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## Loss of Seniority and Job Loss Clauses in Cases of Long-Term Disability: No More Automatic Decisions!

*By Nicolas St-Pierre and Rolland Forget*

Many collective agreements now in effect in the labour force stipulate that workers will lose their seniority or even their job if they are on leave for a disability not covered by the *Act respecting industrial accidents and occupational diseases*[1] (hereinafter the "AIAOD") (in other words a disability that did not result from work) for more than a certain period of time that can generally range from one to two years. Employment contracts of salaried executives often contain similar clauses. While it may be true that, over the years, certain courts and arbitration tribunals have recognized the validity of such clauses and allowed their automatic application, two recent Court of Appeal of Québec decisions herald the end of this era of automatisms and suggest that caution in such matters might just be the best approach.

In *Syndicat des employés de l'Hôpital général de Montréal* **v**. *Centre universitaire de santé McGill (Hôpital général de Montréal)*[2] (hereinafter the "*McGill University Health Center*"), the Court of Appeal ruled on a case involving a medical secretary who lost her job at the end of a 36-month disability period when a clause in her collective agreement governing her working conditions was applied. The worker had gone on leave after a nervous breakdown and was subsequently given four readaptation periods, all unsuccessful. Some two years into her disability leave, the worker was in a car accident that prevented her from returning to work full-time within the 36-month period provided in the collective agreement. At the time of her dismissal, the worker was still unable to do any work whatsoever because of the accident, and could not yet give a return-to-work date.

In its ruling, the Court of Appeal first maintained that the employer's policy violated the right to equality in the workplace guaranteed under the *Charter of Human Rights and Freedoms*,[3] the worker's actual situation, needs and abilities not having been taken into account. While the court conceded that adopting and applying a strictly rigid standard might better serve the employer, doing so would not fulfil its duty to accommodate. The court described this duty as being, "[TRANSLATION] in fact, an obligation imposed on the employer to agree with the complainant on a satisfactory measure that will not unduly obstruct the employer's business operations or impose an undue hardship." The tribunal did admit that the four readaptation periods given the worker could be construed as an accommodation of sorts, but the fact remained that the worker could not be reinstated for reasons entirely independent of the cause of her original disability – depression – for which she had taken leave three years earlier. This suggests that a distinct duty to accommodate applies to each of the worker's causes of disability.

The collective agreement clause at issue in *Procureur général du Québec* v. *Syndicat des professionnelles et professionnels du gouvernement du Québec (S.P.G.Q.)* [4] differs slightly from the previous case in that, instead of providing for automatic job loss at the end of an extended leave, it grants the employer discretion over such matters once the 104 weeks of wage-loss insurance guaranteed under the collective agreement run out. Here the employer chose to exercise its discretion and dismissed a civil servant who had been absent for over two years due to depression. Before making its decision, the employer sought the medical advice of an expert who declared

the worker unable to perform her usual job tasks in the immediate future, but able to return to work progressively within ten-weeks' time.

In their examination of the merits of the employer's decision, the justices of the Court of Appeal agreed that, generally speaking, an employer cannot indiscriminately apply an automatic loss of seniority or job loss clause in cases of long-term disability where matters of accommodation are at issue. In the case in point, they emphasized that the employer had an obligation to re-examine the worker's health at the end of the 104-week period of wage insurance guaranteed under the collective agreement.

According to Justice Rothman, the duty to accommodate required the employer to consider the complainant's proposed return-to-duty plan, taking into consideration the two years of accommodation already granted. Similarly, Justice Rousseau Houle believes the burden of proof lies with the employer, who must demonstrate that it would have suffered undue hardship had it agreed to the worker's request for additional accommodation, in this case ten weeks of unpaid leave. The financial burden of the required measure of accommodation, staff morale, disruption of the collective agreement, interchangeability of workforce and facilities, and size of the employer's operation are all elements which the magistrate maintains must be taken into consideration when evaluating the reasonableness of a requested accommodation measure. For her part, Justice Thibault claims that the collective agreement's wording does authorize the employer to dismiss workers who do not establish their ability to return to work within a reasonable period after their wage-loss insurance expires. But the length of this period will increase, she warns, depending on the nature of the worker's job, the prognosis for the disease, the size of the employer's operation and the wage-loss insurance period already authorized. She therefore ruled the employer's dismissal of the worker discriminatory in light of her impending ability return to work.

If these two Court of Appeal of Québec decisions are any indication, employers can expect to run into difficulties if they choose to invoke the loss of seniority or job loss clauses some collective agreements or individual employment contracts prescribe as justification for the administrative termination of workers on disability leave. Once the agreed-upon disability period expires, employers must carefully analyze the worker's situation and make sure they have all of the relevant information they need to make an enlightened decision. One way of achieving this would be to have workers take a medical exam with a professional selected by the employer.

Should the worker's medical records show that a return to work is possible within a relatively short period, employers must demonstrate that they would suffer undue hardship by maintaining the employer/employee relationship any longer on the grounds that the requested extension is unreasonable. As *McGill University Health Centre* illustrates, employers will have to prove undue hardship even in the absence of a specific return-to-work date. While the permanence of the worker's disability, repeated relapses and the job responsibilities he or she had while with the employer can all still be invoked as grounds for terminating a work relationship, it will now be far more difficult for employers to dismiss disabled workers.

It should be added in closing that these principles do not apply to workers who suffer from employment injuries within the meaning of the AIAOD. The distinct accommodation mechanism set out in that statute makes it difficult to transpose the rules outlined by the Court of Appeal.

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1) R.S.Q. c. A-3.001;

2) D.T.E. 2005T-311, J.E. 2005-627 (C.A.) (March 18, 2005). Motion for authorization to appeal before the Supreme Court filed on May 16, 2005;

3) R.S.Q. c. C-12, ss. 10 and 16;

4) Montréal 500-09-013759-030 (C.A.) (March 31, 2005).