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**ILLNESS AND DISABILITY
IN THE WORKPLACE**

Bennett Jones LLP

Release No. 55, September 2018

What's New in This Update:

This release updates to Chapters 2 (Common Law), 3 (The Union Employee), 4 (Human Rights Legislation), 5 (Short and Long-Term Disability Insurance) and 6 (Workers' Compensation and Other Statutory Benefits).

Case Law Highlights

Of the new case law discussed in this release, the following are of note:

- **Common Law – Termination of the Ill or Disabled Employee at Common Law – Frustration Due to Permanent Disability** Employee had been on short-term and then long-term disability leave, until the insurance company sent the employer a letter which the employer

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interpreted as meaning that the insurer considered the employee permanently disabled – The employer terminated the employee on the basis that the employment contract was frustrated – The employee’s claim for wrongful dismissal was dismissed – Although it was inappropriate for the employer to rely upon the insurance company’s letter to unequivocally establish permanent disability, there was sufficient additional evidence, including the assertions of the employee himself, to support the conclusion that in fact the employee was permanently disabled and therefore, the contract frustrated: *Roskaft v. RONA Inc.*, 2018 ONSC 2934.

- **Common Law – Termination of the Ill or Disabled Employee at Common Law – Effect of Termination on Disability Benefits** – The employee, who was disabled, had his employment terminated by his employer, following which he signed a settlement and release agreement that purported to resolve all matters between the parties – The court held the agreement to be unreasonable and unenforceable – The court specifically found that termination of the disabled employee during his appeal of the insurance company’s denial of further LTD benefits made the employee particularly vulnerable, and the employer had taken advantage of this vulnerability, exacerbated by the great power imbalance between the parties, to cause the employee to sign a release which was not to his advantage: *Swampillai v. Royal & Sun Alliance Insurance Company of Canada*, 2018 CarswellOnt 10574, 2018 ONSC 4023.
- **The Union Employee – Safety Concerns and Medical Fitness – Other Cases** – The grievor complained he had not been offered employment with the employer because of his admitted use of medical cannabis during off-hours – The arbitrator was sympathetic to the grievor’s plight and was glad that he had found something to manage his chronic pain, however ultimately concluded that the employer’s concerns with respect to the sobriety of persons working in safety sensitive positions outweighed its duty to accommodate the grievor’s ailment: *International Brotherhood Lower Churchill Transmission Construction Employers’ Assn. Inc. and IBEW, Local 1620 (Tizzard), Re*, 2018 CarswellNfld 198 (Nfld. And Lab. Arb.).