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Automatic Application of Loss of Seniority and Job Loss Clauses in Cases of Disability: The End of a Saga?

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Numerous collective agreements contain provisions that are designed to maintain, for a specified period of time, the employment relationship with workers who are absent due to a disability not covered by the compensation plan managed by the *Commission de la santé et de la sécurité du travail.* Such clauses have been thoroughly analyzed by arbitration boards, which have long recognized the validity of employment terminations decreed by employers upon expiry of the specified period of absence provided for in a collective agreement. The terms of these clauses usually vary from one to three years.

In recent years, the higher courts have been called upon to rule on the validity of these clauses in light of the provisions of the *Charter of Human Rights and Freedoms* (hereinafter the "Charter"). Simply put, the question before the courts can be summarized as follows: does the automatic termination of employment of a worker who is absent due to illness, once the period of absence provided for in the collective agreement is exhausted, violate the worker's right not to be discriminated against and his right to reasonable accommodation?

A recent Supreme Court of Canada decision addresses this very question.

1) The Facts and Decisions of the Lower Courts

The Court of Appeal of Québec, in a March 18, 2005 ruling in *Syndicat des employés de l'Hôpital général de Montréal* v. *Centre universitaire de santé McGill*,[1] found that the automatic application of loss of seniority and job loss clauses violated rights guaranteed under the Charter. The ruling reversed a Superior Court decision confirming an arbitrator's award.

This case involved the administrative employment termination of a medical secretary at the end of a 36-month disability period, in application of a clause in the collective agreement. The worker first took a leave of absence due to a nervous breakdown, then benefited from four unsuccessful readaptation periods. Two years after the beginning of her sick leave, the worker was victim of a car accident that prolonged her absence beyond the 36 months provided for in the collective agreement. At the time of her employment termination, the worker was still unfit to work, and her doctors were unable to establish a return-to-work date in the foreseeable future. The union representing the worker filed a grievance against the employment termination and asked that the employer reach an agreement with the worker on an accommodation, granting an additional 10-week unpaid leave.

The arbitrator dismissed the grievance after considering, among other things, the employer's efforts to encourage the worker's return to work and the medical evidence establishing her inability to hold the

position that she had held at the time of her employment termination. This award, as stated earlier, was upheld by the Superior Court.

In a March 2005 judgment, the Court of Appeal ruled instead that the employer's duty to accommodate required the latter to consider the additional accommodation proposed by the union and the worker's disability, despite the terms and conditions of the collective agreement. On the ground that the employer failed to demonstrate that the accommodation proposed by the union constituted undue hardship, the court reversed the Superior Court decision and returned the case to the arbitrator to rule on the matter. The employer appealed that ruling before the Supreme Court of Canada.

2) Position of the Supreme Court of Canada

On January 26, 2007, the nine judges of the Supreme Court allowed the employer's appeal.[2] It bears noting that, while the nine judges were unanimous that the Court of Appeal's decision should be set aside, their reasons varied.

According to Justice Deschamps, speaking on behalf of six judges of the court, the loss of seniority and job loss clause is of a type of negotiated accommodation, since it helps preserve the employment relationship of workers who are absent due to illness. However, the majority of the court felt that, if the period negotiated in the loss of seniority and job loss clause is a factor in assessing the employer's duty to accommodate, it "does not definitively determine the **specific accommodation measure** to which an employee is entitled, since each case must be evaluated on the basis of its particular circumstances" [3] (emphasis added). The court adds: "Thus, although a clause providing for termination of the employment relationship after a specified period is not determinative, it does give a **clear indication** of the parties' intention with respect to reasonable accommodation" [4] (emphasis added).

The majority goes on to explain that the duty to accommodate does not take effect upon expiry of the period provided for in the loss of seniority and job loss clause, but from the beginning of the worker's absence. In this case, the court found that the arbitrator did not automatically apply the clause in the collective agreement, seeing as he considered the adaptation periods the employer had granted during the absence, and took into account the absence of evidence that the worker would be able to return to work in the foreseeable future.

Finally, in a brief passage, the majority of the court pointed out that "[t]he duty to accommodate is neither absolute nor unlimited. The employee has a role to play in the attempt to arrive at a reasonable compromise. If in Ms. Brady's view the accommodation provided for in the collective agreement in the instant case was insufficient, and if she felt that she would be able to return to work within a reasonable period of time, she should have provided the arbitrator with evidence on the basis of which he could find in her favour." [5]

This finding might prove to be important, because the court appears to be imposing a burden on the worker to demonstrate why the loss of seniority and job loss clause is insufficient in order to protect her rights under the Charter.

According to Madam Justice Abella, speaking on behalf of the three other judges, the loss of seniority and job loss clause is not a discriminatory measure prohibited under the Charter, and therefore does not impose a duty of accommodation on the employer. According to the court minority, instead of being discriminatory, these clauses offer "extensive protection from job loss due to disability." [6]

Madam Justice Abella states that "designating such clauses as presumptively discriminatory removes the incentive to negotiate mutually acceptable absences. It suggests that, regardless of the reasonableness of the duration of the protection, an employee can still, by bringing a grievance, render the clause's term meaningless, shifting the burden to the employer to explain why it was reasonable to terminate a particular employee." [7]

3) Conclusion

By reinstating the arbitrator's decision on the grounds that he did not automatically apply the loss of seniority and job loss clause, a majority of the judges of the Supreme Court sealed the fate of the automatic application of these clauses. From now on, unless case law eventually supports the minority opinion in this matter, it will be difficult to claim that an administrative dismissal is valid based merely on the automatic application of a loss of seniority and job loss clause.

The majority opinion in this judgment is expected to have an impact on future negotiations. Some employers might question whether it remains necessary to use traditional means to protect the employment relationship of workers who are absent due to illness if workers can file a grievance contesting their termination on the grounds that the period provided for in the collective agreement does not constitute sufficient accommodation to which they are entitled under the Charter. Other employers, however, might continue to find these clauses useful since they are, as recognized by the Supreme Court, a form of reasonable accommodation that forces workers to demonstrate why, in their particular case, that accommodation was insufficient.

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1) D.T.E. 2005T-311, J.E. 2005-627 (C.A.). See also the article drafted by N. St-Pierre and R. Forget, *Loss of Seniority and Job Loss Clauses in Cases of Long-Term Disability: No More Automatic Decisions!*, *Beyond Results* newsletter, Summer 2005;

2) 2007 SCC 4 (CanLII); See: http:// www.canlii.org/en/ca/scc/doc/2007/2007scc4/2007scc4.html;
3) Id., par. 20;
4) Id., par. 27;
5) Id., par. 38;
6) Id., par. 61;
7) Id., par. 55.