 537 (B.C.C.A.) and *Datardina v. Royal Trust Corp. of Canada* [1995] 6 W.W.R. 531 (B.C.C.A.)) Mr. Bohun had worked for approximately 20 years as an accountant for Similco Mines Ltd. He left work suffering from chronic refractory depression. He was notified approximately eight months later that he was dismissed, to take effect 14.7 months later. The employer, however, regarded the disability benefits as the only payments to which Mr. Bohun was entitled on termination. The evidence established that at the time Mr. Bohun was dismissed he was expected to be able to return to work in approximately one and a half months. However the termination of his employment had an adverse effect on his condition and made his return to work impossible.

The Court of Appeal found that Mr. Bohun's employment was terminated by his employer before frustration could have been claimed. As such, he was entitled to be paid notice in any event.

The court held that since the employer notified Mr. Bohun that his contract was terminated before Mr. Bohun's illness became permanent, the employer lost the frustration defence. The employer had breached the contract by terminating Mr. Bohun without providing him

with reasonable notice before the contract had been frustrated and as such Mr. Bohun's right to damages had fully accrued before the contract had been frustrated.

There have been some cases where the employer was able to rely on medical evidence that arose later to argue the contract had been frustrated but these cases are rare.

An example of this issue arose in the Ontario case of *Altman v. Steve's Music Store Inc.* 2011 ONSC 1480. This case is very much a cautionary tale on how not to handle an employee's absence from work due to an illness or disability.

Ms. Altman had worked for Steve's Music Store for over 30 years. She developed cancer. She stopped working while she had chemotherapy and radiotherapy. She then returned to work for about 6 months working reduced hours. She had to take time off for her therapies. Then the lawyers for the employer sent her a letter advising her that she had been "remiss" in her duties and obligations by failing to report to work as and when required and by failing to give her employer prior notice or written justification of her absences. The letter warned her that her employment may be terminated if she did not fulfil her obligations to her employer.

Ms. Altman was shocked by the letter. She reported to work the next day, for fear of losing her job. That was the last day she worked. She then took a medical leave over the next 6 months.

Towards the end of the 6 months, she faxed a letter to the employer's head office to advise she would be reporting to work in one week. Then 5 days later she sent a letter to the employer advising she had fractured her back and had to delay her return to work by 2 more weeks. The day after that letter was sent the lawyers for Steve's Music Store sent a letter to Ms. Altman terminating her employment. The employer paid her nothing upon termination.

By the time the case went to trial (about 2 years later) there was medical evidence that Ms. Altman's condition had become permanent and she therefore could not work any longer.

The employer argued the contract had been frustrated. The court said, the question of whether the contract had been terminated had to be considered as at the date of the letter terminating her employment. On that date it was not clear that Ms. Altman would not be able to continue to work. Therefore the court rejected the frustration of contract defence.

The court also heard evidence at trial from a psychiatrist that the letters caused Ms. Altman to develop depression and psychological distress. The court awarded Ms. Altman 22 months salary in lieu of notice and also ordered the employer to pay her $35,000 in damages for causing her mental distress and a further $20,000 in punitive damages.

It is clear from these decisions that it is almost always a bad idea to terminate an employment contract when an employee is absent from work due to an illness or disability. If an employer is going to take the position the employment contract has been frustrated, the employer must be absolutely certain of this. Otherwise, the employer runs the risk it may have to pay damages to the employee, notwithstanding that at a later point in time it may be abundantly clear that the contract has been frustrated.

As noted above, when dealing with conditions like depression and stress which may be suffered by an employee for many years and where the medical practitioners are often reluctant to declare the condition is permanent, it is difficult to know when the contract of employment has been frustrated. If the employer has advised an employee that his or her employment is terminated before the medical practitioners have determined that the illness or disability is permanent, then the employee will be entitled to damages even though the employee may never work again. The disabled employee, however, who never receives any notice of termination from his employer will receive nothing more than his or her long term disability benefits until the plan terminates, or the date of recovery from the illness or disability. There is, therefore, an incentive for employers to avoid giving notice of termination to employees in such circumstances.

