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RECENT ONTARIO DECISIONS HIGHLIGHT RISKS OF TERMINATING DISABLED EMPLOYEES

By Barry W. Kwasniewski *

A. INTRODUCTION

Employers, including charities and not-for-profits, may be faced with the challenges of dealing with employees who suffer from long-term disabilities. These disabilities may unfortunately prevent the employee from returning to work for significant and unknown periods of time. Focusing on two recent Ontario Superior Court decisions, this Bulletin reviews the law regarding the termination of employees suffering from long-term disabilities, and will provide some guidance to employers as to the matters that need to be considered in deciding whether to terminate disabled employees.

B. THE DOCTRINE OF "FRUSTRATION" OF CONTRACTS

For an employer to justly terminate a long-term disabled employee, the employment contract must be found to have been 'frustrated'. The doctrine of frustration of a contract was summarized by Binnie J. in the Supreme Court of Canada decision in *Naylor Group Inc. v. Ellis-Don Construction Ltd.*,[1] where he stated:

> "Frustration occurs when a situation has arisen for which the parties made no provision in the contract and performance of the contract becomes a thing radically different from that which was undertaken by the contract."

* Barry W. Kwasniewski, B.B.A., LL.B., practices employment and risk management law with Carters' Ottawa office and would like to thank Kate Robertson, B.A. LL.B., for her assistance in the preparation of this *Bulletin*.
[1] [2001] CarswellOnt 3340 S.C.C.

This doctrine of frustration is relevant to employment contracts in cases where an employee is unable to work because of a disabling illness, whether it be physical or mental. The question employers must carefully consider in these situations is whether or not the employee's incapacity appears likely to continue for such a period that further performance of the employee's obligations in the future would either be impossible, or would be a thing radically different from that undertaken by him and agreed to be accepted by the employer under the agreed terms of the employment. Each situation needs to be decided on its own facts and circumstances, taking into consideration factors such as: the terms of the contract, how long the employment was likely to last in the absence of the illness, the nature of the employment, the nature of the illness or injury, and the prospects of recovery.[2]

Case law has suggested that the longer an illness persists, the more likely that frustration of a contract will be found. Smith J.A. in *Wightman Estate v. 2774046 Canada Inc.*[3] stated that if an employee's sickness persists for an extended period of time, then it is more likely that the employment relationship has been destroyed. However, as discussed below, employers face the risk of wrongful dismissal claims even when an employee has been unable to work for several years.

C. RECENT DECISIONS

1. *Duong v. Linamar Corp.*

   An employer recently successfully defended a wrongful dismissal action in the decision of *Duong v. Linamar Corp*.[4] In this decision, an employee, who was employed as a machine operator, suffered from a severe back problem and was unable to work for over four years. The long term disability benefits that the employee was receiving for 24 months were eventually terminated as a result of the employee's refusal to participate in a mandatory rehabilitation program. Eventually, the employee was terminated due to frustration of contract. The employee commenced an action against the employer for wrongful dismissal, breach of fiduciary duty and breach of contract.

[2] *Marshall v. Harland & Wolff Ltd*., [1972] 2 All E.R. 715 (N.I.R.C.)
[3] [2006] BCCA 424 (B.C.C.A).
[4] 2010 CarswellOnt 3663, 2010 ONSC 3159.

Newbould J. ruled that the contract of employment was frustrated. The fact that the employer provided the employee with long term disability coverage did not mean the employer was required to employ the person indefinitely. Nothing within the employee's contract indicated that the contractual relationship would continue in spite of a permanent disability. The termination of the plaintiff's employment was justified by reason of frustration of contract, based on the fact that there was no foreseeable date that he would be able to return to work.

2. *Naccarato v. Costco Wholesale Canada Ltd.*

In another recent decision[5], an employee was similarly terminated on the basis of frustration of contract, as a result of his long and continuing absence from employment due to disability. The plaintiff was employed with Costco Wholesale Canada Ltd., and became absent from work for approximately five years as a result of depression. The plaintiff received short and long-term disability benefits in accordance with the group insurance policy. After the employee's contract was terminated on the basis of frustration, the plaintiff brought an action for wrongful dismissal. However, unlike the *Duong* decision, the employer was found liable to the former employee for wrongful dismissal.

The court in this case took a somewhat different approach to the doctrine of frustration of contract. Justice A. Pollak preferred the approach taken in the earlier decision of *Skopitz v. Intercorp. Excelle Foods Inc*.[6] In that case, Justice Sachs discussed the doctrine of frustration in the context of an employment contract. He opined that a contract can only be considered frustrated when the illness or incapacity is of such a nature or likely to continue for such a period of time that either the employee would *never be able to perform the duties contemplated by the original employment contract,* or *that it would be unreasonable for the employer to wait any longer for the employee to recover.* There must be regard had to the relationship of the term of the incapacity or absence from work to the duration of the contract, and to the nature of the services to be performed. Essentially, this approach requires evidence provided by the employer that either the employee will not be returning, or that the employer will suffer disruption or hardship if the employment contract is maintained.

[5] *Naccarato v. Costco Wholesale Canada Ltd.* [2010] O.J. No. 2565 (ON.S.C)
[6] [1999] O.J. No. 1543 (Gen. Div.).

As a result of this interpretation, the employer was unable to successfully rely on frustration. Since there was no evidence of any hardship or disruption to the employer in maintaining the plaintiff as a long-term disabled employee, the judge held that the employment contract had not been frustrated. Another element that contributed to this finding was the fact that the employer did not provide the court with the necessary medical evidence to support a finding that the plaintiff would be unable to work in the reasonably foreseeable future. Also, the presence of long-term disability benefits suggested that a much longer period was anticipated before it could be said that the frustration of contract had even occurred.[7]

D. HUMAN RIGHTS CODE CONSIDERATIONS

In dealing with disabled employees, it is also important that employers be aware of their obligations pursuant to the Ontario *Human Rights Code*.[8] Under section 5(1) of the Code, employers cannot discriminate against employees on the basis of disability, and, under s. 17(2), they must accommodate disabled employees to the point of 'undue hardship'. Therefore, to comply with the Code, termination should only be considered once reasonable attempts to accommodate the employee to a return to work have failed.

E. EMPLOYMENT STANDARDS ACT, 2000 CONSIDERATIONS

It is also important to note that as a result of amendments to Regulation 288/01 of the Ontario *Employment Standards Act, 2000*[9] (the "ESA"), provincially regulated employers in Ontario that terminate an employee on the basis of frustration of a contract due to illness or injury must pay statutory termination and, if applicable, severance pay. The amount of these payments are based on years of service, as set out in the ESA.

F. SUMMARY

The *Naccarato* decision raises concerns for employers who are deciding the future of long-term disabled employees in their organization. Before an employer takes action to terminate an employee, they should take precautions to ensure that they have relevant evidence from a medical doctor confirming that the employee

[7] Applying *Dragone v. Riva Plumbing Limited*, 2007 CanLII 40543 (ON. S.C.).
[8] R.S.O. 1990, c. H.19.
[9] S.O. 2000, c.41

will not be returning to work anytime in the foreseeable future. Therefore, it may be necessary to have an independent medical examination done before any decision is made. The *Naccarato* decision highlights the risk that employers face in terminating disabled employees. Dealing with disabled employees can be both challenging and frustrating. This is a situation where employers need to be very careful to reduce the risks of both civil claims and human rights complaints.

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Ottawa (613) 235-4774
Mississauga (905) 306-2791
Orangeville (519) 942-0001
Toll Free: 1-877-942-0001
www.charitylaw.ca