

Employer Liability in the Administration of Benefit Plans

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Employers are facing increasing claims as a result of their failure to provide employee benefits and/or their negligence in the handling of benefit issues.

Summarized below are some of the areas where liability may arise.

1. Obligation to Extend Benefit Coverage Upon Termination of Employment

Absent an express term to the contrary, most contracts of employment contain an implied provision that they can only be terminated for just cause or, in the absence of just cause, upon reasonable notice. The amount of reasonable notice that must be given varies from employee to employee as it is based upon factors which affect the employee's ability to find comparable employment such as the employee's age, length of service, level of responsibility and salary. (See *Bardal v. The Globe & Mail*, [1960] O.W.N. 253).

If an employer fails to provide reasonable notice of termination, it is liable to an employee for all damages suffered as a result of that failure. Normally these damages are the value of the employee's lost salary and benefits during the notice period less the amount that the employee earns during that period from alternative employment.

The *Employment Standards Act, 2000* prescribes minimum notice periods applicable to all employees. The length of these periods is based upon the employee's years of service with the employer. Under the *Act*, employers are required to provide a minimum period of salary continuance and benefit coverage. (This statutory notice period is usually less than the reasonable notice period required by common law). During this minimum notice period, employees are "deemed" to be in the active employ of their

employer for the purposes of interpreting the policy of insurance and establishing eligibility for coverage by virtue of Section 62(1) of the *Act*.

Some employee benefits may not be continued after the expiration of the statutory notice period because, by their terms, they are available only to employees in the active employ of the company. The most common example of this type of insurance is long term disability.

Normally employers and employees negotiate severance packages at the time of termination. In these severance packages, it is clearly stated that certain benefits will not be continued after the expiry of the statutory notice period. In exchange for the severance package, employees are usually required to sign a release. In this way, the employer is protected from any further liability should the employee have a claim under one of these discontinued benefit plans.

However, situations do occur where the parties are not able to successfully negotiate a severance package. In these cases the employee may sue the employer for damages for wrongful dismissal and claim all salary and benefits that the employee would have received had the employee been given reasonable notice of termination. If the employee becomes disabled during the notice period, the employee's claim for damages could include a claim for all disability benefits the employee would have received had the employee been given reasonable notice. In cases of catastrophic disabilities these damages can be enormous.

For example, in *Prince et al. v. The T. Eaton Co. Ltd.* (1990), 32 C.C.E.L. 174 (B.C.S.C.) the plaintiff became disabled after termination and the cancellation of his group long term disability coverage. As the disability occurred during the reasonable notice period, the trial judge allowed the plaintiff's claim against his employer for the disability benefits he would have received but for the cancellation of the insurance coverage. The trial judge held at page 185:

If there is no overriding express provision, the contract of employment is taken to contain an implied term that each party must give reasonable notice of termination to the other. The implied term is not a term to the effect that the employer may give pay in lieu of notice: see *Dunlop v. British Columbia Hydro & Power Authority* (1988), 23 C.C.E.L. 96, [1989] 2 W.W.R. 518, 32 B.C.L.R. (2d) 334 at 338 (C.A.). Compensation for the period of reasonable notice is not limited to severance pay in lieu of salary. As stated above, it extends to actual monetary loss sustained from deprivation of fringe benefits that would otherwise have been enjoyed during the notice period.

On appeal the British Columbia Court of Appeal affirmed the trial judge's assessment of liability at (1992), 41 C.C.E.L. 72 (B.C.C.A.), but held that the appropriate measure of damages was the loss of the income stream from the disability benefits reduced to whatever extent was necessary to take into account the plaintiff's likelihood of recovery and his life expectancy.

The decision of the Ontario Superior Court of Justice in *Piolo v. Calian Technology Services* (2000), 48 O.R. (3d) 275 cast some doubt as to whether the reasons in the *Prince* case would continue to apply in Ontario. In that case, the court denied a former employee's claim for damages for the loss of long term disability benefits during the notice period even though the court was satisfied that the employee had become disabled during that time. The court held that the LTD policy held by the employer terminated coverage at the time of termination of employment. The court noted that this coverage was standard in the industry and that the employee was aware of the terms as they were set out in the employee handbook. To date this reasoning has not been adopted in any other decisions.

More recently, in *Hussain v. Suzuki Canada Ltd.* (2011), 100 CCEL (3d) 295, the Ontario Superior Court of Justice held that if a benefits carrier will not continue benefit coverage during the notice period, the employer must provide the employee with the value of the benefits either at the employer's cost or at the cost to the employee of replacing them.

It is important to limit liability for benefits upon termination either through a carefully worded employment contract or by purchasing plans that can be converted to private plans on termination.

