

# Is It Possible to Terminate the Labor Contract with the Employee Whose Medical Treatment Period Has Expired? CHINA

## **CASE PRESENTATION:**

Mr. Huang joined the Company "X" (the "Company") in Shanghai on April 21, 2006. Both Parties have concluded several labor contracts consecutively and the latest labor contract was a non-fixed term contract signed on May 1, 2017.

Due to cervical spondylopathy, Mr. Huang started to apply for sick leave since April 1<sup>st</sup>, 2019 and until the expiration of his medical treatment period<sup>1</sup>, he was still on sick leave.

The Company sent written notices to Mr. Huang twice, notifying him the expiration date of his medical treatment period as well as asking him to return to work or pass an official appraisal on his labor capacity.

As Mr. Huang refused to return to work but kept submitting the sick certificate issued by the hospital, the Company issued a termination notice to Mr. Huang based on his absence from work for more than 14 days.

Mr. Huang filed the labor arbitration claiming for the economic compensation of illegal termination, which was fully supported by the labor arbitrator. Then the Company brought the lawsuit before the court, applying to order that the concerned termination was a legal termination.

In the process of the litigation, the Company provided the relevant documents, such as Management Policy, the Code of Ethics Conduct and Management Process on Leaves, in order to prove that (i) the Company was entitled to terminate the labor contract under the situation where an employee had been absent from work for more than three days, and (ii) the application of sick leave should be approved by the department manager in writing. In this case, as Mr. Huang's sick leave application exceeding legal medical treatment period had not been approved by the Company, the Company considered that his behavior constituted the long term absence from work and the dismissal should be lawful.

Despite the documents and arguments of the Company, the court of first-instance dismissed its claims, and the judgment was held by the court of second-instance as well.

## **VIEWPOINT OF THE JUDGE:**

- Whether the concerned dismissal is lawful?

Both the Courts of First and Second Instances consider that the Company adopted a wrongful method to terminate the labor contract. Instead of a dismissal based on "absenteeism", the Company should terminate the labor contract in accordance with

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1. "Medical treatment period" is a legal concept that refers to the period during which the employee takes sick leave and the employer cannot terminate the labor contract, except for some special situations provided by laws and regulations. In Shanghai, the legal medical period of an employee ranges from 3 months to 24 months based on his length of working years for the employer.



Article 40 of the Labor Contract Law which provides that “*The employer can terminate the labor contract by a written notice to the employee 30 days in advance or additionally paying the employee one month’s salary in any of the following situations: (i) the employee suffers from an illness or a non-work related injury and is unable to undertake the original work and other work arranged by the employer following the completion of his legal medical treatment period; .....*”

The courts hold the opinion that “absenteeism” refers rather to an employee’s refusal to engage in work without justification. Although Mr. Huang had used up his medical treatment period, as he could still submit sick leave certificates, it can only be considered that he could no longer enjoy the benefits under medical treatment period, but it cannot be concluded that he refused to return to work.

Therefore, the concerned dismissal was judged as unlawful and the Company shall pay legal compensation to Mr. Huang arising from the illegal termination.

#### **DS COMMENTS/TIPS:**

In practice, it is a common issue faced by most of the companies about how to deal with the employees who continue to apply for the sick leave after the expiration of their legal medical treatment period.

Firstly, although the companies may terminate the labor contracts with such employees on different grounds based on the specific situations and “serious violation of internal rules” seems often adopted, as concluded from the above case, if the employee can still provide sick leave certificate, “absenteeism” is not a correct basis for the dismissal and Article 40 of Labor Contract Law shall be the first option.

Secondly, for the application of Article 40 of Labor Contract Law, the company shall pay attention to the process and avoid any procedural flaws.

For instance, in Shanghai, when facing the situation where the employee will shortly use up its medical treatment period and may still require the sick leave:

- The company shall firstly notify the employee regarding the specific expiration date of the medical treatment period in advance;
- Upon the expiration of the medical treatment period, the company shall issue a new notification to the employee, requiring him to return to work;
- If the employee keeps submitting the sick leave certificate, the company shall consider to offer a new position or adjust the working contents to the employee by a formal notice;
- Where the employee still refuses to return to work by providing the sick leave certificate, then the company can terminate the labor contract based on Article 40 of Labor Contract Law.



During the above-mentioned process, it is worth noting that:

- The company shall fully maintain communications with the employee, before, on and after the expiration of the medical treatment period in written or by meetings. The company shall be aware to keep all the evidence for such communications, such as written notice, video record etc.
- During the communication with the employee, the company shall try its best to understand the employee's difficulties and offer new position/work scope in order to show its good faith and its efforts.



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