

BREAKFAST SEMINAR SERIES

Managing Complex Terminations

Colleen Dunlop
cdunlop@ehlaw.ca

Amanda Sarginson
asarginson@ehlaw.ca

June 19, 2013

www.ehlaw.ca



Termination and Employees on Leaves of Absence

Scenario #1 – The Basic Facts

- Ms. Jones is a 20-year employee of ABC Co.
- She was diagnosed with major depression and anxiety phobia 4 years ago
- Her LTD benefits were terminated after 22 months by insurer for failure to provide evidence of ongoing treatment

Scenario #1 – Points to Consider

- Test for frustration of contract – is it met?
 - No reasonable likelihood of employee returning to work in the reasonably foreseeable future
- Updated medical information – medical questionnaire or letter
- Accommodation requirements met?
- Compliance with statutory notice and severance requirements (under *ESA* or *CLC*)
- Loss (or appeal) of LTD not determinative

5

Scenario #1 – What was Decided

- *Fraser and USB Global Asset Management, 2011 ONSC 5448*
 - USB terminated Fraser's employment 5 months after LTD benefits ceased
 - Court acknowledged that employee had not provided up-to-date medical information (2 year old medical report)
 - USB provided Fraser with pay in lieu of notice and severance pay under *ESA* (29 weeks total) – met its statutory obligations
 - Fraser admitted that her disability was permanent and that she would never be able to work again – Court found employment contract was frustrated

6

Scenario #1 – Best Practice Tips

- Ongoing communication with employees on leaves of absence is critical
 - Re any changes in condition, prognosis for return to work, any possible accommodations
- Send medical questionnaires
- Employee has an obligation to co-operate in return to work process
- At 2-year mark, BF all LTD cases for review (own occupation vs. any occupation)
- Letter of frustration – loss of employment does not mean loss of LTD benefits

Terminating Employees with Mental Health Issues

Scenario #2 – The Basic Facts

- Ms. Smith is an 8-year employee of a retail store with behavioural and performance issues
- She has had several managers and changes to job duties
- Had a recent negative performance review
- She took “stress leave” for a period of 2 months
- Recent incident – challenging manager’s authority

9

Scenario #2 – Points to Consider

- Test for establishing discrimination contrary to the *Human Rights Code* – was disability a factor in the decision that has adverse consequences?
- Employer’s obligation to make inquiries where reason to question mental health (i.e., behavioural changes)
- Employee’s obligation to provide necessary information where seeking accommodation
- EAP program?

10

Scenario #2 – What was Decided

- *Mackenzie v. Jace Holdings and another (No. 4)*, 2012 BCHRT 376
 - Tribunal found – complainant suffers from a mental disability within the meaning of the *Code* and her Manager knew she suffered from depression when she decided to terminate her
 - Medical evidence suggested that the behavioural issues, for which she was terminated, were related to her disability
 - Where employer has reason to suspect that a medical condition may be impacting an employee's ability to work, then employer's failure to make inquiries before terminating will be found to be discriminatory
 - Damages - \$17,600 lost wages (6 months); \$5,000 injury to dignity

11

Scenario #2 – Best Practice Tips

- Be proactive – ask general questions
- Offer assistance (through EAP) but don't play healthcare professional
- Make expectations known (in writing)
- Deal with performance that is culpable in a disciplinary manner
- Resources:
 - <http://www.mentalhealthcommission.ca/English/issues/workplace?routetoken=89ca9c1790bdf067454ad467e240c877&terminal=30>
 - <http://www.ohrc.on.ca/en/human-rights-and-mental-health-fact-sheet>
 - <http://www.chrc-ccdp.gc.ca/eng/content/policy-and-procedures-accommodation-mental-illness>

12

Downsizing and Restructuring



13

Scenario #3 – The Basic Facts

- XYZ Inc. operates a manufacturing business with 60 employees
- Due to slow economy and reduction in profits, needs to reduce its workforce by 15-20% (9-12 employees) over the next 12 months
- Various employees off on leaves of absence
 - 1 on pregnancy/parental leave and 1 scheduled to go on pregnancy/parental leave in 2 months
 - 3 employees on STD
 - 2 employees on LTD (one for 18 months; one for 22 months)