2. Misrepresentation by Employer of Employee Benefits

Employers have an obligation to describe the extent of employee benefit coverage accurately. Employer liability can occur both in situations where the benefits summary booklet inaccurately describes the terms of the benefit policies from the insurance company, and, where an employer misrepresents the nature of benefits in an offer of employment or a contract of employment. An employee has a claim for the benefit coverage stated in the contract regardless of the terms of the actual benefits policy. If the terms of the policy are not the same as those represented by the employer, the employer may face liability for the coverage described in the contract of employment

The case of *Deraps v Labourer's Pension Fund of Central and Eastern Canada*, [1999] OJ No. 3281 (Ont. C.A.) is an interesting example of this principle. The union maintained a pension fund for its members. Mrs. Deraps, the wife of a union member signed a waiver whereby she waived all rights to spousal pension benefits after her

husband's death. After her husband's death, Mrs. Deraps sued the pension plan claiming that no one had explained the waiver to her and that she did not understand the consequences of signing it. The court found that the plan's advisor owed a duty of care to Mrs. Deraps to provide her with "complete and clear information". It awarded Mrs. Deraps damages equal to the amount of pension income she would have received had she not signed the waiver.

The case of *Smith v. Casco Inc.*, 2008 CarswellOnt 8437, aff'd at 2010 ONSC 2584, aff'd at 2011 ONCA involved a widow who had signed a waiver in which she waived her right to a spousal survivor pension benefit. Following the death of her husband, the plaintiff sued her husband's former employer for the survivor pension she would have received had she not signed the waiver.

The plaintiff gave evidence at trial that she signed the document without reading it carefully because her husband indicated that it was necessary to enable him to retire. The trial judge found in favour of the widow on the basis of negligent misrepresentation because the company owed the widow a duty of care to clearly communicate to her the significance of signing the waiver.

An appeal to the Divisional Court was dismissed but only because the form of the waiver she signed did not comply with a statutory requirement. The court noted that but for the defect in the waiver, it would have allowed the appeal because the widow did not read the waiver form and ignored the company's advice to get independent legal advice. The Ontario Court of Appeal dismissed a further appeal as it agreed with the Divisional Court that the form of the waiver was defective.

Recently there have also been several cases involving misrepresentations about employees' entitlements on retirement. In *Gauthier v. Canada (Attorney General)*, [2000] N.B.J. No. 143, the New Brunswick Court of Appeal awarded damages to a former R.C.M.P. officer who made a decision to take early retirement based on an inaccurate pension calculation provided to him by his employer.

An employer's failure to pay premiums for benefit coverage may lead to liability far in excess of the value of those premiums. Once an employer has represented to its employees that it is providing certain benefit programs, those programs must be provided. If they are cancelled because of the employer's failure to pay premiums, an employee may have a claim against the employer for all of the benefits it would have received had that premium been paid. The Court of Appeal's decision in *Pluzak v. Gerling Global Life Insurance Co.*, [2001] O.J. No. 34 has held that there is no relief from forfeiture available in a case involving the failure to pay premiums on a term life insurance policy.

3. Liability for Negligence in Administering Benefit Policies

Employers often act as administrators of benefit policies on behalf of insurance companies. In this respect, they are acting as agents for the insurers. Employers often deliver policy booklets to employees, assist in completion of application and claim forms and collect premiums on behalf of the insurance company.

In *Branco v. American Home Assurance Company*, 2013 SK2B 98, the Queen's Bench for Saskatchewan found an employer liable to an employee for negligence on two grounds:

1. It failed to notify its long term disability insurer of an employee's claim; and
2. Upon notification from its insurer that the plaintiff's workers' compensation equivalent benefits had been cut-off, it cut off the employee's health benefits without taking steps to determine if it was appropriate to do so.

The court reasoned that because the plaintiff continued to be eligible for disability benefits, the employer remained liable to the employee for health benefits.

Insurers and employees may be jointly and severally liable for any errors or omissions that occur in the administration of benefit plans.

Traditionally, insurers could only recover a small amount from employers who were negligent in the administration of benefit plans. Recovery in such cases was limited to the premiums that the insurer had not been paid. This rule was changed in *Pittman v. Manufacturers Life Insurance Company* (1990), 48 CCLI 25 (Nfld. C.A.). Mr. Pittman applied for optional group life insurance for his wife through his employer. It was his employer's responsibility to receive such applications on behalf of the insurer. The employer lost the application and never forwarded it to the insurance company. When Mr. Pittman's wife died, he brought a claim for payment under the policy. The Newfoundland Court of Appeal awarded judgment to Mr. Pittman. The court found that the insurance company would have accepted the application if it had received it. As the insurer had made the employer its agent for the purpose of receiving the application, the insurer and the employer were liable.