An example of how these situations can create uncertainty in an employment relationship is the British Columbia Supreme Court decision of *Middleton* v. *Cisero Enterprises Ltd.*

[1997] B.C.J. No. 634 (QL). In that case the plaintiff had developed hypertension and other heart problems. He began to receive long term disability coverage which continued until he reached age 65. He brought an action against his former employer claiming that his employer's actions in failing to provide him with certain benefits and in hiring a replacement for his position had amounted to a constructive dismissal. The court dismissed his action on the basis that the employment had never been terminated. It appears that frustration of the contract was not argued in this case.

As *Middleton* demonstrates, uncertainty surrounding the parties' contractual obligations when an employee suffers from a prolonged illness or disability is a problem for both employers and employees.

ASSESSING DAMAGES FOR THE WRONGFUL DISMISSAL OF THE DISABLED OR ILL EMPLOYEE

If, in the circumstances, an employment contract has not been frustrated then the dismissal of an employee who is ill or disabled for any reason not amounting to just cause will give rise to damages. An employee who is wrongfully dismissed while absent from work due to an illness is entitled to damages for the salary the employee would have earned had the employee been working during the notice period, just as an employee who is wrongfully dismissed while working enjoys such an entitlement. The fact that the employee could not have worked during the notice period is irrelevant to the assessment of damages.

A number of special considerations arise when assessing damages in these difficult circumstances.

I. Deductibility of Disability Benefits

The first issue is whether disability benefits the employee receives during the notice period may be deducted from the payment of damages in lieu of notice. This raises the question of when the notice period begins to run when an employee is on disability leave.

The Supreme Court of Canada in *Sylvester* made it clear that benefits received by the employee pursuant to a disability plan that is part of the employment contract will be deducted from the award for damages for reasonable notice. For example, if an employee was receiving disability benefits at 70% of his or her usual salary, the employer would only be required to "top up" the salary to 100% during the notice period. An employee who arranges his own private disability insurance will not have those funds deducted from the notice period damages.

A. The Notice Period

In the trilogy of decisions released in 1995 each dealing with the dismissal of employees who were absent from work during an illness or disability, (*Bohun v. Similco Mines Ltd*. [1995] 6 W.W.R. 552; *Sylvester v. British Columbia* [1995] 6 W.W.R. 537; *Datardina v. Royal Trust Corp. of Canada* [1995] 6 W.W.R. 531), the British Columbia Court of Appeal held that the notice period should run from the date of the employee's wrongful dismissal. For example, if an employee was absent from work due to an illness for two years, and was dismissed six months after his or her absence from work began, the notice period would run from the dismissal date, six months after the date the employee last worked due to the illness. Therefore, the notice period would run during the period of disability.

The Ontario Court of Appeal in *McKay v. Camco Inc*. (1996), 53 O.R. (2d) 257 (C.A.) took a different approach, and held that the notice period should be suspended and run after the period of disability ends. This was based on the reasoning that the employee was not in a position to look for work while on disability leave. Disability benefits the employee may have received would not be deducted from the award, as the damages would relate to the time frame following the end of the disability or illness.

One of the trilogy of cases heard by the British Columbia Court of Appeal went to the Supreme Court of Canada. While the Supreme Court of Canada in *Sylvester* was not expressly asked to address the question of when the notice period begins to run, by holding that an employer may deduct the disability benefits which an employee receives during the

notice period, it appears the Court accepted the approach of the British Columbia Court of Appeal and impliedly overruled the Ontario Court of Appeal's decision in *McKay*. Had the Supreme Court of Canada adopted the *McKay* approach, it would have logically followed that benefits which an employee receives from a disability plan should not be deducted.

In *Sills* v. *Children's Aid Society of the City of Belleville* [1997] O.J. No 37481 (QL); [1999] O.J. No. 2841 (QL) Mr. Justice Chilcott of the Ontario High Court followed *Sylvester* and decided *McKay* was no longer binding in Ontario.