14

Scenario #3 – Points to Consider

- Human rights considerations when eliminating the position of an employee on pregnancy/parental leave or sick leave – sex or disability cannot be a factor in employer's decision regarding which positions to eliminate
- Business needs/operational requirements – should be well-documented
- Objective criteria must be applied fairly in determining which positions will be eliminated
- Where employees can compete for remaining jobs, employees on leave must be given the same opportunity

15

Scenario #3 – What was Decided

- *Kane v. Caledon Community Services*, 2013 HRTO 213
- *Hill v. Spectrum Telecom Group Ltd.*, 2012 HRTO 133
- *Chyc v. Newmar Window Manufacturing Inc.*, 2012 HRTO 376
 - In all 3 cases, claims of discrimination were dismissed
 - Tribunal looked at evidence regarding the employer's motives and how decisions were made regarding downsizing and, in all 3 cases, concluded the employees had not shown it was more likely than not that disability was a factor in employer's decision
 - Tribunal clearly aware of economic realities

16

Scenario #3 – Best Practice Tips

- Document reasons for reorganization
- Identify which positions will become redundant or significantly changed and document reasons
- Document factors considered where more than 1 employee in same position
 - Length of service
 - Skills
 - Education
 - Qualifications
 - Past performance
 - Discipline on file

17

Scenario #3 – Best Practice Tips

- Consider allowing employees to compete for remaining positions
- Give employees options – new position or termination
- Assess outcomes for potential systemic discrimination
- LTD cases – consider frustration
- STD cases – advisable not to terminate while on leave

18

Dealing with Older Employees



"We're looking for someone with the wisdom of a 50-year old, the experience of a 40-year old, the drive of a 30-year old and the payscale of a 20-year old."

19

Scenario #4 – The Basic Facts

- Ms. Buchanan was 59 years old and a 28-year employee (office administrator)
- She was called into a meeting with her Supervisor to discuss her performance bonus, after which he asked about her upcoming "big birthday" and posed questions about her retirement plans
- Two weeks later she informed her Supervisor that she had no plans to retire before age 65

20

Scenario #4 – Points to Consider

- Mandatory retirement was eliminated in Ontario in 2008 and federally in 2012 (has also been eliminated in most other provinces)
- Human rights legislation protects employees from discrimination based on age
- Reorganizations and downsizing will often have a disproportionate impact on older employees (with relatively higher salaries) – discrimination complaints are common
- Can employee be offered training to update skills?
- Can employee be offered an alternate position?

21

Scenario #4 – What was Decided

- *Buchanan v. WMC Management Services BC Ltd.*, [2006] B.C.H.R.T.D. No. 339
 - Complainant was terminated - Tribunal found that complainant had established a *prima facie* case of discrimination based on age – reasonable to infer in all the circumstances that age was a factor in WMC's decision to terminate her employment
 - Burden on WMC to show that complainant's termination was due to a reason other than her age – employer failed in this regard
 - Employer had subsequently offered employee part-time employment (3 days per week) which she accepted
 - Damages – \$5,000 lost wages; \$7,500 injury to dignity

22

Scenario #4 – Best Practice Tips

- When downsizing/restructuring – may be tempting to target older employees (with relatively higher salaries)
- When considering which positions to eliminate, should consider all positions/employees equally, without reference to age
- When terminating an older worker, make it part of a broader or overall restructuring
- Create new position with different skills/qualifications

23

Social Media in the Workplace



24

Scenario #5 – The Basic Facts

- Employer becomes aware of online (Facebook) activity of three employees
 - Employee A posted numerous complaints/comments/insults about working conditions and the company; disparaging comments about supervisor
 - Employee W posted negative comments about the employer and insulting remarks about a supervisor
 - Employee S posted insulting comments about a supervisor
- FB profiles were “private” but all had co-workers as “*friends*” and profiles identified their employer

25

Scenario #5 – Points to Consider

- Employer has legitimate concern re employees' use of social media where:
 - Employees use social media while at work; or
 - Employees make inappropriate use of social media sites outside of the workplace
- General rule – employers can only concern themselves with the off-duty conduct of employees where the conduct will have a negative impact on the employer's interests or the workplace in general
- Considerations – How frequent were the comments? Did employee show any remorse (remove comments from FB)? How offensive/insulting? Who is on their “*friends*” list?

