IN FACT AND IN LAW

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Clauses Related to Disability Leave, Administrative Dismissal, and the Loss of Seniority and Employment Are Not Automatic!

By Dominique L'Heureux

Preamble

In Quebec, most collective agreements contain a "*loss of seniority and employment*" clause according to which the signatories agree to terminate the employment of an employee in various circumstances, in particular after an absence of a specific period of time due to disability or illness.

Collective agreements usually also provide for a benefit plan for an employee who is absent due to disability or illness, or the protection of his or her employment during this period.

The Quebec Court of Appeal recently rendered two judgments which confirm the scope of the employer's obligations with regard to applying contractual provisions of this type in light of the "*duty of reasonable accommodation*" arising from the protection offered by the *Charter of Human Rights and Freedoms* against discrimination on the basis of a "*handicap*".

It should be remembered that the "*duty of reasonable accommodation*" is a concept created by case-law in order to protect employees against wrongful discrimination in the workplace and, more specifically, on the basis of a "*handicap*".

Syndicat des employés de l'Hôpital général de Montréal v. *Centre universitaire de santé McGill (Montreal General Hospital et al.)*, 2005 QCCA 277

The employee, a medical secretary employed by the *Montreal General Hospital*, was on medical leave of absence because of depression. Despite four rehabilitation periods, the employee was unable to return to work within the 36-month period provided for in the "*loss of seniority and employment*" clause in her collective agreement as a result of an automobile accident which occurred during her leave of absence.

When the employer terminated the woman's employment, under the "*loss of seniority and employment*" clause, no date for returning to work was foreseeable because she was still waiting for surgery required as a result of the automobile accident.

The arbitrator dismissed the grievance filed by the employee against her dismissal judging, first, that the "*loss of seniority and employment*" clause in the collective agreement was not discriminatory with respect to the provisions of the *Charter of Human Rights and Freedoms* and, second, that the clause had been applied correctly and without discrimination by the employer.

The union's motion for a judicial review was dismissed as the Superior Court maintained that there could not have been wrongful discrimination in this case because, up to the end of the period provided for in the collective agreement, the employee was unable to work, and she would not be able to work in the foreseeable future.

In a unanimous decision, the Court of Appeal quashed the Superior Court judgment, cancelled the arbitrator's award and ordered that the file be returned to the arbitrator so he could determine the employer's duty of reasonable accommodation and, if applicable, decide the remedy to which the employee was entitled.

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The Court essentially considers that the automatic application of a "loss of seniority and employment" clause adversely affects the rights guaranteed by the Charter regarding protection against wrongful discrimination on the basis of a handicap because it does not take into account the employee's actual situation or his or her needs and abilities.

The arbitrator cannot, without committing an error likely to be subject to judicial review, simply acknowledge the application of the "*loss of seniority and employment*" clause, stating that it is not discriminatory to refuse to extend the employment of a person who is physically unable to work.

Instead, the arbitrator should have considered whether the employer discharged his burden of proof by showing that the additional time period required for the employee's return to work represented an "*undue hardship*".

Québec (Procureur général) v. *Syndicat des professionnelles et professionnels du gouvernement du Québec (SPGQ)*, 2005 QCCA 311

The woman, who was employed by the *Ministère de l'Emploi et de la Solidarité sociale*, was absent from work because of depression. In accordance with the collective agreement, she first received her usual salary for sick-leave credits accumulated by her and then received disability insurance benefits for a period of 104 weeks.

A provision in the collective agreement stated that, at the end of this period, the deputy minister could terminate the employment relationship of a disabled employee, except if there existed the possibility of a demotion. By applying this contractual provision, the employer carried out an administrative dismissal.

The arbitrator dismissed the grievance filed by the union against the dismissal on the employee's behalf. However, in a judicial review, the Superior Court quashed the arbitral award for the reason that the employer had not proven that he could not have allowed the accommodation required by the employee, namely leave without pay for 10 weeks and a gradual return to work, without suffering "*undue hardship*".

