Eric's LTD Update - Fall 2019

Date: September 17, 2019

A) FRUSTRATION OF EMPLOYMENT CONTRACT

Since frustration of employment routinely arises as an issue in LTD mediations, the following case may be of interest.

Roskaft v. RONA Inc., 2018 ONSC 2934

The Plaintiff ("R") commenced employment with a predecessor company of RONA Inc. ("RONA") on September 16, 2002 and started a leave of absence for a medical condition on September 28, 2012.

Short-term disability ("STD") and long-term disability ("LTD") benefits were provided to R, subject to the terms of a self-insured employment benefit plan (the "Plan") through Sun Life. Sun Life administered claims on behalf of RONA and made all decisions and payments with respect to employee claims. RONA had no involvement in Sun Life's decision process and could not legally challenge its decisions. Employee claims were submitted to Sun Life. RONA had no access to copies of any medical documentation. RONA was told when an LTD claim is approved, but was not given the reason for the employee's absence.

Sun Life approved R's claim for both STD benefits and LTD benefits as a result of his disability and inability to work.

On October 20, 2014, R completed a Return to Work Form which stated that he was unable to work and that his return to work date was "N/A". The form was stamped by his general practitioner.

In correspondence dated December 5, 2014, from Sun Life, RONA was advised that R could not return to work and it was alleged by RONA that in that correspondence, Sun Life concluded that R was "permanently" totally disabled in relation to both his own occupation and any occupation.

In September of 2015, RONA reviewed R's file and decided that on the basis of the letter from Sun Life dated December 3, 2014, and in the absence of any other documentation to the contrary, R was "permanently" totally disabled from employment in any occupation and that it was unlikely that R would be able to return to work within a reasonable time.

On September 15, 2015, R was advised that he was terminated from employment as a result of frustration of the contract, and that he would continue to receive Sun Life LTD benefits provided he remained totally disabled as defined in his insurance plan and that RONA would pay him his minimum entitlements pursuant to the *Employment Standards Act*, 2000, S.O. 2000.

In his wrongful dismissal action, R denied that his 13 year employment contract was frustrated.

The motion brought by RONA was for summary judgment dismissing this action against RONA.

The motions judge wrote:

The parties agree that if there was no reasonable likelihood, at the time of termination of employment that R would be able to return to work within a reasonable period of time, his employment contract had become frustrated. The doctrine of frustration applies because the Plaintiff's permanent disability made his performance of the employment contract impossible and the obligations of the parties are therefore discharged without penalty: Fraser v. UBS Global Asset Management, 2011 ONSC 5448; Nason v. Thunder Bay Orthopaedic Inc., 2015 ONSC 8097, at para 180; Lemesani v. Lowerys Inc., 2017 ONSC 1808, at para 137.

RONA's position is that at the time of his termination, neither R nor Sun Life had provided any information to RONA to change a conclusion that R was permanently totally disabled and that there was no reasonable likelihood that he would be returning to work within a reasonable period of time.

The Plaintiff's position is that at the time of this termination of employment, RONA had not properly considered the possibility of his return to work. He argues that after 13 years' employment, in a non-essential, clerical position, following a job related injury, where he was covered by LTD benefits, it was not unforeseeable that he could be off on LTD disability for a lengthy period of time before losing his job. He submits that, at the time of his termination from employment, it was not known if he would be returning back to work within a reasonable time-frame.

His evidence on this motion is that when he was terminated, he was starting to feel better, but RONA made no inquiries about his condition.

In the case of Ciszkowski v. Canac Kitchens, a division of Kohler Canada Co., 2015 ONSC 73, relied on by the Plaintiff, the court stated that:

Frustration of an employee's contract is always established with reference to the time of dismissal. In pleading frustration, an employer is entitled to rely on post-termination evidence not in its possession at the time of dismissal so long as it relates to the nature and extent of an employee's disability at the time of dismissal. The "evidence subsequently disclosed" should shed light on the nature and extent of the employee's disability at the time of an employee's dismissal. An employer is not entitled to rely on evidence that relates to the post-termination nature and extent of an employee's disability if that evidence is not relevant to the dismissal

date. To allow an employer to succeed in pleading frustration on the basis of such evidence would be neither fair nor reasonable.

