

B.C. Court of Appeal upholds provision terminating LTD benefits to employees capable of working but unable to find alternate employment

When is an employer entitled to terminate long term disability (LTD) benefits to a disabled employee without running afoul of its human rights obligations? This issue has been considered recently in *British Columbia Government and Service Employees' Union v. British Columbia* (March 7, 2005), a case before the British Columbia Court of Appeal that concerned the grievance of an employee whose LTD benefits were terminated after unsuccessful attempts were made to find her alternate employment with the employer. At issue in the case was a scheme under which, after two years of being on LTD benefits, employees who were incapable of returning to their former positions but were not disabled from all occupations could apply to the Rehabilitation Committee to search for alternate employment. If no employment was found by the end of six months, the employees' benefits were terminated. By contrast, employees who were incapable of performing any employment were entitled to continue receiving LTD benefits.

At arbitration, the union argued that the relevant comparator group was that of all active employees and that the six-month limit on the search for alternate employment was discriminatory because it caused the disabled person to be out of work after the period had expired. It also asserted that the employer would not incur undue hardship if it extended the search beyond six months. The employer countered that the rule had no discriminatory impact because the relevant comparator group was not active employees but, rather, other disabled employees.

ARBITRATION BOARD: SIX-MONTH LIMIT ON PLACEMENT NOT DISCRIMINATORY

The majority of an arbitration board agreed with the employer, holding that the six-month rule was not discriminatory. The purpose of the scheme in question, the board held, was to return disabled employees to work. In the board's view, the appropriate comparison to be made was between employees who were unable to return to their previous employment but who could find other positions and employees who were unable to return to their previous employment and could not be placed elsewhere. The board held that employees who could not be placed in other positions were not, because of their particular disability, treated any more harshly than those disabled employees who could be placed.

COURT OF APPEAL: CORRECT COMPARATOR GROUP USED

By a majority of two to one, the Court of Appeal upheld the board's decision. It held that the board had been correct in determining that the scheme was not discriminatory because its purpose was to encourage the return to work of disabled employees and, accordingly, the appropriate comparator group was those disabled employees who were incapable of returning to their former positions but were able to be placed in new ones.

The Court relied heavily in its reasoning on the decision by the Supreme Court of Canada in

Granovsky v. Canada. In that case, the plaintiff had incurred a back injury that had caused him to be irregularly employed. Thirteen years later, he applied for a permanent disability pension under the Canada Pension Plan but was refused because he had failed to make the required number of contributions to the Plan over the previous ten-year period. He challenged the "drop-out" provisions which permitted severely and permanently disabled persons to have their periods of disability not counted for purposes of calculating contributions to the Plan, while those suffering lesser disabilities had to contribute to the same level as able-bodied workers for a ten-year period before they applied for the pension. The Supreme Court of Canada had ruled against the plaintiff, holding that the purpose of the "drop-out" provisions was to facilitate access to the disability pension for persons with permanent disabilities. Workers who were able to meet the contribution requirements before they became disabled and applied for the pension had no need for the "drop-out" provisions. By contrast, the persons who benefited from the "drop-out" provisions were those who were not only permanently disabled at the time of the application but also during the contribution period. Accordingly, the Court held, those persons were the appropriate comparator group for the plaintiff.

Similarly, the B.C. Court of Appeal held that the purpose of the benefit was to facilitate the return to work of disabled employees. Just as in *Granovsky*, the appropriate comparator group was not the broader category of working employees but, rather, the group of employees enjoying the benefit – that is, disabled employees who were unable to return to their former employment and who had been placed in other positions within the six-month period. It had not been shown that the grievor's disability was the basis for the distinction drawn between her and those for whom alternate employment had been found. The union was denied leave to appeal to the Supreme Court of Canada on September 22, 2005.

In Our View

The difficulties of adjudicating discrimination cases can be seen in the dissenting opinion delivered in this case. The dissenting judge held that the arbitration board had failed to focus on the real issue in the case: the termination of the grievor's employment because of disability. In that judge's view, the proper question about the six-month limit on locating alternate employment was not whether it was discriminatory but whether it could be extended without causing the employer undue hardship. Given that there was no dispute that the grievor was disabled and that she had lost her employment due to her disability, the dissenting judge held that this was a clear *prima facie* case of discrimination and that there was no need to engage in the analysis of the appropriate comparator group.

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