In a unanimous decision, in which, however, three judges stated separate reasons, the Court of Appeal decided to return the case to the arbitrator so he could decide the employee's grievance based on the employer's duty of reasonable accommodation.

On the one hand, the Court considers that the provisions of the collective agreement were not discriminatory, mainly because they allowed employees to be absent from work due to illness for an extended period of time and be "*generously*" compensated during this period. Therefore, the collective agreement acknowledges the value of these employees by maintaining their employment relationship "*for a significant period of time*" and by subordinating the legality of the dismissal to a review according to the merits of the "*employee's personal situation*". From the point of view of the Court, it is an accommodation included or incorporated in the collective agreement.

On the other hand, the Court maintains that the application of these clauses in the case at bar represented a discriminatory practice because the automatic dismissal of a disabled employee upon the expiry of the disability insurance period was a violation of the employer's duty of reasonable accommodation.

Justice Thibault stated that the period during which an employee may take leave due to illness before returning to work varies according to different factors, such as the nature of the work, the size of the company, and the prognosis for the illness, amongst other things. In fact, each case is unique and should be considered based on its merits.

In this regard, Justice Thibault noted that, in most cases, the period allowed under the collective agreement will be considered reasonable. However, in some cases, the employee may indicate that, in order to return to work, he or she needs to receive a specific treatment which is likely to help him or her to return to work in the foreseeable future.

In other words, ***accommodation, which is included in the collective agreement in the clauses to protect employment during a period when an employee is absent due to a disability or "handicap", does not automatically eliminate the need for further accommodation depending on the particular circumstances.***

For Justice Rothman, it is important to take into account the fact that the employee was already accommodated during the period provided for in the collective agreement when determining the reasonableness of the further accommodation sought.

Conclusion

Managers responsible for applying contractual provisions related to the "*loss of seniority and employment*" in the context of an employee's absence due to disability and/or other contractual provisions related to protecting the employment of an employee on disability leave should refer to the following guidance derived from the Quebec Court of Appeal's recent judgments:

- **An employer should not automatically apply a "*loss of seniority and employment*" clause by terminating a person's employment when the period provided for disability leave expires if this disability results from a "*handicap*" within the meaning of the *Charter of Human Rights and Freedoms* [see the above-mentioned case involving the *Montreal General Hospital*];**

- **When an employee has a disability or "*handicap*", the employer should not automatically carry out an administrative dismissal simply because of the expiry of the period for the disability leave stipulated in the collective agreement: the employer must demonstrate that the employee is unable to perform his or her work within the foreseeable future [see the above-mentioned case involving the *Procureur général du Québec*];**

- **The employer must review each situation individually, based on its merits, to determine whether he can provide the employee with reasonable accommodation without suffering "*undue hardship*";**

- **In this regard, however, the employer could legitimately consider that he has already accommodated the person who is absent because of a disability or "*handicap*" during the period provided for in the collective agreement and take this into account in his review of the reasonableness of any further accommodation proposed.**

As a result of the above guidance, we may witness a reduction in the frequent debates heard before administrative tribunals in which an employee announces a *miraculous* recovery *in extremis* before the expiry of his or her "*loss of seniority and employment*" period under the collective agreement.

On the other hand, there might be more debates where an employee requests an "*extension of his or her right to leave*" in order to undergo a particular medical treatment, for example. The employer should determine in each case and based on all relevant circumstances whether he can allow this request, without suffering "*undue hardship*".

In summary, the above-mentioned judgments confirm the rule of conservatism according to which the case of each employee must be reviewed and documented before his or her employment is terminated at the expiry of the protection period stipulated in a collective agreement, in order to evaluate the possibility of reasonable accommodation.

Our team will monitor any leave to appeal filed at the Supreme Court of Canada with regard to the judgments studied in this bulletin.

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