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ACCOMMODATING EMPLOYEES WHO HAVE MADE LTD CLAIMS

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Employers are sometimes confused about how LTD benefits and the duty to accommodate fit together. This articles attempts to dispel some of that confusion by explaining the differences between the two and providing guidance on how to manage an employee who is on a disability leave.

LTD Benefits vs. The Duty to Accommodate

Typically a LTD plan will define disability as a restriction or lack of ability due to an illness or injury, which prevents the employee from performing the essential duties of his or her own occupation or, after a two year period, any occupation for which the individual is qualified or might reasonably be qualified by training, education or experience.

Human rights laws generally define disability more liberally and may include an actual or perceived disability, pre-existing condition or even alcoholism.

While the distinction may not seem important at first, it can create problems when an individual is denied LTD benefits under the terms of the policy. At that point, employers will often advise disabled employees that they must immediately return to work or be deemed to have abandoned their position. Employers feel safe in taking this step as they mistakenly believe that the denial of benefits by the insurance carrier proves that there is no disability.

Unfortunately, this approach is flawed. There are numerous reasons why an employee might be denied LTD benefits, for example, due to a pre-existing injury, which does not automatically mean that the employee is not disabled under the human rights law. For that reason it is advisable to obtain an independent assessment of the disability to determine whether there is a duty to accommodate. This must be done very carefully and may require the involvement of a medical assessment company.

If LTD benefits are denied, wait out the appeal period to allow the employee every opportunity to obtain benefits. If the appeal is denied or the employee chooses not to file an appeal, request medical documentation in support of the continued absence from work. If, and only if, the employee fails to provide this documentation can you begin to consider the employee to have abandoned the position.

The bottom line is that the LTD benefits are provided pursuant to the contract, while the duty to accommodate arises under human rights law and transcends the terms of the contract.

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Managing the Employee During a Disability Leave

Even if you offer short and long term disability benefits through a separate insurance carrier, you should not simply step aside and allow the benefits provider to be the sole monitor of the situation.

Insurance companies are increasingly reluctant to provide any information about an employee's medical leave, due to privacy considerations. Since the definition of disability for accommodation purposes is different in any event, you should maintain direct contact with employees while they are off on leave. This may involve obtaining copies of medical documentation with respect to their prognosis for a return to work, or simply asking the employee to contact you directly on a regular basis to discuss their return to work and to offer accommodation assistance.

The benefit to maintaining ongoing contact with the employee is that it will often lead to an earlier and more successful return to work.

Terminating the Disabled Employee

Automatic Termination Dates

Historically, collective agreements and employment policies have sometimes indicated that employees will be automatically terminated if they are absent for a specific period of time, usually two years. The two year mark has been selected because it generally coincides with the change in entitlement to LTD benefits, from being disabled from one's own occupation to any occupation.

These types of provisions have been successfully challenged by employees and their unions as violating human rights laws. These challenges succeed because employers are required to prove that the employee cannot be accommodated short of undue hardship, regardless of any artificially selected deadline.

You must, therefore, look at each situation in light of its particular facts and refrain from making arbitrary decisions based on a provision in a contract or policy. Even if the employee is still off work after two years, you should obtain medical documentation regarding his or her prognosis for a return to work.

Frustration of Contract

Many employers are familiar with (and fond of) the doctrine of frustration of contract. Frustration arises where something prevents an employee from continuing his or her employment, such that the employment contract comes to an end. Employers have often argued that an extended disability is something that frustrates the contract of the employment.

However, if the employee is entitled to participate in a sickness or disability benefit plan, the employer is deemed to have accepted the fact that sickness and disability may arise during the term of an individual's employment and, accordingly, the contract cannot be frustrated.

In *Antonacci v. Great Atlantic & Pacific Co. of Canada*,[1] Madam Justice Swinton dismissed the employer's argument that the contract had been frustrated and stated that:

> This is not a case in which it is appropriate to find that the contract of employment was frustrated, if only because the defendant offered its employees sick leave and long term disability plans. This is consistent with the conclusion that the contract of employment contemplated a lengthy period of absence by an employee, especially one with long service and who was injured on the job.

Unfortunately this may be one of those situations in which "no good deed goes unpunished", since to provide disability benefits may reduce or even eliminate your ability to argue frustration of contract. Even if the contract is frustrated under human rights law, you may still be obligated to pay severance to the terminated employee, in light of recent case law to that effect.

Bad Faith and Terminating Disabled Employees

In addition to the challenges in asserting frustration of contract, you must take care to handle the termination of a disabled employee fairly, or face a claim of bad faith.

In *Montague v. Bank of Nova Scotia*[2], the employee was granted additional damages bad faith in her wrongful dismissal claim against the Bank, based on its handling of her disability claim.

Ms. Montague worked for the bank for approximately 15 ½ years. As a result of an injury to her lower back she stopped working after a period of modified work. Her claim for disability benefits was denied because she did not provide sufficient medical information to support her absence. On July 8, 1991, the Bank advised Ms. Montague that because of the denial of benefits, she was expected to return to work on July 22, 2001, failing which she would be deemed to have abandoned her employment. The letter also indicated that she could appeal the denial of benefits if she provided further documentation. Ms. Montague responded to the Bank that same day and indicated that she had a medical appointment on July 12, 1991 and another appointment with a specialist on July 23, 1991 and would provide reports from these two physicians.

[1] (1998), 35 C.C.E.L. (2d) 1 (Ont. Gen. Div.), varied on other grounds (2000), 48 C.C.E.L. (2d) 294 (Ont. C.A.), aff'd on costs (2000) 48 C.C.E.L. (2d) 294 (Ont. C.A.)

[2] (2004), 69 O.R. (3d) 87 (Ont. C.A.)

The Bank ignored this information (at its peril) and terminated Ms. Montague's employment on July 24, 1991, one day after her appointment with the specialist. The Bank terminated Ms. Montague's employment without having made any inquiry as to the status of her disability and her attempt to obtain medical reports. The appeal upheld the trial judge's extension of the notice period as a result of the Bank's bad faith conduct, finding that:

> The trial judge focused on the timing of the termination and the characterization made by the respondent of the appellant's failure to report to work on July 22, 2001. There was ample evidence for her to conclude that the respondent fired the appellant precipitously, knowing of the pending medical visits but making no effort to find out what information they had yielded or when the resulting reports might be available. Moreover, the respondent treated the appellant as having abandoned her position, knowing that she had done nothing to suggest that. It was reasonable for the trial judge to assess this conduct as being unreasonable and in bad faith. As a result, Wallace [bad faith damages] was properly applied.

This case illustrates the importance of not simply relying on the insurance company to determine whether or not the employee is disabled. The employer's obligation is independent of the insurance company's and must always be borne in mind when managing a disabled employee.

Conclusion

The provision of LTD benefits and the duty to accommodate are separate legal issues and you should treat them as such. As an employer, you need to be mindful of your duty to accommodate, regardless of whether or not an employee is receiving long term disability benefits. Doing so will not only help you avoid litigation, it may also help you return employees to work sooner.

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About Lauren Bernardi

Lauren is a lawyer and human resource advisor with the Mississauga firm of Bernardi Human Resource Law. Lauren's advisory, training and educational services help managers direct their human resources in a strategically sound and legally appropriate manner. She is an accomplished and entertaining speaker on management and human resource issues.

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