

# LTD benefits and terminations demystified

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forward thinking at work™



# overview

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- circumstances for terminating someone on LTD benefits
- possible implications of LTD benefits on package
- employer obligations during notice period
- minimizing the risk of wrongful dismissal damages



# overview

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- part 1: LTD implications in terminations
- part 2: terminating employees on LTD



# part 1: LTD implications in terminations



# long term disability benefits

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- provided for in employment contract
- income replacement
- start 17-26 weeks after disability



# long term disability benefits

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- to age 65
- typically 55-75% of earnings
- premiums paid by employee, employer or both



# termination obligations

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- provide notice of termination
  - ESA, common law or contractual
  - continue benefits during notice period
    - includes LTD



# issues

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- many LTD insurers won't cover employees not "actively" at work
- LTD coverage typically ends at end of ESA notice period
- potential breach of legal rights





# consequences

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- employer effectively becomes self insurer for LTD coverage
- employer liable for LTD benefits if terminated employee becomes disabled



# Egan v. Alcatel Canada

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- 21 month employee
- 40 years old
- terminated without cause July 2002
- paid ESA notice and severance = 12 weeks
- benefits terminated after 12 weeks, including LTD



# Egan v. Alcatel Canada

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- disabled due to depression October 2002
- totally disabled until October 2003
- sued for wrongful dismissal and benefits, including LTD



# Egan v. Alcatel Canada

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- wrongfully dismissed
  - 9 month notice period
  - inducement



# Egan v. Alcatel Canada

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- awarded:
  - full salary: July to Oct 2002
  - STD benefits (60%): Oct 2002 to Jan 2003
  - LTD benefits (60%): Jan 2003 to Oct 2003
- employer liable for salary or benefits



# Brito v. Canac Kitchens

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- 24 year employee
- 55 years old
- terminated without cause July 2003
- paid ESA notice and severance = 32 weeks
- benefits terminated after 8 weeks,  
including LTD



# Brito v. Canac Kitchens

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- re-employed August 2003
  - lower salary
  - no disability benefits
- disabled due to cancer November 2004
- sued for wrongful dismissal and benefits, including LTD



# Brito v. Canac Kitchens

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- wrongfully dismissed
  - 22 month notice period to *May 2005*
- awarded:
  - difference in pay: Aug 2003 to Nov 2004
  - full pay: Nov 2004 to *May 2005*





# Brito v. Canac Kitchens

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- awarded:
  - disability coverage for 22 month notice period
    - STD for 17 weeks = \$9000
    - LTD to age 65 = \$200,000
- employer liable for both salary and LTD benefits



# practical tips

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- consider working notice
- continue STD and LTD during ESA notice period at minimum
- consider if employee likely to need LTD during remaining notice period
- bridge coverage with insurer



# practical tips

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- help employee obtain replacement benefits
  - provide information
  - offer extra \$\$ for premiums
- get a release
- use employment contracts



# **part 2: terminating employees on LTD**



# disability leaves

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## can you terminate?

- what do you gain?
- what is the risk?
  - human rights
  - wrongful dismissal claims
  - cost of lost benefits to employee
  - punitive damages



# long term disability

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- restrictions due to illness or injury
- prevents employee from:
  - first 2 years: performing essential duties of job
  - after 2 years: performing any job qualified for or can become qualified for with training



# the sick or disabled employee

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- can you terminate employee on LTD?
  - frustration of contract
  - legitimate business reasons
- do you need to provide a package?



# frustration of contract





# frustration of contract

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- definition:
  - *contract incapable of being performed through no fault of either party*
- possible wrongful dismissal claims even if employee unable to work for years
- consider each situation individually



# Duong v. Linamar Corp

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- 7 year employee
- workplace injury
- unable to return to work
- refused modified duties
- received LTD benefits



# Duong v. Linamar Corp

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- contract frustrated
- 3 years post injury with no improvement
- even with rehab:
  - no evidence in foreseeable future of return to work
  - employment agreement did not provide that contractual relationship would continue in spite of disability



# Duong v. Linamar Corp

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- was given opportunity to provide medical evidence to the contrary but did not do so
- LTD coverage did not mean employment contract indefinite
- Court of Appeal agreed with lower court's decision = contract frustrated



# Naccarato v. Costco

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- 17 year employee
- absent 5 years
- received STD and LTD benefits
- return to work date unknown



# Naccarato v. Costco

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- contract not frustrated
- evidence did not support no reasonable likelihood of returning in foreseeable future
- Costco failed to seek medical evidence re: likelihood of return to work
- still under doctor care and seeking treatment
- no business hardship/disruption



# practical tips

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- consider:
  - terms of contract
  - length of employment
  - permanent or temporary illness
  - prospect of recovery
  - disability benefits offered



# practical tips

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- do not act in haste
  - allow employee sufficient time to provide medical evidence
- consider all forms of accommodation
- don't rely too heavily on LTD decision





# practical tips

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- confirm LTD benefits can continue
- still owe ESA notice and severance
  - note: years of service during disability leave considered active service
- no common law notice as of yet



# severance package considerations



# severance package considerations

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- can LTD payments received by the employee during the notice period be deducted from pay in lieu of notice?



# Sylvester v. British Columbia

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- employee terminated while on LTD
- offered severance package with LTD benefits deducted
- employee disagreed about deduction and sued



# Sylvester v. British Columbia

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- disability benefits can be deducted from pay in lieu of notice when:
  - benefit plan established solely by the employer
  - employment contract stipulates disability benefits substitute for regular salary



# Sylvester v. British Columbia

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- employees dismissed while on LTD and employees dismissed while working are:
  - *“both entitled to damages consisting of the salary the employee would have earned had the employee worked during the notice period”*



# practical tips

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- may be able to deduct LTD benefits from pay in lieu if:
  - employer paid premiums
  - employer is self-insured
  - contract specifics
- no deduction if:
  - employee paid premiums
  - not addressed by contract



# practical tips

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- insurance policies normally reduce benefits by severance payments
- consider paying out package after LTD stops







# questions

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terminations demystified