The law now allows insurers to claim indemnification from employers in these situations. Conceivably the whole of the loss could fall upon the employer depending upon which party (the insurer or the employer) was at fault.

It is also possible that employees administering benefit plans on behalf of their employer may find themselves personally liable for errors in administering benefit plans. In *Alper Developments Inc. v. Harrowston Corporation et al.* (1998), 38 O.R. (3d) 785, the

Ontario Court of Appeal held that employees could be liable for breach of duty of care in cases where they fail to obtain appropriate insurance coverage or fail to properly report a claim.

4. Employer Liability Under Collective Agreements

In unionized settings, collective agreements usually make some provision for employee benefits. These provisions take a variety of forms. Some simply provide for the payment of the premiums for benefit coverage. However, others contain provisions listing the extent of the coverage to be provided to employees.

Arbitrators have classified benefit plans in collective agreements into four categories (*Oakville (Town) v. CUPE, Local 136* (1997), 68 LAC (4) 117).

1. The benefit plan is not mentioned in the collective agreement;
2. The collective agreement specifically provides for the payment of benefits in certain circumstances;
3. The collective agreement provides only for the payment for the premiums for the benefit plans; and,
4. The policy or insurance document is incorporated by reference into the collective agreement.

Benefit plans falling within categories 2 and 4 must be enforced through the grievance procedure.

An employer may be found liable to an employee if the benefits carrier does not provide the employee with the benefits described in the group policy. The Supreme Court of Canada has made it clear in *Weber v. Ontario Hydro*, [1995] 2 S.C.R 929 that these issues must be dealt with through the grievance procedure. As a result, an employer may be found liable to an employee for benefits even after an insurance company has rejected an employee's claim.

Traditionally employers were of the view that if the collective agreement fell under category 3, they were immune from liability as long as they paid the required premium for benefits coverage. Employees had to address all other issues in connection with benefits with the insurance company. This is not necessarily the case.

In the case of *Kingston v. Kingston Professional Firefighters' Assn.* (2012), 222 LAC (4th) 165, the City of Kingston was bound to a collective agreement which required it to pay 100% of the premium cost for Blue Cross coverage or equivalent coverage. The union grieved that some of the coverage provided was not equivalent to Blue Cross

coverage. The arbitrator held the matter was arbitrable as the dispute was over whether the plans complied with what was stipulated on the collective agreement.

In *Mississauga v. Mississauga Professional Firefighters' Association* (2012), 222 LAC (4th) 209, the City of Mississauga dealt with a situation it could not have foreseen.

Under its collective agreement, the City committed to contribute 100% of the cost of an accidental death and dismemberment benefit. The policy purchased by the City required that the death occur within 1 year of the accident in order for benefits to be paid.

The grievors, who were all firefighters, died of colorectal cancer. Many years after the deaths of the firefighters the *Workplace Safety & Insurance Act* was amended to recognize that colorectal cancer was an occupational disease of firefighters. After this amendment the union filed a grievance claiming benefits under the accidental death and dismemberment policy.

The arbitrator found the City liable for the amount that would have been paid by the insurer but for the 1 year time limit because even though it paid the premium for the accidental death and dismemberment coverage, the coverage contained a time limit that was not provided for in the collective agreement.

5. Vested Rights

Cancellation of benefit plans can also raise a number of liability issues. The Supreme Court of Canada held in *Re Dayco (Canada) Ltd. v. C.A.W. Canada* (1993), 102 D.L.R. (4th) 609; (S.C.C.) that retirement benefits offered under a collective agreement vested in the employee at the time of retirement such that the employer could not cancel these benefits. The Supreme Court of Canada held that this was the case even though there was no longer a collective agreement in effect which provided for these rights.

However, in the more recent decision of *Mercury Graphics* (2010), 83 CCEL (3d) 285, an arbitrator held that an employer was not obliged to provide benefits that had vested under a collective agreement that had expired. The collective agreement had contained a provision that employees were entitled to severance pay of 2 weeks' pay for every year of service.

The collective agreement had terminated as a result of a strike/lockout. Subsequently, the employer closed its plan and terminated 85 employees. The union filed a grievance requesting severance pay.

An arbitrator held the matter was not arbitrable because in order for the severance pay to become a vested right there would have to be a crystallizing event such as severance before the collective agreement expired.

6. Ontario Human Rights Code

The *Ontario Human Rights Code* prohibits discrimination in employment based upon race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, record of offences, marital status, same-sex partnership status, family status and disability.

The *Code* provides that it is not a violation of the right to equal treatment with respect to employment where employment is denied or made conditional because enrolment in a group insurance plan is required even though the plan makes a distinction based upon a prohibited ground of discrimination.

The *Code* also exempts some contracts of group insurance provided they comply with the *Employment Standards Act, 2000*.