The Court must determine whether, on the basis of the evidence before it, a determination can be made on whether at the time of the Plaintiff's termination of employment there was no reasonable likelihood that he would be able to return to work within a reasonable period of time. The evidence is that as of the hearing of this motion, the Plaintiff is still being paid LTD benefits and has never taken the position, since he has been receiving benefits that he does not continue to be totally disabled and is able to do any work. I find that the post-termination evidence does "shed light on the nature and extent of the employee's disability at the time of an employee's dismissal". This evidence contradicts the Plaintiff's assertion that had RONA or Sun Life asked for further medical evidence at the time of his termination of employment, he would have provided it and he would have been able to return to work.

When I examine the evidence in its totality I find that RONA was not entitled to conclude on the basis of the December 2014 letter from Sun Life that it had determined that the Plaintiff was "permanently" disabled. There is no reference to "permanent" disability in that correspondence. However, I find that there was enough evidence at the time of the termination of employment on the basis of the decision of Sun Life that the Plaintiff was sufficiently disabled to qualify for his LTD benefits; as well as the continued representations of the Plaintiff that his medical condition has not improved and he was totally disabled from performing the duties of any occupation, and the Plaintiff's continued receipt of LTD benefits, to reasonably conclude that there "was no reasonable likelihood" that the Plaintiff would be able to return to work within a reasonable period of time.

To conclude, I find on the totality of the evidence I have referred to above, that it was reasonable for RONA to conclude at the time of employment that there was no likelihood of R returning to work within a reasonable period of time.

For these reasons, the Defendant's motion is therefore granted.

B) USE OF EXPERT WITNESSES

Mizzi v. Hopkins [2003] O.J. No. 1671 (Ont. C.A.)

In this decision, an expert defence psychiatrist's opinion was denounced by the trial judge as being at such odds with the evidence of a number of treating psychiatrists and psychologists as to be not credible.

In this and other decisions by judges and arbitrators, this expert's reports have been noted as having "serious flaws", "cherry picking", impartiality found wanting", "incorrect" assumptions and "superficial" interviews (these descriptions appeared in a December 2017 Globe and Mail article). And of course such criticism cuts both ways. LTD insurers routinely denigrate reports by "the usual" plaintiff expert psychologists, psychiatrists and other experts.

This presents a quandary for both plaintiff and defence counsel. Plaintiff counsel routinely say to Eric, “I know the LTD insurer hates my Dr. X, but I’m damned if I do, damned if I don’t. If I show up at mediation with no expert report, the insurer will criticize me for not having any medicals."

Similarly, LTD insurers wrestle with whether to obtain a defence expert report prior to mediation.

So what to do?

There is no question that the use of plaintiff and defence experts is under heavy criticism, especially when all parties know in advance what the findings of their experts will invariably say.

Consider the following:

TORONTO STAR – December 2017

“Reforms introduced under the (Province of Ontario’s) Fair Auto Insurance Plan, will include the creation of “independent examination centres”, according to (then) Finance Minister Charles Sousa, where accident victims of more serious collisions can get neutral assessments of their injuries. Sousa said the reforms follow a report by David Marshall, the province’s advisor on auto insurance and former CEO of the WSIB, who recommended a full revamp of the system – that currently allows some bad lawyers, medical clinics and insurers, to take advantage of victims…”

GLOBE AND MAIL – December 2017

“While he seldom treats patients, Dr. P still brings in as much as $800,000 a year, compiling reports on accident victims for auto insurance companies. In a good year, Dr. P gets roughly 1,500 bookings with approximately 300 being paper reviews."

Dr. P is among a raft of physicians whose reports have been rejected by judges and arbitrators, some reportedly for being inaccurate, unfairly biased against the injured person.

In Ontario and B.C. alone, hundreds of Canadian doctors take in roughly $240 million a year collectively, putting their names to accident injury assessments for the auto insurance industry.

