

Question 4

When does an employee on disability
cease to be an employee?

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Human Rights Code

- Disability requires Accommodation
- If the absence is due to a disability, within the meaning of the code – Accommodation is required
 - ...up to point of 'undue hardship' – taking into account:
 - Cost
 - Outside sources of funding
 - Health and Safety Requirements
- Note:
 - Wishes of other employees, seniority, 'convenience' and other factors NOT CONSIDERED

ESA Provisions

- *Regulation 288/01*
 - Severance is required if an employee is terminated because he or she unable to perform the essential duties of his employment because of 'illness or injury suffered by the employee'
 - Amends provision that previously did not require severance in these circumstances
 - Result of case *Mount Sinai v. ONA*
 - *Note:* At the moment does not include circumstance where employee quits as a result of disability
 - *BUT:* One case has suggested this could be future interpretation

Case Law

- The Kiosk Case:
- Several years old - but shows mentality of OHRC
- Kiosk employs essentially one employee in mall environment
- she is responsible to hire temps to fill in for her when she cannot work (about 10 hours per week)
- Off sick for three months - Kiosk owner replaces her
- Commission refers to Board of Inquiry

Kiosk Case

- *OHRC Counsel takes position Kiosk owner had to hold job open for longer than three months*
- *Test of 'undue hardship' not met according to OHRC counsel*
- *Case decided [after 10 day hearing!] on other grounds*
- *So no decision on whether, in these circumstances, three months was 'enough'*

Town of Midland Case: Arbitration

- *Worker had heart attack - after more than 2 years - Physician said could return to work with limitations*
- *C.A. said seniority lost after two years*
- *worker was labourer - could not do all the work required because of restrictions - Doctor testified work 'hardening' required for six months*
- *Worked in a crew*
- *Arbitrator ruled - other members of crew required to 'support' for period of work hardening*
- *After work hardening - would be able to do all*
- *Employer could not depend on C.A. provision - accommodation required by HRC*

Hydro Quebec Case: SCC

- “The Purpose of the duty to accommodate is not to completely alter the essence of the contract of employment ... The employer does not have a duty to change working conditions in a fundamental way, but does have a duty, if it can do so without undue hardship, to arrange the employee’s workplace or duties to enable the employee to do his or her work”
- “ Because of the individualized nature of the duty to accommodate and the variety of circumstances ... rigid rules must be avoided. If a business can, without undue hardship, offer the employee a viable work schedule or lighten his or her duties – or even authorize staff transfers – to ensure that the employee can do his or her work, it must do so to accommodate the employee.”
- Chronic Absenteeism: “ ... despite measures to accommodate ... the employee will be unable to resume ... work in the reasonably foreseeable future ... employer will have ... established undue hardship.”

Conclusions

- 1. Cases must be evaluated individually
- 2. Undue hardship only on basis in Code.
- 3. Requires 'reasonable foreseeable future' analysis.

- SO
- Don't make decision absent sufficient information
- Ask for appropriate medical prognosis
- Remember ESA provisions - maybe use them!