26

Scenario #5 – What was Decided

- *Bell Technical Solutions v. C.E.P.U. of Canada*, [2012] OLAA 481 (Chauvin)
 - Employees A and W were dismissed; employee S was given a 5-day suspension
 - Arbitrator upheld S's suspension
 - Arbitrator also upheld W's dismissal - evidence showed he complained regularly about his job, over a 16 month period and made disparaging comments about both the company and the supervisor
 - A's discharge was substituted with a 1-year suspension without pay – no disparaging comments against company; employer not identified on his profile; provocation and 9 ½ years of service

27

Another Case Involving Social Media

- *Credit Valley Hospital v. CUPE, Local 3252*, [2012] OLAA 29 (Levinson)
 - Grievor, a part-time service representative for the hospital, was assigned to assist at the site of a fatality involving a hospital patient (who had jumped to their death from the hospital parking garage)
 - Grievor took two pictures of the scene and posted them on Facebook with a brief description; posting was taken down after a couple of days
 - Grievor was terminated
- Termination upheld – nexus to workplace found
 - Breach of patient confidentiality
 - Breach of policy relating to confidentiality
 - Premeditated act and grievor failed to show remorse for his actions

28

Scenario #5 – Best Practice Tips

- Cases highlight the importance of employer policies:
 - Dealing with acceptable use of employer's computer networks and systems
 - Code of Conduct
 - Harassment policies
- Employer needs to set clear expectations
- Policies need to be communicated to employees and consistently applied and enforced
- Job-relatedness – consider impact of postings on job functions

Termination Checklist

Pre-Termination Considerations

- Type of termination – with or without cause
- Unionized setting
 - May only terminate for just cause
 - Termination can be challenged and reinstatement may be ordered
- Non-unionized setting
 - May terminate employment at any time for
 - Just cause, or
 - On provision of “reasonable” notice (exception federally-regulated, non-unionized employees, s. 240 of *Canada Labour Code*)
 - No reinstatement remedy before civil courts
 - But financial obligations if a court finds no cause for termination

31

Pre-Termination Considerations

- Ensure thorough and objective investigation
- For cause terminations
 - Ensure that what is alleged constitutes “cause”
 - Ensure that cause being relied on is clearly documented
 - Ensure doctrine of progressive discipline has been followed
 - Two letter approach

32

Pre-Termination Considerations

- Consider mitigating circumstances:
 - Apology
 - Rehabilitative potential
 - Economic hardship
 - Previous good record
 - Length of service
 - Seriousness of offence
 - Reasonable excuse
 - Employer condonation
 - Failure to warn
 - Compassionate grounds

33

Pre-Termination Considerations

- Without cause terminations
 - Any provisions in employment contract dealing with notice?
 - Review notice and severance pay obligations under relevant statute (*ESA* or *CLC*)
 - Review common law obligations re reasonable notice
 - *Bardal* factors – nature of position, age, length of service and availability of similar employment
 - Ensure termination does not contravene other applicable legislation (human rights or labour relations legislation)

34

Tips for Termination Meeting

- Avoid Monday, Friday and special days (holidays, birthdays, anniversaries)
- Schedule the meeting later in the day
- Advise the employee of the time and location of the meeting
- Conduct the meeting in private
- Have 2 employer representatives present

Conducting the Termination Meeting

- Advise the employee in clear and candid language at the beginning of the meeting that his/her employment is being terminated immediately
- Provide employee with termination letter
- Be calm, respectful and sensitive
- Outline the basic reasons for dismissal but avoid unnecessary detail about the reasons for the dismissal
- Keep the meeting short

Departing the Workplace

- Ask for any access cards / keys / credit cards and other company owned property
- Allow employee to leave immediately
- Consider offering a taxi to the employee
- Arrange to have any personal belongings packed up and sent to employee
- Make notes of the meeting immediately afterwards

List of Cases Referenced

Fraser and USB Global Asset Management, 2011 ONSC 5448
Mackenzie v. Jace Holdings and another (No. 4), 2012 BCHRT 376
Kane v. Caledon Community Services, 2013 HRTO 213
Hill v. Spectrum Telecom Group Ltd., 2012 HRTO 133
Chyc v. Newmar Window Manufacturing Inc., 2012 HRTO 376
Buchanan v. WMC Management Services BC Ltd., [2006] B.C.H.R.T.D. No. 339
Bell Technical Solutions v. C.E.P.U. of Canada, [2012] OLAA No. 481
Credit Valley Hospital v. CUPE, Local 3252, [2012] OLAA No. 29

Questions?