B. What Benefits Are Deductible?

1. Statutory Benefits

Statutory disability benefits (such as WCB and EI benefits) must be distinguished from disability benefits from a plan arranged by an employer: *Sylvester v. British Columbia* [1997] 2 S.C.R. 315; *Dowsley Estate v. Viceroy Fluid Power Int'l Inc.* (1997) 34 O.R. (3d) 57. The Courts of Appeal in three Provinces (Alberta, Ontario and Newfoundland) have ruled that worker's compensation benefits received during the notice period are deductible from the damages awarded. The Quebec Court of Appeal ruled they were not deductible: *Dowsley Estate v. Viceroy Fluid Power Int'l Inc.*, supra; *Salmi v. Greyfriar Developments Ltd.* (1985), 7 C.C.E.L. 80 (Alta. C.A.); *White v. F.W. Woolworth Co.* (1996), 22 C.C.E.L. (2d) 110 (Nfld. C.A.); *Industries de Caoutchouc Mondo (Canada) Ltee v. LeBlance* (1987), 17 C.C.E.L. 219 (Que. C.A.).

The British Columbia Supreme Court has ruled that workers' compensation benefits will be deducted or treated as mitigation: *Royster v. 3584747 Canada Inc.* [2001] B.C.J. No. 136; *Prince v. T. Eaton Co.* (1990), 34 C.C.E.L. 228; *Birch v. London Drugs Ltd.*, 2003 BCSC 1253.

Employment Insurance benefits are not deductible: *Jack Cewe Ltd. v. Jorgenson*, [1980] 1 S.C.R. 812.

2. Employment Disability Benefits

It is clear that disability benefits which an employee receives pursuant to a private insurance plan the employee has arranged and paid for on his or her own, will not be deducted from an award of damages: *Sylvester v. British Columbia* [1997] 2 S.C.R. 315; *McNamara v. Alexander Centre Industries Ltd* [2001] O.J. No. 1574.

The parties to the employment contract are, of course, free to agree whether certain disability benefits will be deducted from a notice payment: *Sylvester v. B.C.* supra, para. 20.

In the absence of any express agreement in the employment contract, disability benefits may be deducted when they have been paid to an employee pursuant to a plan that forms part of the employment contract. While at first blush it might appear clear what this means, the jurisprudence is far from settled.

3. Is the Plan part of the Employment Contract?

As noted above, the Supreme Court of Canada in *Sylvester v. British Columbia* said that benefits received by the employee pursuant to a disability plan *that is part of the employment contract* will be deducted from the award for damages for reasonable notice. The Supreme Court of Canada left open the possibility that an employee could argue the disability benefits should not be deducted if they were "akin to benefits from a private insurance plan for which the employee has provided consideration".

In *Sylvester* the employer was the government of British Columbia. The government of B.C. had set up and funded its own disability plan for its employees. The Supreme Court of Canada was of the view that since these benefits formed part of the employment contract, the employer should be entitled to deduct the benefits from the damages award.

Instead of setting up their own plans, many employers arrange disability coverage through private insurers, where the employees may or may not contribute directly to funding the plan. The question then is: are these benefits part of the employment contract or are they akin to private insurance?

On this question, the Supreme Court of British Columbia has taken a different approach from the Courts of some of the other provinces. The Ontario High Court in *Sills* v. *Children's Aid Society of Belleville,* supra, ruled that an employer should not deduct the long term disability benefits received by an employee from the award of damages. This was mainly because the employee had made direct and indirect contributions to the long term disability plan. The British Columbia Supreme Court in *McKendrick* v. *Open Learning Agency* [1997] B.C.J. No. 2763 (QL) determined where an employer had implemented a private long term disability plan with compulsory employee contributions, the employer could still deduct those disability benefits from the notice payment, since the plan formed part of the employment contract. Mr. Justice Scarth, in *McKendrick* considered *Sills* and expressly chose to not follow it.

