



## Some hope for employers dealing with employees on long-term disability leave

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The Ontario courts have released another interesting decision regarding the contractual concept of frustration as it applies to the termination of employees receiving long term disability benefits (see our October 27, 2010 post "[Further "frustration" for employers dealing with employees on long term disability](#)"). In *Duong v. Linamar Corp.*, released on June 2, 2010, Justice Newbould dismissed the wrongful dismissal claim of Mr. Hoa Duong, a former employee of Linamar Corp. who was dismissed following nearly three years on long-term disability leave.

The Court found that the parties did not agree that the contractual relationship would continue indefinitely in spite of the employee being unable to work. In line with the concept of frustration, Justice Newbould concluded that if the company continued to employ Mr. Duong, it would be required to something "radically different" from that which was undertaken in the contract of employment.

### Mr. Duong's Disability

Mr. Duong commenced employment with Eston Manufacturing (Eston), a division of the Defendant Linamar Corp, in April of 1998. Mr Duong was employed as a machine operator. In October 2005, Mr. Duong reported to his supervisor that he was experiencing back pain after reaching for parts in a box. Several attempts in the following weeks to return Mr. Duong to work failed after he complained of pain and refused modified duties. Mr. Duong returned to work in mid December though he left shortly after due to persistent pain. He did not return to work again.

As an employee, Mr. Duong was entitled to a group benefit program provided by Co-operators Life Insurance Company (Co-operators). This plan provided for short term disability benefits followed by long-term benefits if Mr. Duong was deemed, "totally disabled." Mr. Duong was approved for long term disability benefits in May, 2006. He was later informed that these benefits were to continue until he reached the age of 65 as long as he complied with treatment and medical evidence continued to support that he was totally disabled. Co-operators required employees to participate in a rehabilitation program under this policy and Mr. Duong participated in such a program.

In August, 2008, Eston asked Mr. Duong to provide medical documentation regarding his prognosis. In response, Mr. Duong provided a letter from the administrator of the rehabilitation program which stated that with comprehensive treatment there was a good likelihood that he could return to work. He also

provided two further letters from a physician stating that Mr. Duong's prognosis was poor and that he was not then capable of returning to work.

Eston then received a letter from Co-operators in early October 2008, stating that Mr. Duong's long term disability benefits had been terminated as a result of his lack of participation in the rehabilitation program. Shortly thereafter, Mr. Duong approached Eston's human resources manager regarding the termination of his benefits. Mr. Duong was told that he would be given assistance if he chose to appeal the termination, but that Eston could not appeal on his behalf. However, no appeal was initiated by Mr. Duong.

#### Mr. Duong's Termination

From November 2006 until September 2008, Eston had received reports from Mr. Duong's physician on at least a monthly basis which consistently stated that Mr. Duong's condition had not improved. After Eston learned of the termination of Mr. Duong's long term benefits, Eston's HR manager informed Mr. Duong that he could still provide Eston with medical documentation if his situation changed and he could return to work.

No further documentation was provided, and on February 25 2009, Eston terminated Mr. Duong. The termination letter stated that Mr. Duong had not been able to work since December 2005 and there was no foreseeable date that he would be able to return to work. Following his termination, Mr. Duong sued Linamar Corp. for wrongful dismissal, including damage claims for aggravated and punitive damages.

#### Trial Decision:

Justice Newbould ultimately held that Eston was entitled to terminate Mr. Duong's employment for frustration. He noted that Mr. Duong had not worked since October 2005 and that Mr. Duong's physician's reports repeatedly stated that there had been no improvements in his condition. While the administrator of the rehabilitation program had said that there was good likelihood that Mr. Duong could return to work, Justice Newbould noted that after his benefits were terminated, Mr. Duong did not appeal the termination, which was an indication that he knew he had not participated as required. The failure to appeal the termination of benefits also supported the position that there was no reasonably foreseeable date for Mr. Duong's return to work. Even if Mr. Duong had continued to participate in the rehabilitation program, there was no evidence provided to Eston or the court indicating that Mr. Duong could return to work in the foreseeable future. In fact, Mr. Duong's counsel agreed that the effect of Mr. Duong's statement of claim was that Mr. Duong was alleged to be permanently disabled.

Mr. Duong's counsel argued that the availability of a long term disability plan as part of the employment terms meant that Eston could not rely on frustration against a permanently disabled employee. However, Justice Newbould did not accept this broad statement and held that the parties did not agree that the contractual relationship would continue indefinitely in spite of the employee being unable to work. In line with the concept of frustration, Justice Newbould stated that, "to have required Eston to continue to employ Mr. Duong in all of the circumstances would ... have required Eston to do something radically different from that which was undertaken in the contract of employment." Summary judgement was granted, and the action against Eston was dismissed.

#### Our Views:

As opposed to the previously discussed case of *Naccarato*, *Duong* presents an example where an Ontario court was willing to find an employment contract to be frustrated in a similar fact situation. Interestingly, *Naccarato* was heard three weeks prior to *Duong*, but the decision was released two weeks after, and neither case references the other.

Justice Newbould upheld a lower threshold of what constitutes frustration than did Justice Pollack in *Naccarato*, as Mr. Duong had been off work for approximately three years as opposed to the five years Mr. Naccarato was away from work.

However, this decision is arguably in line with *Naccarato*. Specifically, Mr. Duong’s disability met the standard set out in *Naccarato* that the disability must be “so substantial that an objective assessment of it lead[s] to the conclusion that the contract of employment was frustrated, thereby justifying its termination.” Mr. Duong’s physician reports consistently stated there was no improvement in his condition, and it was agreed by the parties that Mr. Duong was permanently disabled. This distinguishes these facts from *Naccarato*, where Costco did not provide evidence that there was no reasonable likelihood that Mr. Naccarato would not be able to return to work in the reasonably foreseeable future.

It is our view that employers should continue to tread lightly in this as yet unclarified area of the law. We will continue to update this important area of the law as further cases are decided – stay tuned!

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