



TORONTO ABI NETWORK CONFERENCE
“BRAIN INJURY AND BEYOND: LOOKING BACK, THINKING FORWARD”
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LOOKING FORWARD – RETURN TO WORK AFTER ABI

**An Overview of Key Legal Issues
Affecting Employees with ABI**

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In many cases, the impact of a brain injury can carry over to a survivor’s workplace, affecting an employee’s ability to perform work in the way he or she did pre-injury. Beyond the challenge posed just by returning to work, in some unfortunate instances an employee will face further hurdles imposed by his or her employer, often because the employer fails to appreciate or to observe the employee’s legal rights.

What follows is a summary of some of the key employment law issues that may concern an employee (in a non-unionized workplace) with ABI on or following his or her return to work.

Employer’s Ability to Terminate Employment

Obviously, job security is a central concern for someone on leave or returning to work after an injury. In general terms, *any* employee can be terminated at *any* time. The real question is whether the employer terminates that person’s employment for cause (i.e. some wrongdoing) or without cause. The difference between the two is that an employee who is terminated without cause is entitled to advance notice of the termination, or pay in lieu of that notice. The length of the notice period, in weeks or months, will depend on numerous factors but it primarily rests on the terms of the employment contract (if any) and the employee’s length of service. Section 57 of Ontario’s *Employment Standards Act, 2000* establishes minimum notice periods based on an employee’s length of service. An employee must have agreed to be bound by those minimum amounts, in his or her employment contract, otherwise a court may award a longer period of notice (usually in the ballpark of a month per year of service).

Courts have concluded that conduct justifying dismissal for cause (i.e. without notice) must be wilful or deliberate. Because an absence from work due to illness or disability is not intentional, disability cannot be relied upon by an employer as cause to terminate a person's employment. This does not mean that a disabled employee cannot be terminated without cause (i.e. by giving notice), it just means that the employer cannot rely upon the employee's disability as cause to terminate his or her employment. Arguably, however, the notice period should run from time that the employee is able to return to work and, where an employee becomes disabled during a notice period, passage of the notice period is suspended until the person could return to work. As well, all employee benefits must be maintained through minimum notice period under section 61 of the *Employment Standards Act, 2000*.

The notice period (i.e. compensation) afforded to any employee may be increased where the manner in which the employee is dismissed violates the employer's duty to act fairly and in good faith. Firing a disabled employee for cause has been held by the courts to be an example of bad faith, resulting in an extension of the notice period to which the employee was entitled. Also, following a recent decision from the Ontario Court of Appeal, the courts now may award punitive damages against an employer where the employer has violated the employee's rights under Ontario's *Human Rights Code*. (This is discussed further below.)

“Frustration” of the Employment Contract

While an employer cannot rely on an employee's disability to terminate his or her job, there is a separate legal doctrine that in certain circumstances permits an employer to treat the employment contract as being at an end. This is called the doctrine of “frustration,” which applies to all kinds of contracts (not just employment contracts).

Under this doctrine, an employee is not considered to have been dismissed. Instead, the parties to the employment contract are seen as being incapable of performing the employment contract, putting their obligations at an end. However, a key recent court decision applied the *Canadian Charter of Rights and Freedoms* in concluding that disabled employees still are entitled to severance pay in such circumstances.

An employment contract is considered to be frustrated where the employee's inability to work, when viewed from the perspective the parties would have held before the dismissal, is such that further performance of the employee's obligations would either be impossible or radically different from that to which the parties originally agreed.

This doctrine is not to be lightly invoked and, as a rule of thumb, an employee must have been disabled for 18 months to 2 years, with no prospect of return, before the employment contract can be said to have been frustrated. A court will consider the following factors:

1. The Terms of the Contract; i.e. when a contract provides for sick pay/LTD benefits, it contract cannot be frustrated so long as the employee returns to work, or appears likely to return, within the period during which sick pay is payable;
2. How Long Employment was Likely to Last; i.e. employment was long term or temporary?;

3. Nature of the Employment: i.e. is the employee one of many in same role, or fills a key post that cannot be left vacant;
4. Nature and Duration of Disability/Prospects for Recovery: i.e. the employment relationship more likely has been destroyed where there is a greater incapacity and/or the disability has persisted or is likely to persist for a longer period; and
5. Period of Past Employment: i.e. a longstanding relationship is not so easily destroyed.

All of this must be viewed in light of employer's duty to accommodate a disabled employee under the Ontario *Human Rights Code*. In particular, an employer cannot discriminate against an employee on the basis of disability and has a duty to accommodate an employee's disability to the point of "undue hardship". This is discussed further below.

