

**DENTONS**

# Dismissing employees on leaves of absence

**Andy Pushalik & Kyle Isherwood**

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Grow | Protect | Operate | Finance

# Speakers:



**Andy Pushalik**  
Partner, Toronto, Canada  
+1 416 862 3468  
[andy.pushalik@dentons.com](mailto:andy.pushalik@dentons.com)



**Kyle Isherwood**  
Senior Associate, Toronto, Canada  
+1 416 863 4739  
[kyle.isherwood@dentons.com](mailto:kyle.isherwood@dentons.com)

# The BIG Question

**Can an employer dismiss an employee who is on a leave of absence?**

**Yes...**

**But**

# **Can an employer dismiss an employee who is on a leave of absence?**

Must balance between human rights and employment standards considerations

# Human Rights considerations

[81] With respect to the termination of his employment, the applicant submits that his employment was terminated at a time when he was on a medical leave of absence from work. He takes the position that this was a violation of the Code. However, the Code does not prevent the respondent from terminating employees while they are on a medical leave of absence where the termination is not based on a prohibited ground under the Code.

- *Sosoo v. Winners Merchants*, 2010 HRTO 1367

# Human Rights considerations

- It is not necessary for the HRTO to determine that the employee's disability was the sole or dominant reason for ending their employment
- The HRTO simply needs to decide whether the employee's disability was a factor in that decision



# Employment Standards considerations

- Statutory leaves of absence (e.g. pregnancy, parental, ) are job protected.
- Upon the conclusion of an employee's statutory leave of absence, the employer must reinstate the employee to the position the employee most recently held with the employer, if it still exists, or to a comparable position, if it does not.
- This right to reinstatement is not absolute:
  - Where the employer has reasons to terminate an employee's employment that are completely unrelated to the fact that the employee went on the leave of absence, reinstatement will not be required.

# Employment Standards considerations

Beware the sham reinstatement!

- For example, an employee who was dismissed one week after reinstatement won damages for the violation of her statutory rights.

# Discrimination or not?

- January 2 – employee has slip and fall; she is off work sporadically for 10 days; employee takes these days as a combination of sick leave and compassionate leave.
- June 12 – employee experiences a miscarriage; she is off work for 2 days; employee takes these days as vacation.
- July 12 – employee’s mother-in-law dies; employee absent for 9 days in July; employee takes these days as vacation.
- October/November/December – employee absent sporadically because of asthma, migraines and dentist appointments.
- December – HR meets with employee about absenteeism; employee tells HR that her absences are isolated instances and will not be treated as an ongoing problem.
- February – Company terminates employee’s employment.

# Discrimination or not?

“I agree with the applicant that the temporal connection between these two events is sufficient to require an explanation from the respondent regarding its decision to terminate the applicant’s employment. But the temporal connection alone does not establish discrimination. In order to establish discrimination, the applicant must prove that her disability-related absences in 2013 were a factor in the decision to terminate her employment in February 2014. The applicant does not have to establish that the disability-related absences were the only reason for her termination.”

- *Mou v. MHPM Project Leaders*, 2017 HRTO 246

# Frustration of employment

- Where an employee's contract of employment has become impossible to perform or has been frustrated due to illness or injury suffered by the employee, the employee's termination entitlements will be limited to their minimum statutory rights.
- Onus is on the employer to prove that the employment contract has become frustrated.
- Duration of the employee's illness is significant but not determinative.
- ***Test: Does the medical evidence support a finding that there is no reasonable likelihood of the employee returning to work in the reasonably foreseeable future?***

# Key takeaways

- **Timing can be everything** – Consider the proximity between the employee's illness/medical leave of absence and the employee's dismissal.
- **Consistency Across the Board** – If conducting a restructuring, ensure that you are using consistent criteria for determining which employees will be impacted (e.g. job function, job classification; region, etc.).
- **A leave of absence may delay a termination due to performance reasons, but it will not stop it** – A well documented performance record will be a good defence to any discrimination claim.
- **Frustration** – Is there a case to be made that the contract of employment is frustrated.