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PRESENTS

# YOU AND THE LAW

## DISMISSING A DISABLED EMPLOYEE

By Janice Mucalov, LL.B.

**D**ismissing a disabled employee is difficult – the employee has rights, and the termination can be expensive for the employer.

In general, any employee can be fired without cause if given reasonable notice of the termination or severance pay instead. But if the employee can't work because of a disability that appears to be permanent, then the employment contract may be said to be "frustrated," and the employee can be dismissed without notice or pay in lieu.

Consider Janice D. She'd worked for 19 years at a "desk job" when she injured her right elbow in an unrelated fall. She was on disability for 20 months and expected to be off work for another seven months. Her boss decided to let her go. Her long-term disability coverage ended after two years, and she sued her employer for wrongful dismissal. The BC Supreme Court found that her 20-month absence was "one of sufficient duration... to make the further performance of the employee's obligations under the contract of employment either impossible or radically different from those contemplated by the agreed terms of employment." The employment contract had been frustrated, and Janice D. accordingly lost her claim.

But it's rare for an employer to win a dismissal case on the basis of "frustration" due to an employee's illness. Several cases suggest that if a disability benefits plan is offered at work, then the employment contract can't be frustrated, because you've contemplated the potential disability of the employee.

Also, you must be careful that the termination doesn't affect the employee's entitlement to long-term disability benefits. Most disability plans won't cover an employee who isn't actively employed at the time of the claim for disability. So if you fire the employee before they start receiving long-term disability, you may be liable for all the benefits that the employee loses.

You must also consider BC's Human Rights Code. You have a duty to "accommodate" a disabled employee, for example, by allowing the employee time off for physiotherapy. But you can be excused if the accommodation needed would result in "undue hardship" or would endanger the safety of others.

Bottom line? If you terminate a disabled employee, consider providing a generous severance package to avoid a wrongful dismissal lawsuit or human rights complaint. And wait until the employee receives their long-term disability benefits.

*This column has been written with the assistance of McCONNAN BION O'CONNOR & PETERSON. The column provides information only and must not be relied on for legal advice. Please contact Stephanie Sieber at McCONNAN BION O'CONNOR & PETERSON for legal advice concerning your particular case.*

Lawyer Janice Mucalov has authored several popular law books and writes about legal affairs for a variety of publications. "You and the Law" is a registered trade-mark. © by Janice Mucalov.

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