Constructive Dismissal

Even where an employer has not told an employee that he or she has been fired, a court may find that the employee has been "constructively" dismissed. This doctrine of constructive dismissal represents one of the most complicated areas of employment law. The use of the term "constructive" can be confusing: it is not meant to connote something positive (like constructive criticism); instead it refers to the fact that a court "constructs" the employee's dismissal, retroactively, from the circumstances.

To paraphrase a leading decision of the Supreme Court of Canada, a constructive dismissal occurs where an employer unilaterally makes a fundamental or substantial change to an employee's contract of employment – a change that violates the contract's terms. The employer must be seen to have altered the terms of the employment contract to such a fundamental degree that the very nature of the employment has changed. The employee, where this happens, is entitled to consider her or his employment at an end and to sue for damages.

The complexity surrounding this issue arises from two sources: first, whether an employee has been constructively dismissed is not always clear; second, an employee must decide how to respond once it is determined that he or she has been constructively dismissed. In the case of an employee who has been disabled by an injury or illness, these issues can be triggered when the employee returns to work to find that his or her responsibilities have been altered, or that his or her job has changed altogether. An employer's obligation to accommodate a disabled employee under Ontario's *Human Rights Code* adds another layer of complexity to this situation.

The employee has the onus of proving that a constructive dismissal has occurred. As a rule of thumb, a court will ask whether the change effectively amounts to the employee performing a different job. Whether a constructive dismissal has occurred obviously will depend on the facts of each particular case. In very general terms, grounds of constructive dismissal can include: changes in remuneration, in job duties or in working conditions; geographical relocation; forced resignations, leaves or lay-offs; and/or employer conduct that is incompatible with continued employment, like abusive or humiliating treatment or harassment.

An employee who has been constructively dismissed is faced with several choices:

1. the employee can accept the change and continue working for the employer (in which case he or she likely gives up the right to challenge the constructive dismissal); or
2. the employee must elect in a timely fashion to reject the change and:
 - a) quit his or her job and commence a constructive dismissal action; or
 - b) communicate his or her rejection of the change clearly to the employer, and continue working under protest while seeking alternate employment. This option may not always be feasible (i.e. employee is being harassed).

If the employee does not elect to reject the change in a timely way, or does not communicate that rejection to the employer in clear and unequivocal terms, then the employee runs the risk of being viewed later by a court as having condoned the change, which will bar a successful constructive dismissal lawsuit.

Ontario's *Human Rights Code*

All of the foregoing must be viewed in light of the employer's obligation to accommodate the needs of a disabled employee under the Ontario *Human Rights Code*. Under section 17 of the *Code*, people with disabilities have the right to have their individual needs accommodated by their employer, short of undue hardship on the employer, to enable the employee to perform the essential duties of his or her job. This means that an employee has a right to return to work, provided that he or she can perform the essential duties of their job (after being accommodated). (Various resources are available on the website of the Ontario Human Rights Commission: <http://www.ohrc.on.ca>).

One would hope that employers will not be tempted to rely on their duty to accommodate to justify changes to a disabled employee's work that might amount to a constructive dismissal. The focus on the *essential* duties of an employee's job, under the *Human Rights Code*, should prevent this from happening. In other words, the focus of accommodation is to preserve the essence of an employee's job. Similarly, constructive dismissal prevents an employer from changing the fundamental nature of the employee's job. So an employer's attempts to accommodate the needs of a disabled employee should preserve – rather than alter – the fundamental nature of the employee's job.

Employees and employers also should be aware of significant amendments to the *Human Rights Code* by the Ontario Government, under Bill 107, which is currently before the Legislature. These amendments include:

- The focus of the Ontario Human Rights Commission would be promotion of human rights and ending systemic discrimination;
- Individuals would apply directly to the Ontario Human Rights Tribunal for a remedy, ending the Commission's role in investigating complaints;

- The courts would be entitled to award monetary compensation for injury to dignity, feelings and self-respect where a finding made that rights infringed, meaning that employee's could seek remedies for a breach of their human rights through a civil action, i.e. in conjunction with a lawsuit alleging wrongful dismissal.

One other recent and significant development in this area has come from Ontario's Court of Appeal, in the case of *Keays v. Honda Canada Inc.* In a decision released September 29, 2006, the Court upheld the trial judge's award of punitive damages against an employer that the trial judge held had breached the employee's human rights through discrimination and harassment in connection with the termination of his job.

The Appeal Court found that discrimination constituted an actionable wrong giving rise to punitive damages of \$100,000 against the employer (reduced from \$500,000 awarded by the trial judge). Sending a clear message that such conduct on the part of employers would not be condoned, Justice Stephen T. Goudge of the Court wrote, at paragraph 65 of the decision:

The need for this large employer, and indeed all employers, to take seriously their responsibilities in accommodating employees with disabilities is very important.

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