Employee sickness or disability

When can the employment relationship be terminated?

Medical practices and other employers are sometimes faced with making decisions to deal with a situation where a key employee is unable to work because of long term sickness or some other disabling condition.

The law deals with this in terms of two quite separate legal concepts:

- The doctrine of frustration of contract - where the employment contract comes to an end by operation of law because the employee is so affected by their condition that they are unable to fulfil their duty to perform their work responsibilities. This only arises when it is unforeseeable that the condition will improve to allow a return to work in a reasonable timeframe.

- Dismissal for cause - where the employer is justified in terminating the employment because it is unreasonable in all the circumstances to hold the position open any longer.

In theory, the two concepts are mutually exclusive, but in practice they can be difficult to distinguish. There are a number of Court decisions from New Zealand and the United Kingdom that illustrate the difference.

Frustration of Contract

Frustration of any contract occurs when without the fault of either party contractual duties become incapable of being performed due to a radical change in circumstances and it would be unjust to hold the parties to the literal terms of their contract.

This is well illustrated in the employment context by the English case of *Notcutt v. Universal Equipment Co* (1986):

> *The employee suffered a heart attack in 1983 and was thereafter off work. A medical report in July 1984 made it clear that he would be unable to work again. The employer gave him notice terminating his employment as from October 1984.*
> *The employer's decision was challenged and the English Court of Appeal held that the contract of employment was frustrated as the heart attack suffered by the employee had rendered the performance of his duties impossible. The fact that the employer had given notice of termination was considered to be irrelevant as the contract had automatically come to an end at the time that the medical report was provided in July 1984.*

In another English case, *Marshall v. Harland & Wolff Limited* (1972) the Court of Appeal said that the question to be asked in such cases of frustration is:

> "*'... was the employee's incapacity, looked at before the purported dismissal of such a nature, or did it appear likely to continue for such a period, that further performance of his obligations in the future would either be impossible, or would be a thing radically*

different from that undertaken by him and accepted by the employer under the agreed terms of his employment."'

The doctrine of frustration of contract will only apply on rare occasions as this is such a high test. The employer would need independent medical advice to prove that the employee's future performance would either be 'impossible' or a thing 'radically different' from that required by the employment agreement.

In *Marshal's c*ase the Court ruled that the contract was not frustrated after 18 months absence from work as there was no medical evidence of permanent incapacity.

The New Zealand Employment Court in *Motor Machinists Limited v. Craig* (1996) also held that a contract of employment is not frustrated unless there is medical evidence to show that the employee is permanently incapacitated and that the incapacity has been such that it 'destroys the root of the contract'.

Despite the level of proof required, frustration can be a useful tool for employers where there is clear evidence of permanent incapacity. As the employment contract is terminated by operation of law rather than a decision of the employer the decision is not open to challenge on the grounds of procedural fairness. (In practice a good employer is likely to have done the work necessary to satisfy the procedural tests anyway.)

Dismissal

In most situations where an employee is absent from work for a lengthy period as a result of illness or accident the circumstances fall short of the test to allow the doctrine of frustration to be invoked. For instance, a common condition such as occupational overuse syndrome may endure for a lengthy period, but might never lead the individual to be diagnosed as having a permanent incapacity.

The New Zealand Courts have held that the basic test for whether an employee's employment can be terminated as a result of prolonged illness or serious accident is to ask whether the time has come when the employer 'can fairly call a halt': *Canterbury Clerical Workers Union v. Andrews & Beaven Limited* (1983).

In the *Motor Machinists* case the Court held that the employer was not obliged to hold the employee's job open indefinitely where illness or injury prevents the employee from returning to work but if the employer chooses to dismiss, that action must be justifiable at the time. The employer must have substantive reasons for the dismissal and must show that the procedure followed in carrying out the dismissal was fair.

New Zealand cases that found that the time had not been reached where the employer could 'fairly call a halt' include:

- *Northern Hotel Union v. Southern Pacific Hotel Corporation* (1990) where a hotel manager was dismissed following an eight week absence for surgery. The employee was awarded $6000 compensation for distress.
- *Thompson v Gillespie Young Watson* (1995) where a legal secretary was dismissed for a non-work related medical condition after less than three months absence from work

and where the employer had not called for a medical report. The employee was reinstated.

- In the *Motor Machinists* case, the employee had contracted dermatitis that prevented him from working. He was dismissed after an absence of some seven months without adequate opportunity to prove his fitness in a work trial despite earlier advice that he would be re-employed once he was able to resume work. The Court upheld an award of $5,000 compensation for distress.

In these and other similar cases the Courts have stressed the need for the employer to obtain medical reports and other input from the employee to clearly show when the employee was likely to be fit to return to full work before making the decision to dismiss. The employer also needs to show that it is not reasonably practicable to cover the position with a temporary employee until the employee is likely to be fit to return to work.

Members should also note the specific requirement in the ACC legislation requiring an employer to actively participate in a rehabilitation plan prepared for an injured employee by ACC. This implies a commitment to assisting the employee to re-enter the workplace in a managed way that may involve part-time work on limited duties initially.

Summary

In rare circumstances, such as a crippling accident or a heart attack which leaves the employee permanently incapacitated, it will be possible for the employer to rely on the doctrine of frustration as automatically terminating the contract.

But in the great majority of illnesses or accidents that befall an employee, the course and outcome will be too uncertain to enable an employer to rely safely on frustration and it will usually be necessary for the employer to wait for a lengthy period (in the region of three to six months) to see whether the employee will be able to return to work.

Before any decision is made, the employer should call for medical reports on the employee's condition, invite such other input as the employee may wish to provide on the situation, and allow the opportunity of a work trial on normal duties if that is indicated.
The employer would also need to be assess whether it is practicable to replace the employee with a temporary appointee until the employee is fit to return to normal work.

If, after taking those steps the employer is satisfied that the employee is unlikely to be able to resume his or her normal functions within a reasonable period and there are no other reasonably practicable options, the employer may give notice and dismiss the employee.

Need more help?

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