The lucrative, little known growth industry that generates “independent medical evaluations” has gone largely unchecked in recent years. Injury lawyers working on behalf of accident victims also hire IME doctors to help bolster their cases. That starts an expensive, drawn-out game of “duelling assessments, by numerous doctors, working both sides…”

BRITISH COLUMBIA MINISTRY OF ATTORNEY GENERAL/NEWS RELEASE – February 2019

“Changes to Court rules (Parties will be able to use only one expert for claims less than $100,000 and up to three experts for all other claims) will help bring balance between reducing legal costs and the ability to receive settlements. The intent of these reforms is to avoid the

costs and delays associated with the disproportionate use of experts and reports that we are seeing used today, said David Eby, B.C. Attorney General."

While the above articles apply to motor vehicle cases, and while the proposed Ontario changes towards “neutral assessment centres” died with the change in government, it does not take much imagination to foresee the day when the use of expert reports by both plaintiff and defence counsel in LTD cases, is restricted or reduced from the rules in place today.

Do we need to wait for such a day if and when it happens?

Or should parties attend at mediation without obtaining expert medical opinions? As a mediator, Eric likes to have as much money on the table as possible to facilitate settlement of cases.

Refraining from obtaining dueling medical reports or a single medical issue LTD case will collectively “save” at least $10,000 which can be used to try to settle the case.

And who really “cares” about such reports. As set out above, judges may well reject the evidence of such “hired guns”. Plus, even if a report by Dr. X states strongly that the plaintiff is either completely disabled or is perfectly able to work, it is not the report per se which is key. What is key is how such medical expert performs on the witness stand, something which can never be predicted with certainty.

Eric has been involved in 4 LTD trials where an expert physician’s evidence collapsed on the witness stand, rendering their report all but useless. Twice Eric was delighted when this happened, twice he was horrified.

So Eric’s view at least, is skip expert reports prior to mediation. Plaintiffs can obtain all the treating physician medicals, statements from lay witnesses, whatever helps your case. Defence can perhaps obtain an in-house medical review and TSA. But save the $10,000 in dueling expert reports until post-mediation.

DISCLAIMER: While Eric did not invent the severe criticism which has recently been levelled against expert medicals or the attempts by governments in B.C. and Ontario to restrict such use of medicals, Eric’s opinion is simply that; an opinion. Eric realizes that many readers will view me as crazy and that you will want to obtain expert reports pre-mediation as is your inherent right in litigation (see *Harris v. Canada Life* (2002) 37 C.C.L.I. (3d) 41 (O.S.C.J.). There is no need to send Eric an e-mail saying you think he is crazy. He already knows that.

C) MISREPRESENTATION

Mohammed v. Manulife 2019 ONSC 3386

A life insurance case, but since the Insurance Act statutory misrepresentation provisions are identical for disability and life insurance, a case which is relevant for individual disability insurance applications.

In Mohammed (“M”) both the plaintiff and Manulife brought motions for summary judgement. Manulife claimed the life insurance policy was void ab initio since the deceased 1) fraudulently misrepresented his immigration status by providing a social insurance number on the application form and/or 2) fraudulently misrepresented his criminal past (M had been convicted of manslaughter for his part in a terrorist hijacking of a plane).

Held: For the insured. There was no specific question on the application regarding criminal history. While the form did have a space for a SIN, the deceased had a SIN, and filling this in did not constitute a representation of his immigration status. While “an Applicant must disclose material facts, whether or not the insurer has asked about them, an insurer’s failure to ask a question may be evidence that the particular insurer does not consider the issue to be material, even if, objectively, the information would have been regarded as relevant by a prudent insurer”.

The Court further held that even if it was wrong and the information should have been provided by M, his failure to do so was not fraudulent as per *Gregory v. Jolley*. As M was not aware of the materiality of his criminal past and his misrepresentation on entry into Canada his failure to disclose this to Manulife was not reckless.

To look for available mediation dates or to book a mediation with Eric, visit: https://www.blaney.com/schjerning-mediation, or simply e-mail Eric at: eschjerning@blaney.com

For any questions on these, or other LTD case law, or if you have a case you wish to share, please e-mail *eschjerning@blaney.com*.