

HARNESSING THE POWER AFTER BRAIN INJURY

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The Rights of a Disabled / Brain Injured Person Returning to Work

Prepared By:

David R. Tenszen

416-868-3210

dtenszen@thomsonrogers.com

David A. Payne

416-868-3193

dpayne@thomsonrogers.com



Barristers and Solicitors

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- 1) In June of 2008, the Supreme Court of Canada stated as follows:
“The contract of employment is, by its very terms, subject to cancellation on notice or subject to payment of damages in lieu of notice without regard to the ordinary psychological impact of that decision. At the time the contract was formed, there would not ordinarily be contemplation of psychological damage resulting from the dismissal since the dismissal is a clear legal possibility. The normal distress and hurt feelings resulting from dismissal are not compensable”. *Honda Canada Inc v. Keays*. [2008] 2 S.C.R. 362, para 56.

 - 2) Employers have an obligation of good faith and fair dealing in the manner of dismissal. *Keays*, para 58.

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- 3) Employers in the course of dismissing employees must be candid, reasonable, honest, and forthright with their employees.

Keays, para 58.

- 4) For an existing employee who is absent from work as a result of a disability (ABI), the *Ontario Human Rights Code* legislates a duty on employers to accommodate the disability and facilitate a return to work, if possible.

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- 5) The *Ontario Human Rights Code* prohibits discrimination against employees on the basis of an acquired brain injury / disability. A breach of this duty allows the employee to file a complaint of discrimination on the basis of disability to the Ontario Human Rights Tribunal.
 - 6) The presence of a medical condition (ABI) and corresponding disability, removes the unqualified legal right of the employer to terminate employment without providing a reason.

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- 7) The fact that a disability is due to an “invisible” medical condition not readily seen or known by an employer does not mean a disability does not exist.
 - 8) Disabled employees, under the *Human Rights Code*, have the right to be free from discrimination because of the disability. If poor job performance is a result of a disability arising from an acquired brain injury, the termination of the employment for reasons traced to the disability will be found to be discrimination if an employer knew or ought to have known of the disability and terminated the employee without accommodation attempts.

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- 9) The duty to accommodate means the functions of a job may have to be changed for the individual employee who is disabled.
 - 10) An employer does not have to accommodate a disabled employee if it creates undue hardship.

Undue hardship is to be determined on an individual case-by-case basis considering such factors as financial costs, size of the employer's operation, risk to health and safety of the employee, other employees and the public, morale of other employees, and the impact of a co-worker's accommodation measures on other employee's rights, among other factors.

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- 11) Accommodation includes a requirement to re-employ employees absent from work due to a disability if they can fulfill the essential duties of their pre-disability job with reasonable accommodation.

 - 12) An employee should expect the employer to objectively and fairly inform co-workers of his/her need for accommodation, together with a caution to refrain from idle gossip.

13) An employee can expect to attend for independent medical examinations by qualified physicians if the medical evidence for disability is not clear and/or if progressive steps to accommodate the disability are not successful.

14) The employer must make genuine efforts to impartially assess the employee's situation:

If poor performance by the employee is due to a disability, the employer must accept the termination of employment will not proceed unless and until accommodation has been explored fully and is not successful or creates undue hardship.

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- 15) The employer has the right to obtain sufficient information upon which to conclude that accommodation is necessary in the first instance.

 - 16) The employer must refrain from any conduct that will be seen as threatening or exerting undue pressure on the employee.

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- 17) The employer is in the best position to determine how accommodation without undue hardship can be accomplished. However, the suggestions of the employee should be sought and should be seriously considered.

 - 18) Employers do not have a right to tell the employee which option for recovery the employee must take provided the employee is actively seeking medical and therapeutic assistance. The employer cannot interfere with the employee's healthcare.

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- 19) An employer may not prohibit any employee from seeking independent legal counsel or ignore or deny an employee's request to involve their own legal counsel.
 - 20) The *Ontario Human Rights Code* recognizes there are circumstances where employees become so disabled they are not capable of performing or fulfilling the essential duties or requirements of a position. In these cases, the duty to accommodate is not engaged and it would not be discriminatory to terminate the employee's employment under the *Ontario Human Rights Code*. The employee is still entitled to reasonable notice or damages in lieu thereof.

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- 21) In common law, the doctrine of frustration can apply to the contract in cases where an employee is unable to work as a result of an employment disability
 - 22) The proof required to establish frustration of contract is that the employee's incapacity at the time the dismissal decision is taken is of such a nature that it is likely to continue for an indefinite period such that performance of the employee's obligations in the future would be impossible. The nature of the illness, the nature of the disability, how long it has continued and any prospects for recovery are all material factors.

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- 23) The employee must meet performance and job standards in accordance with the accommodation plan once accommodation has been provided.
 - 24) There is no set formula for accommodating people with disabilities. Each person's needs are unique and must be considered afresh once an accommodation request is made. A solution may meet one person's requirement but not another's. Whether an accommodation is appropriate is a determination completely distinct and separate from whether the accommodation would result in undue hardship.

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- 25) The *Ontario Human Rights Code* guarantees equal treatment to all persons capable of performing the essential duties or requirements of the job or service. No one can be judged incapable of performing those duties until efforts have been made to accommodate the individual up to the point of undue hardship.

Damages

- 26) At common law, in addition to reasonable notice or damages in lieu of reasonable notice, any employee dismissed in a dishonest, highhanded and unreasonable manner may also recover punitive and/or aggravated damages.
- 27) A breach of the *Ontario Human Rights Code* of the duty to accommodate or an active discrimination against a disabled employee in breach of the *Ontario Human Rights Code* can give rise to a complaint and a hearing before the Ontario Human Rights Tribunal.
- 28) The Tribunal has the authority to order reinstatement and damages up to \$25,000.00.

Recommendations

- 29) An employee who has suffered an acquired brain injury should:
- 1) Keep their employer advised of their medical condition.
 - 2) Inform their employer that they wish to return to their employment as soon as possible after the injury.
 - 3) Inform their employer on an ongoing basis in consultation with medical practitioners of a potential return date to work.
 - 4) Inform their employer of a request for an accommodation the employee anticipates being required.
 - 5) Work with the employer for the implementation of an accommodation plan or plans.

THANK YOU