The deductibility issue was considered again by the Ontario Court of Appeal in the case of *McNamara v. Alexander Centre Industries Ltd* [2001] O.J. No. 1574 (QL), (followed in, *Thomson v. Rob Myers Chevrolet Geo Oldsmobile Ltd.* [2001] O.J. No. 5228). In that case Mr. McNamara had worked for the defendant for 24 years. The court described the circumstances around his dismissal as “troubling and disappointing”.

In the summer of 1995, Mr. McNamara advised his employer he would be off work due to medical reasons, indefinitely. On August 1st, the employer advised him they accepted he was quitting his employment due to his medical condition. The day before, however, Mr. McNamara’s doctor had told him he could return to work in two weeks. Mr. McNamara tried to contact his employers to advise them he planned to return to work in two weeks (in actual fact, Mr. McNamara then continued on disability leave for another year and one half). The employer neither responded to Mr. McNamara’s enquiries nor reconsidered their position. The employer never offered to pay any severance to Mr. McNamara.

At trial the court found Mr. McNamara had been wrongfully dismissed. Damages were assessed at 24 months notice. The employer argued that the disability payments which Mr. McNamara received during those 24 months should be deducted from the award. The disability benefits were from a plan with London Life arranged by the employer. The Court of Appeal refused to deduct the disability benefits.

In doing so, the Ontario Court of Appeal considered what the Supreme Court of Canada meant in *Sylvester* when it said the disability plan in that case had to be contrasted with benefits from plans "akin to" private insurance plans. The Ontario Court of Appeal ruled that, even though the Supreme Court of Canada had not said so explicitly in *Sylvester*, the S.C.C. must have had in mind the long line of cases culminating in *Cunningham v. Wheeler* [1994] 1 S.C.R. 359, which dealt with the deductibility of collateral benefits from damages awards made in tort actions. In *Cunningham v. Wheeler* the Court ruled that if there was evidence that the employee had either expressly made contributions to the plan or had done so indirectly (such as agreeing to a lower hourly wage during bargaining, in return for disability benefits), then it would be a plan "akin" to private insurance.

The Court in *McNamara* went on to say:

> "If the disability benefits are deducted, McNamara will receive his full salary for the entire notice period. However, that salary will be less than it might have been if he had not bargained a trade-off between salary and benefits, and he will forfeit all of the disability payments. ACI, on the other hand, will derive a huge benefit from the deductibility scenario, solely because it chose an employee's new disability, after 24 years of loyal service, as the moment and reason to fire him. ACI's windfall for acting abominably will be $163,000."

The decision in *McNamara* was recently followed in *Altman v. Steve's Music*, 2011 ONSC 1480, referred to above. In *Altman*, the Court held that the question of whether disability insurance benefits are deductible from an award of damages turns on the terms of the employment contract and the intention of the parties. The Court went on to say that since the since the employee paid part (if not all) of the premiums, the insurer paid the benefits to

the employee, the employee received no disability payment until a year from the date she took medical leave, and the employer terminated the employee while she was on medical leave but before she received any disability payment, the long term disability payments were not deductible from the damages awarded.

A similar approach was taken by the Nova Scotia Court of Appeal in *Kaiser v. Dural, a division of Multibond Inc.* [2002] N.S.J. No. 249. Some Courts have even refused to allow employers to deduct benefits from plans paid for solely by the employer: *Zorn-Smith v. Bank of Montreal* [2003] O.J. No. 5044.

Considering that the *McKendrick* decision conflicts with *McNamara* and *Kaiser*, it appears the question of when disability benefits paid from a plan arranged by an employer may be deducted from a damages award will eventually have to be addressed by our Court of Appeal and perhaps again by the Supreme Court of Canada (although leave to the S.C.C. was sought in *McNamara* and denied).

Another important consideration is whether the disability plan has a "subrogation provision" (as most do). Even if the British Columbia Courts eventually overrule *McKendrick*, adopt *McNamara*, and rule that the disability benefits are not deductible, the employee may then have to pay back the benefits to the disability insurer from the damages award. The effect of a change in the law may be that the disability insurers will mainly benefit, not employees.

II. Mitigation

As mentioned above, it is implicit in the *Sylvester* approach that notice runs during the period of disability. This raises the question of whether the defence of mitigation will be available to an employer in such circumstances.