However, the eligibility requirements of some benefits plans may still be found to be discriminatory. In *Thornton v. North American Life Insurance* (1992), 17 CHRRD/481 an employee was diagnosed by his doctor as being HIV positive, within the first 90 days of his employment. Six months later, he developed the symptoms of an AIDS related illness and was no longer able to work. The insurer denied the employee any LTD benefits on the basis that the insurance policy contained an exclusionary clause for pre-existing illnesses and illnesses for which the applicant received medical care within the first 90 days of employment. A Board of Inquiry appointed under the *Human Rights Code* found that the insurance company did not violate the *Code* and acknowledged that it would be uneconomical for an insurance company to be forced to provide coverage in this case. The decision was upheld by the Divisional Court at (1995), 28 C.C.I.L. (2d) 4. The employer in this case was a small employer having fewer than 100 employees. The cost of providing LTD coverage to persons with pre-existing illnesses was prohibitive. However, one wonders what the result would have been if the employer had been a larger employer.

As the cost of benefit coverage increases, many insurance companies and employers are looking at ways of controlling costs by limiting the type of benefit coverage provided. This is especially true in the case of drug plans. Increasingly these plans are limiting the types of drugs that will be paid for by the plan. These limitations have not yet been challenged in Canada, but they have been in the United States. For example, in *Krauel v. Iowa Methodist Medical Center* (1996), 95 F (3d) 674, a woman claimed that her medical plan discriminated against her based on handicap because it excluded coverage for fertility treatments. The court denied her claim holding that infertility was not a disability. It stated that disabilities were conditions that “limit a major life activity” such as cancers, muscular dystrophy and kidney diseases. One can see that it is only a

matter of time before employees challenge their insurer (and their employer) because a policy does not cover certain treatments for these disabilities.

7. Fiduciary Obligations

Employers have also been found liable for failure to bring the terms of benefit policies to the attention of their employees.

In *Card Estate v. John A. Robertson Mechanical Contractors (1985) Ltd.* (1989), 26 CCEL 294, (Ont. H.C.) an employee was terminated without being told that his life insurance was terminated or that he had 31 days to convert the group policy to an individual policy. The court found that as a result the employer was liable to the employee's estate when he died during the notice period.

In the case of *Tarailo et al v. Allied Chemical Canada Ltd. et al.* (1989), 26 C.C.E.L. 2902; (Ont. H.C.), the court held an employer liable after it dismissed an employee who suffered from mental illness. The court found that the employer had grounds to dismiss the employee as he was incapable for performing his job. However, the court did find the employer was liable to the employee in negligence on the basis that it owed a duty to the employee to assist him in completing forms for LTD benefits. As a result, both the employer and the LTD carrier were held liable for the disability benefits the employee should have received but for the breach of duty.

In *Menard v. Royal Insurance Co. of Canada* (2000), 1 C.C.E.L. (3d) 96, an employer was found liable to a former employee for disability benefits after the employee resigned citing an inability to cope with an increased workload and stress. The employee had a history of mental illness. The court held that the employer, knowing of the employee's medical history, had a duty to inform her of the availability of disability benefits.

The Ontario Court of Appeal has expressed some doubt as to the extent of an employer's duty under the *Tarailo* decision. In *Beaird v Westinghouse Canada Inc.* (1999), 41 C.C.E.L. (2d) 167, a disabled employee sued his former employer for its failure to assist him in obtaining long term disability benefits under a policy maintained by the company for its employees. In the end it was not necessary for the court to determine that issue. The court did, however, express a view about the *Tarailo* decision. It held that the real basis for liability in *Tarailo* was a contractual one set out in the benefits booklet given to employees. The employer had undertaken to assist employees with their applications for disability insurance. As such, the employer became the agent of the group insurer for this limited purpose. The Court has left open the issue of whether an employer, absent a contractual term, owes a duty to its employees to support and assist in their claims under benefits policies.

8. *Employment Standards Act, 2000*

Section 44 of the *Employment Standards Act, 2000* prohibits an employer from providing a benefit plan that treats employees, beneficiaries, survivors or dependants differently because of their age, sex, or marital status except as prescribed by regulation. The Regulations do permit some actuarially based differentiation based on sex, marital status and age.

This *Act* is enforced by the Ministry of Labour at no cost to the employee. The Director of Employment Standards is given the authority to refer any suspected violation of this provision to the Ontario Labour Relations Board for determination. The Board in turn is given broad remedial powers in ensuring compliance with the *Act*.

SUMMARY

As the relationship between employers and employees become more complex we can expect to see increasing obligations being placed upon employers towards their employees. In the field of employee benefits, employers are expected to administer the benefit plans fairly, accurately and efficiently. A failure to do so may lead to liability far in excess of the cost of providing the appropriate benefit coverage.