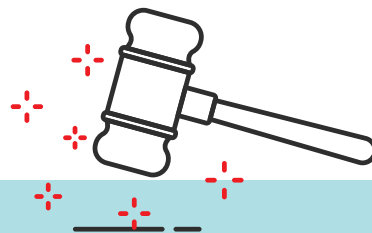


# B.C. RULING ADDS FURTHER CLARITY TO LTD SAGA

By *Jordan Fremont and Gabrielle Fortier-Cofsky*



**D**oes disability interfere with an organization's right to terminate employment and employer-provided benefits?

It's a question that commonly arises when it comes to employees who have been away from work and in receipt of long-term disability benefits for extended periods of time. Generally, and subject to applicable statutory entitlements respecting termination pay and severance, it is permissible to terminate an employee who's unable to work due to disability, either on account of innocent absenteeism (in the case of unionized employees) or frustration of contract (in situations involving non-unionized workers).

While there are differences between the tests applied to unionized and non-unionized employees, a key issue will always be whether a disabled worker has a reasonable prospect of recovering and returning to work in the foreseeable future. From that perspective, an employer seeking to terminate a disabled employee will need to establish that the individual is incapable of performing the essential duties of the position, with or without modifications to accommodate restrictions; is unable to perform any other productive work; and has no reasonable prospect of returning to work.

In addition, employers must consider the implications for long-term disability and other types of coverage since, at least in the unionized context, an employer's right to terminate a disabled employee in that case will depend on whether the dismissal deprives the worker of continued access to negotiated benefits specifically tied to the illness or disability. The question becomes whether disability benefits will continue despite the termination, an issue that requires a review of applicable disability policies and provisions in the collective agreement.

## Considerations for other benefits


As for other benefits, such as extended health and dental plans, the prevailing view is that they don't vest at the point an employee becomes disabled and that continued coverage doesn't impede an employer's ability to terminate employment. The British Columbia Labour Relations Board confirmed that view in its July 2017 decision in *Langley (Township)*

## HISTORY OF THE CASE

The *Langley* case dates back to 2013, when the township moved to dismiss three employees who had been receiving long-term disability benefits for up to 10 years. After the employees grieved the terminations, an arbitrator ordered their reinstatement in 2015. The B.C. Court of Appeal weighed in earlier this year, finding it didn't have jurisdiction to review the arbitration award. The matter then returned to the B.C. Labour Relations Board, which in July set aside the arbitration award and sent it back to the arbitrator for reconsideration. In August, the union unsuccessfully challenged the July decision.

*v. Canadian Union of Public Employees, Local 403*. The case dealt with an earlier arbitration decision on the township's termination of several employees who had been off on long-term disability for lengthy periods of time and who had been receiving group life, dental and health benefits during their absences. The terminations had no impact on the employees' entitlements to long-term disability benefits. The move did, however, mean an end to other group benefits as entitlement required ongoing employment.

The board, relying on undisputed evidence that the township had moved forward with the terminations based on the length of time the terminated employees had been away from work, set aside an earlier decision that had ordered reinstatement and continued group benefits coverage. In support of its decision, the board cited other cases that held that there's no general right to receive non-disability benefits simply because an employee is on long-term disability and that, in the absence of specific contractual language to oust that rule, entitlement to such coverage depends on the ability to fulfil the bargain of work for pay.

Helpfully, the board's decision in *Langley* confirms the understanding that employees on long-term disability don't have an automatic right to continued employment for the sole purpose of maintaining other employer-provided benefits coverage. Nonetheless, as always, the termination of an employee on long-term disability requires careful consideration. As such, an employer will first want to evaluate an employee's prospect for recovery and return to work, as well as opportunities for accommodation. 

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