Arguably, following *Sylvester*, courts may have to ignore mitigation of damages which has actually taken place. For example, suppose an employee suffers from a disability which lasts for two years. Suppose that the nature of the employment relationship is such that the

two year absence does not give rise to a frustration of the employment contract. Suppose the employee was receiving disability benefits during the period of disability. If that employee were entitled to a notice period that amounted to twelve months, then the employer would be required to pay damages for the twelve months by "topping up" the difference between disability benefits received by the employee during the twelve month period to the employee's full salary (or, following *McNamara*, full income replacement for the notice period).

Suppose then the employee obtained equivalent employment two weeks after the employee's disability ended and the employee was then fit and ready for work. If the trial in the matter took place more than two years after the termination of the employment, the court would have evidence before it that the employee had been able to almost fully mitigate his or her damages. Nevertheless, pursuant to the *Sylvester* approach, the court would not be permitted to take this mitigation into account and as a result the employee would be arguably over compensated.

On the other hand, in most cases employees will be under compensated following the Supreme Court of Canada's approach in *Sylvester*. The British Columbia Court of Appeal in *Sylvester* was of the view that disability benefits should not be deducted because the employee could, in effect, hold onto the damages received to provide the employee with sufficient income for support while searching for employment once the disability ended. Most employees suffering from a disability or illness likely cannot look for work. Since the Supreme Court of Canada has ruled that disability benefits are deductible from the damages received, at the conclusion of the disability period the "excess" damages which the employee has received may be insufficient to compensate the employee in his or her search for employment. Damages in lieu of notice, of course, are based on providing the dismissed employee with an income replacement for the time when the employee searches for new employment. If the Court has determined that it may take the employee 12 months to find new employment, and the dismissed employee is prevented from searching for new employment due to the illness or disability then, if the employee's long term disability benefits were 70% of his or her usual salary, at the end of the disability period that employee

will have only 30% of the amount required to assist him or her while searching for employment.

III. Human Rights Considerations

It is important to note that human rights legislation prohibits discrimination on the basis of physical disabilities. The British Columbia *Human Rights Code*, R.S.B.C. 1996, c.210, s. 13 provides as follows:

> "(1) A person must not:
> (a) refuse to employ or refuse to continue to employ a person, or
> (b) discriminate against a person regarding employment or any term or condition of employment
> because of . . . physical or mental disability.
> (4) Subsections (1) and (2) do not apply with respect to a refusal, limitation, specification or preference based on a bona fide occupational requirement."

A remedy under the *Human Rights Code* may exist where an employment relationship is terminated due to a physical or mental disability. However, an employer may be justified in adopting a discriminatory standard if that standard is a bona fide occupational requirement. The Supreme Court of Canada in *BCGSEU v. British Columbia (Public Services Employee Relations Commission)*, [1999] 3 SCR 3, has held that in order for a standard to be a bona fide occupational requirement, the employer must demonstrate the following, on a balance of probabilities:

(1) the standard was adopted for a purpose rationally connected to the performance of the job;

(2) the standard was adopted in an honest and good faith belief that it was necessary to the fulfilment of that legitimate work-related purpose; and

(3) the standard was reasonably necessary to the accomplishment of that legitimate work-related purpose.

In order to satisfy the third criterion, an employer must demonstrate that it is impossible to accommodate the employee without imposing undue hardship upon the employer. The Supreme Court of Canada went on to say that courts should be sensitive to the various ways in which an individual may be accommodated. Some questions to consider include:

(1) Has the employer investigated alternative approaches that do not have a discriminatory effect, such as individual testing against a more individually sensitive standard?

(2) If alternative standards were investigated and found to be capable of fulfilling the employer's purpose, why were they not implemented?

(3) Is it necessary to have all employees meet the single standard for the employer to accomplish its legitimate purpose or could standards reflective of group or individual differences and capabilities be established?

(4) Is there a way to do the job that is less discriminatory while still accomplishing the employer's legitimate purpose?

