

## Sick leave and work

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Articles of Law by Bhag Singh

Provisions for paid sick leave are common but there are limits.

IT IS traumatic for an employee who has health problems to be told that his employment is coming to an end. Unpleasant as it may be, this is sometimes a reality that has to be faced.

If and when this happens, what are the rights of an employee? In a situation where an employee continues to be on extended sick leave, is there no obligation on the employer's part to wait until the employee recovers from his illness?

A contractual relationship exists between an employer and an employee. However, difficulties arise when an employee suffers from illness and is frequently away from work. In a large organisation, the effect of the absence may be mitigated by assistance and support from others. However, in small organisations, the effect may be somewhat different.

When this happens, is an employer compelled to continue to employ the employee who is frequently unwell? On the part of the employee, being sick is not his fault but to what extent is the employer required to support this?

### Entitlement

The starting point would be the contract of employment. Whether a mere letter or a more formal document or on the basis of incorporation by reference, the relationship will be governed by the agreed period of paid sick leave that an employee is entitled to.

The Employment Act 1955 lays down that an employee, upon commencement of employment, is entitled to 14 days paid sick leave.

This increases to 18 days when the person has worked for two years or more, and 22 days when the employee has worked for five years or more.

If hospitalisation is necessary, then irrespective of the period of service, an employee would be entitled to 60 days' paid leave.

The Employment Act 1955 is applicable to employees at the lower income level. As such, this could be regarded in law as the minimum standard for everyone.

With regards to employees governed by the Act and those not governed by the Act, there will be provision for paid sick leave based on the Act or on a basis more favourable. Nevertheless the agreement is unlikely to provide for unlimited paid sick leave. What happens then when the paid sick leave entitlement is exhausted?

#### Beyond entitlement

In such circumstances, it will be open to the employee to rely on his annual leave. But this too may have been used up.

At this point, it would appear that the employee is unable to fulfil his contractual obligations and so the employer-employee relationship can no longer continue. Some employers may have a specific policy to deal with such situations.

There may be a compensation package to provide for an employee who has been on sick leave for a specified period, and there is little likelihood of him returning to normal duties. In other cases, a provision with similar effect may be incorporated into the collective agreement.

In both cases, for such a provision to be applicable, there may be a requirement that the employee has been working in the organisation for a specific period.

Where such a provision exists, there will be a formula for compensation to be paid when the need arises. If so the compensation will have to be computed accordingly.

However, in other cases, it may be stated as an ex-gratia payment to be made at the employer's discretion.

Of course, it would mean that the contract would be brought to an end as the employee is unable to fulfil his part of the bargain.

The employee may feel that it is not his fault. However, there is no legal basis for the employer to continue to pay an employee who is unable to work.

#### During probation

Then there are situations where the employee, even though on probation, is on medical leave most of the time. From the employer's point of view, this could be regarded as disappointing. But can the employer use it as a reason to terminate employment or not confirm the employee who is on probation?

It was said in the case of *Malaysian Smelting Corporation Bhd v Kesatuan Pekerja-Pekerja Perusahaan Pelaburan Logam Butterworth* that "taking of medical leave supported by medical certificates may not be wrong in law and may not contravene the contract of employment."

In fact, being on duly certified medical leave may work in favour of the probation period being extended. In *VS v UMW Toyota Motor Sdn Bhd*, the chairman Mohamad Amin Firdaus Abdullah said of an employee who had utilised almost the entire sick leave allocation that "it would have been fair to further extend the probation period to give her the opportunity to make amends."

#### Employer's option

What options does an employer have with regard to an employee who is a sickly person? A distinction has to be made between a person who has a history of sickness prior to employment, and a person who encounters an unexpected situation which requires sick leave to be taken. The employer could, in the application for employment, require the applicant to disclose his medical history. When an applicant is sent for a medical check-up, the doctor should also be advised to make a detailed inquiry about a person's past history.

If an applicant fails to disclose in full his past medical problems, this would be a serious breach on his part.

In consequence the employer could rely on such non-disclosure as an important factor in the decision to terminate the employment or not confirm the employee.

It helps to make the employment conditional upon the result of a medical examination and the employer being satisfied with what is disclosed.