

THE LONG STORIES SHORT

Two legal cases highlight 'red flags' and 'landmines' for employers with long-term disability coverage

Whether considering age eligibility or policy wording, recent rulings for employees in a pair of Ontario cases are reminders to employers to review their long-term disability offerings.

84%

of Canadian employers don't offer LTD coverage to employees who are over age 65.

80%

More than continue to offer the same dental and health benefits.

30%

of employers have a formal policy regarding employee health coverage past age 65.

55%

expect their over-65 employee base to grow to more than 5% of their workforce within the next five years.

Source: Aon survey, 2016

When I'm 65

Ontario employers may no longer have the option to reduce or eliminate health and life insurance benefits for employees aged 65 or older, following the Human Rights Tribunal of Ontario's decision in *Talos v. Grand Erie District School Board*.

In May, the tribunal ruled the school board had violated the Canadian Charter of Rights and Freedoms prohibition against age discrimination by distinguishing between benefits available to workers under and over age 65 who performed the same tasks.

The decision raises red flags for employers whose plans terminate or change for workers at age 65, says Judy Buckley, vice-president of benefits and health at Accompass Inc. "Any employee affected can now go to the tribunal for relief and initiate what's almost certainly going to be a costly exercise. Certainly, anyone who is currently between the age of 65 and 70 will want their benefits back, likely on a retroactive basis. Plaintiffs' lawyers may also see a fruitful opportunity to file class actions."

But the full impact of the decision is limited and has yet to be determined, according to Stephen Gleave, a lawyer at Hicks Morley Hamilton Stewart Storie LLP, who represented the school board. "The decision only applies to the parties involved on the facts of the particular case," he says. "And the adjudicator has yet to decide whether any remedy is appropriate or necessary."

The case originated with the Grand Erie District School Board's policy of terminating employees' group health, dental and life insurance benefits at age 65, even when they continued working. The policy relied on the exception permitted by the Ontario Human Rights Code that allows differential benefits plan treatment on the basis of age for those under 18 or over 65.

The tribunal concluded, however, that the exempting provision violated the prohibition against age discrimination in the Charter of Rights and Freedoms. Key to the ruling was actuarial evidence provided by government experts establishing "that there are reasonable ways to protect older workers from discrimination in relation to workplace benefits, while protecting employers from the expense of unduly costly health-care benefits and life insurance plans."

Although the decision only affected the age-65 threshold, it's merely a matter of time before thresholds for even older employees are tested, warns Buckley.

"There are a large number of plans that have age 70 as the termination point," she says. "And while the actuarial evidence may show that employers are justified in changing or terminating benefits at age 70, there's currently a lot of ambiguity for employers about just where the safety zone is."

While Buckley acknowledges the precise impact of the decision hasn't yet emerged, she's also advising employers to consider the risk factor.

"We're advising our clients to look at the issue, do a cost analysis and figure out what's right for them as employers in terms of continuing the practice of changing benefits based on age," she says.

As it turns out, with more workers staying in the workforce past age 65, some employers have already been considering these issues.

"Quite apart from the *Talos* decision, some employers have been thinking of what an aging workforce means for them and their benefits programs," says Stephanie Kalinowski, a pension and benefits lawyer at Hicks Morley. "Among the



By *Julius Melnitzer*

considerations is how they want to position themselves as employers, what their competitors are doing and the impact on their overall compensation costs.”

The case can’t be appealed until the adjudicator makes a final decision on the appropriate remedy.

More than words

In another recent ruling related to LTD benefits, the Ontario Court of Appeal overturned a decision in the case of Lenard MacIvor against his former employer Pitney Bowes Inc.

In 2005, MacIvor suffered severe back and traumatic brain injuries while attending a company-sponsored event in Costa Rica. As a result, he missed four months of work. When MacIvor returned to the workplace, his performance suffered, even though Pitney Bowes attempted to accommodate his injuries.

Three years later, MacIvor resigned. He found similar employment but lost the job in less than a year as a result of performance problems relating to his brain injuries. His new employer’s insurer refused coverage on the basis the injury had occurred before he commenced employment.

Two years after leaving Pitney Bowes, MacIvor filed a claim under the company’s LTD policy. When the insurer denied the claim, MacIvor sued.

During the trial, there was no dispute that MacIvor had been totally disabled from the outset, though the severity and permanent nature of the injury wasn’t originally apparent. Still, the trial judge dismissed the claim, concluding that the wording of the termination of coverage clause — “your coverage will terminate on . . . the day on which you cease to be actively employed” — applied to former employees injured during the course of their employment but who didn’t submit their claims until after they left.

The appeal court, however, reversed the trial decision, ruling the language in the policy was intended to prohibit claims for injuries that arose after termination but not claims that originated while the employee was on the job. The fact that MacIvor didn’t

discover the full extent of his injury until after he left Pitney Bowes didn’t bar him from coverage under the company’s policy. Here, the court observed that the policy specifically provided that benefits would be paid if an employee became “totally disabled while covered under the long-term disability coverage.”

Furthermore, the policy didn’t contain exclusionary language that terminated coverage for undiscovered disability claims occurring during the course of employment.


“To so conclude would leave former employees, like the appellant, in the untenable position of having no disability coverage from either their former employer or any new employer,” stated the court. “Such a result would be contrary to the very purpose of disability insurance and the plain meaning of the coverage provision.”

Shana French, an employment and labour lawyer at Sherrard Kuzz LLP, points out the court may have gone further than it otherwise might have because of the severity of MacIvor’s injury. “Generally, courts give more leeway to people with cognitive injuries as opposed to something like a bad back,” she says.

The decision parallels workers’ compensation policies, adds French.

“Under workers’ compensation, employees can go back three years in making claims, even after they’ve left a company,” she says. “Essentially, the issue goes back to the questions of who was the employer or insurer on the date the injury happened.”

Still, cases like *MacIvor v. Pitney Bowes* and *Talos v. Grand Erie District School Board* can be “landmines” for plan sponsors.

“Sponsors should be very careful to ensure that the policy they buy is consistent with their plan design and actuarial calculations, and that intended exclusions are dealt with specifically and clearly,” says French. 

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LTD AND THE CANADIAN ECONOMY

LTD rates were expected to increase by **4.7%** in 2018 compared to the previous year, driven by the strengthening Canadian economy, according to research published by RBC Insurance Services Inc. The finding marked a significant rise from 2017, when the same research predicted an uptick in the Canadian economy would help boost long-term disability rates by **2.1%** by the end of the year.