(5) Is the standard properly designed to ensure that the desired qualification is met without placing an undue burden on those to whom the standard applies?

(6) Have other parties who are obliged to assist in the search for possible accommodation fulfilled their roles?

In *Hydro-Québec v. Syndicat des employé-e-s de techniques professionnelles et de bureau d'Hydro-Québec, section locale 2000 (SCFP-FTQ),* 2008 SCC 43, the Supreme Court of Canada clarified that the purpose of the duty to accommodate is not to alter the

essence of the employment contract. The employer does not have a duty to change working conditions in a fundamental way, but does have a duty, if it can do so without undue hardship, to arrange the employee's workplace or duties to enable the employee to do his or her work. If an employee with an illness remains unable to work for the reasonably foreseeable future even though the employer has tried to accommodate him or her, the employer may have satisfied the test for undue hardship. The employer's duty to accommodate ends where the employee is no longer able to fulfill the basic obligations associated with the employment relationship for the foreseeable future.

An employer should keep in mind that the duty to accommodate, in addition to being a substantive duty, does have a procedural aspect as well. As discussed above, the substantive duty to accommodate requires the employer to show that it could not have accommodated the employee's disability without undue hardship. Procedurally, an employer should obtain all relevant information about the employee's disability, including the employee's current medical condition, prognosis for recovery, ability to perform job duties, and capabilities for alternate work. Proper procedure is that the employer should also seriously consider how the employee could be accommodated. Some courts have suggested that the procedural aspect is a duty that must be followed: *Adga Group Consultants v. Lane*, 2008 CanLII 39605 (ON SCDC). However, the BC Supreme Court in *Emergency Health Services Commission v. Cassidy*, 2011 BCSC 1555, has recently held that there is no separate procedural duty to accommodate, but procedure is simply a factor to consider in looking at whether an employer has discharged its overall duty to accommodate.

Given the conflicting jurisprudence, it is currently unclear whether there is a separate procedural duty to accommodate. However, a prudent employer should make efforts to ensure that procedural aspects of the duty to accommodate are met.

IV. Length of Notice, Aggravated and Punitive Damages

Often an employee who has been dismissed while absent from work by reason of illness or disability, is prevented by that condition from searching for new employment. Employers

must tread very carefully (if at all) when they terminate an employment contract while an employee is absent from work on disability. Otherwise, they run a substantial risk of exposing themselves to increased damages (i.e. see *Altman*, above).

When an employee's health affects his or her ability to find another job upon dismissal, this factor may justify increasing the length of the notice period: *Moody v. Telus Communications Inc.* 2003 BCSC 471; *Pereira v. The Business Depot Ltd.*, 2009 BCSC 1178. Further, if the employee is particularly vulnerable at the time of dismissal due to the illness or disability, this factor may also justify lengthening the notice period, even where the employer has not acted in bad faith: *Singh v. B.C. Hydro and Power Authority* [2001] B.C.J. No. 2538 (C.A.); *Moody v. Telus Communications Inc.*, supra.

In *Moody* supra, the Court assessed the notice period at 24 months and said:

> "In my opinion, the most significant factor bearing on the amount of notice which the plaintiff is entitled to, is the issue of his health. It is clear that he was terminated at a time when he just completed treatments for cancer which despite his current state of recovery remains an ongoing uncertainty not unlikely to affect his future employment prospects."

Where the termination of the employment contract of an ill or disabled employee is accompanied by conduct by the employer that amounts to bad faith or unfair dealing, this may also justify additional damages.

In *Honda Canada Inc. v. Keays*, 2008 SCC 39, the Supreme Court of Canada ruled that if an employee can show the employer engaged in bad faith conduct, and the employee suffered harm because of that conduct (like in *Altman*, supra, where there was medical evidence that she developed depression in response to her termination) aggravated damages may be awarded. Some courts have also extended the notice period for bad faith conduct: *Slepenkova v. Ivanov*, 2009 ONCA 526, although this approach is controversial.

