

# *Extended leaves blur lines between quitting and firing*

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For Law Times

A woman gets in a car accident in the fall of 2009 and goes on disability. She's on it for about a year.

She's getting better, so her physiotherapist writes a letter saying she can return to work but on a modified basis with fewer hours and tasks.

Because of her slightly improved health, her insurance company tells her she's going to lose some benefits. The letter goes to her employer as well.

She can go back to work and needs to. But she receives no response. This goes on for a few months with no response from her employer.

She then has her lawyer draft a constructive dismissal claim in the fall of 2010 saying the client expects a termination package. The employer responds that it never fired her and would be happy to have her back.

Soon after, both sides settle out of court for a modest amount of money.

Toronto employment lawyer Kevin Marshall has a term for this scenario: blurring. The employer didn't fire the woman, but she felt as though it had.

"Wrongful dismissal is very clear," says Marshall. "That's where, for example, a person loses their job. They get a letter indicating as such and they often get a package."

But in constructive dismissal, Marshall continues, "the employer has done something fundamental, a big change, in their status of employment. For example, overnight they get a 25-per-cent cut in pay but they have the same

responsibilities. So, the employee is very upset."

If that person decides to stop working in response, the employer will take the position that the employee has resigned and isn't entitled to anything. So the question then becomes: what's a termination and what's a resignation?

"That is the big issue," says Marshall. "That is a pretty clear example because in that case, the courts will generally rule in favour of the employee. But sometimes it's trickier."

The issue can be particularly difficult in a situation where the person can't work because of a disability and has been off work for a long time. "That is where there is a blurring between resignation and termination," says Marshall. "Those cases tend to be most difficult. Employers have a duty to accommodate the disabled employee the best they can."

But Marshall notes he understands how it can be difficult for employers as well, particularly for small companies that have to handle the employee's duties. Do they hire someone short-term or for longer? In the meantime, they may not know how long the employee is going to be off.

But according to Marshall, it's not uncommon for small employers to not respond to employees who are on disability as though they never existed.

"It's very common for some small employers to do that. I do notice there is a clear trend," he says, adding that because employers believe most employees don't know the law very well, they'll eventually just give up and find a job somewhere else. "The hope in many cases, which is often true, the employee [accepts] the

situation and basically gives up, in which case the employer is vindicated."

In the case of the woman who had the car accident in 2009, she had Marshall representing her in a claim related to that issue. He helped her draft some letters and eventually file the constructive dismissal claim.

"She just mentioned this situation with her employer," says Marshall, who then noted he could help in the employment matter.

"So in this case, I guess she kind of lucked out. She probably wouldn't have thought to contact an employment lawyer."

Kumail Karimjee of Karimjee Greene LLP in Toronto says he has seen this type of situation before, particularly when employees are off on extended disability leave.

"The employer has sometimes erroneously moved on when they still have obligations to the employee," says Karimjee, who represents both employers and employees. "That certainly does happen."

When he's representing employers, Karimjee reminds them of their legal obligations to their employees. They include the Ontario Employment Standards Act that allows for emergency leave and the Ontario Human Rights Code that allows for extended leave and accommodation upon return to work.

"There are a lot of obligations on the employer under this context that they need to be aware of," says Karimjee. "I think sometimes what happens is the employers, after the employees have been off for an extended period of time, they've moved on in a sense. They are functioning without having had that employee within the workplace."

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