

## Costco Experiences Frustration with Judge's Generous Returns Policy

By Thomas Gorsky  
Sherrard Kuzz LLP  
Employment & Labour Lawyers

Many employers have encountered challenges arising from an employee's extended absence from work due to health reasons. A recent case illustrates the pitfalls for employers who attempt to prematurely bring matters to a head by terminating employment.

### The Facts

Just short of 12 years into his clerical employment with Costco, Frank Naccarato became disabled in July, 2002, and was unable to continue attending at work. This absence continued four years, during which Mr. Naccarato received short term and then long term disability benefits. In 2006, Costco cut off Mr. Naccarato's other group benefits, but he continued to receive disability benefits. At the beginning of January, 2007, Costco made inquiries of Mr. Naccarato's family physician. The questions and responses were as follows:

Q: "Please provide basic details about Frank's current treatment plan (i.e. medication, referral to specialist, test results etc.) and progress.

A: "...Mr. Naccarato is still very depressed and poor function at home. ... Effexor ..., Remeron ..., Zyprexa ...

***"Patient was seen Dr. Paul - psychiatrist weekly who depart since ... Nov. 2006. I am try to find another psychiatrist for him to see ... for further treatment"***

Q: "Please provide a specific estimate of the duration of Frank's continuing absence and an approximate return to work date."

A: "At the present condition I can't predict when Mr. Naccarato will be able return to his job."

### The Law

It has been a longstanding rule in employment law that an absence due to illness or disability is permissible, without triggering an automatic right on the part of an employer to summarily terminate employment. Originally, health-related absence from work was considered to be a right which was implied by judges into the employment relationship. With the modern day enactment of human rights legislation, absence from work due to disability has become a statutorily protected right.

However, it has always been an accepted tenet that at some point, a prolonged absence from work becomes too substantial to impose a continued obligation on an employer to keep an employee's job

open. That point is known in law as “frustration”. If an employment relationship is deemed frustrated, that brings the relationship to an end, with an employer’s responsibility being limited to payment of the amount prescribed under employment standards legislation.

### **The Facts – *Continued***

Costco concluded from the doctor’s answers that the time had come when Costco could consider the employment relationship to have been legally frustrated, so it notified Mr. Naccarato and paid out his statutory entitlement. In making this decision, Costco believed it had the highest authority on its side, based on a Supreme Court of Canada decision which contained the following statement: “... *The employer’s duty to accommodate [a medically based absence from work] ends where the employee is no longer able to fulfill the basic obligations associated with the employment relationship for the foreseeable future.*”

Costco relied on the portion of the doctor’s note which said that he was unable to predict when Mr. Naccarato would be able to return to work. Costco emphasized the following factors:

1. The lengthy absence of five years.
2. In order to continue to receive disability benefits, Mr. Naccarato had taken the position that he was totally disabled from performing work in any occupation.
3. The doctor’s statement that he did not know when Mr. Naccarato would improve.

Mr. Naccarato did not accept Costco’s decision, and sued for wrongful dismissal. Unfortunately for Costco, the trial judge agreed with Mr. Naccarato.

### **The Court’s Decision**

On the facts before it, the Court found Mr. Naccarrato’s absence of nearly five years (perhaps as long as any absence ever judicially sanctioned in a wrongful dismissal claim) did not constitute frustration. The reason, the Court held, was as follows:

1. The legal burden of proof rested with Costco.
2. That part of the doctor’s note which stated he was trying to find another psychiatrist to work with Mr. Naccarato at least suggested a possibility that Mr. Naccarato’s condition would improve.
3. In light of the foregoing note, Costco ought to have followed up with the doctor(s) to request a statement of probability as to whether Mr. Naccarato would ever return to work.
4. Costco’s business requirements and workplace policies confirmed its recognition that employees could be off work and receiving disability benefits for lengthy periods of time.
5. Costco had not led evidence to demonstrate that it had incurred or would continue to incur costs by leaving Mr. Naccarato on its books as an employee.

In the result, the judge allowed Mr. Nacaratto's wrongful dismissal claim and awarded him 10 months' pay in *lieu* of notice (with a credit for statutory payments already received).

### **Lessons Learned**

There are several important lessons to be learned from the Court's decision in Costco.

When an employee has been off work for an extended period of time due to a health-related issue and receiving benefits, and a possible termination of employment is being contemplated, consider the following before taking any action.

It is important that a well-developed medical record be assembled. Ambiguities or incomplete medical notes or reports are likely to be resolved in favour of the employee. If an employee's physician is unable or unwilling to provide a sufficiently conclusive response, consider obtaining a medical report from an independent physician.

An employer should review whether it has a policy limiting the amount of time the employer will continue to maintain its premium payments. Even if there is no policy, it may be permissible to discontinue premium contributions after an extended absence. An experienced employment lawyer will be able to help an employer work through the analysis.

Even if an employer does not currently have an employee absent for health reasons, it is prudent to take proactive steps to create and implement a policy limiting the amount of time the employer will continue to maintain its premium payments. By having a policy in place proactively, an employer will have put itself in a stronger position (should the need arise) to argue the decision to cease premium payments was neither biased nor capricious. Rather, the decision could be justified as one taken in the ordinary course of business and consistently applied to all affected employees.

Finally, when an employee is off work for an extended period of time due to health reasons, whether or not receiving disability benefits, an employer should ask itself whether taking action to terminate the employment of the employee, is truly necessary to satisfy the employer's business imperatives. If the employee's absence is not materially affecting the employer, there may not even be a problem which needs fixing.

**Thomas Gorsky** is a lawyer with **Sherrard Kuzz LLP** a management-side employment and labour law firm in Toronto. Tom can be reached at 416.603.0700 (Main), 416.420.0738 (24 Hour) or by visiting [www.sherrardkuzz.com](http://www.sherrardkuzz.com).

The information contained in this article is provided for general information purposes only and does not constitute legal or other professional advice. Reading this article does not create a lawyer-client relationship. Readers are advised to seek specific legal advice from Sherrard Kuzz LLP (or other legal counsel) in relation to any decision or course of action contemplated.