The decision in *Honda* also provides some examples of bad faith conduct: attacking the employee's reputation by declarations made at the time of dismissal, misrepresentation

regarding the reason for the decision, or dismissal meant to deprive the employee of a pension benefit or other right. Another example of bad faith conduct could include advising an employee on disability that her employment would be terminated unless she returned to work against her doctor's advice: *Zorn-Smith v. Bank of Montreal* [2003] O.J. No. 5044. At least one Court has suggested that the mere act of terminating an employment contract when the employee is on disability leave may be bad faith conduct: *Skopitz v. Intercorp Excelle Foods Inc.*, 1999 CanLII 14852 (ON SC). This reading of *Skopitz* regarding bad faith conduct is perhaps an overly broad statement of the law. Nevertheless, it is an indication of how risky it is for an employer to dismiss an employee in such circumstances.

Employees who are wrongfully dismissed while absent from work due to a disability might also be able, in the appropriate circumstances, to successfully argue that this conduct gives rise to a claim for aggravated damages: *Vorvis v. I.C.B.C.* [1989] 1 S.C.R. 1085.

Another such example is the case of *Zorn-Smith v. Bank of Montreal*, supra, where the Court awarded aggravated damages, because the employer's conduct was the primary cause of the plaintiff's adjustment disorder which lead to a depressed and anxious mood.

When read together, the Supreme Court of Canada's decisions in *Whiten v. Pilot Insurance Company* [2002] 1 S.C.R. 595, *Wallace v. United Grain Growers Ltd.*, supra, and, *Vorvis v. I.C.B.C.*, supra, arguably suggest that while terminating an employment contract when the employee is on disability leave may not, by itself, warrant punitive damages, punitive damages may be available where the employer engages in harsh, vindictive, reprehensible and malicious conduct (see also, *Greenwood v. Ballard Power Systems Inc.* 2004 BCSC 266). As noted above, an employer must be particularly sensitive to the treatment of its employees in such circumstances.

V. Other Issues

If the employee is suffering from a mental disability or illness, one may also have to consider whether the employee is capable of contracting for the purposes of a settlement

agreement. In *Elliott v. Parksville (City)* (1990), 29 C.C.E.L. 263 (B.C.C.A.) the Court held that an employee who resigned while suffering from stress induced affective disorder lacked the mental capacity to contract at the time (nevertheless, the employer was justified in raising other grounds for dismissal which had included tardiness, failure to perform duties in a timely fashion, insubordination. The Court of Appeal upheld the dismissal of the action relying on the trial judge's findings that she employer had just cause to dismiss the employee).

SUMMARY

If the employee's illness or disability does not frustrate the employment contract then in the absence of other factors, an employer will not have cause to dismiss the employee. If the employment is terminated, the notice period will run from the date the disabled or ill employee's employment was terminated. As such, employment which the employee may obtain following the period of disability will not be counted on the question of mitigation, unless the notice period extends beyond the end of the disability period.

An employee who has been wrongfully dismissed at a time when he or she is unable to work and is receiving disability benefits, is entitled to damages. Disability benefits which are from a plan paid for solely by the employer may be deducted from the award of damages. In British Columbia, as the law presently stands, disability benefits that form part of the employment contract, even if the premiums have been paid by the employee, may be deducted by the employer from the award of damages such that the employer is only required to "top up" the employee's salary from the amount of disability benefits to 100% of salary and benefits. Appellate Courts in Ontario and Nova Scotia, however, have determined that if an employee has made direct or indirect contributions to the disability plan, then the disability benefits will not be deducted from an award of damages. It remains to be seen how the British Columbia Court of Appeal, or perhaps the Supreme Court of Canada, will resolve on this issue.

Employers who do terminate the employment of an employee who is absent from work due to illness or disability, must act with extreme caution and sensitivity, or run the risk of exposing themselves to an award of damages for bad faith conduct, or even aggravated or punitive damages. An employer should be cognizant of its duty to accommodate a disabled employee. Even where the employer has not acted in bad faith, if the employee's illness or disability will interfere with his or her ability to look for new employment, this factor may justify increasing the length of the notice award.