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• ATTENDANCE MANAGEMENT AS A METHOD OF DISABILITY MANAGEMENT: THE VALUE AND LIMITATIONS* •

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INTRODUCTION

Employers are well-aware of the challenges arising from the application of the duty to accommodate. Those challenges are made all the more difficult by recent developments in the case law, particularly in the area of chronic innocent absenteeism.

Absenteeism is either culpable or innocent. Culpable absenteeism refers to absences for which the employee is responsible and for which there is no reasonable excuse. Common examples include sleeping in and failure to arrange transportation to get to work. Innocent (non-culpable) absenteeism, on the other hand, refers to absences caused by circumstances that are outside of the employee's control. This includes absences due to illness or disability, or absences that are otherwise justifiable.

The focus of this paper is on innocent absenteeism due to disability and the implications for employers. This paper will discuss recent developments in the law and provide recommendations with respect to maintaining attendance management programs. We begin with an explanation of the legal framework, including a definition of the term "disability". This general discussion will be followed by a review of two recent cases dealing with chronic innocent absenteeism that assist in defining the nature of employer and employee obligations in this area. Finally, we discuss the implications of the decisions on the workplace generally and attendance management programs specifically.

LEGAL FRAMEWORK

Both the *Canadian Human Rights Act*[1] and the British Columbia *Human Rights Code*[2] prohibit discrimination based on disability. Generally speaking, federal labour, employment and human rights legislation applies to employers in industries within federal jurisdiction, such as federal departments, agen-

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cies and Crown corporations; chartered banks; and in the areas of aviation and interprovincial communications, telephone and transportation. Provincial legislation is applicable to most Canadian employees. Again, generally speaking, provincial labour, employment and human rights legislation governs employment with the provincial government; local and municipal governments; schools and universities; hospitals and medical clinics; and private businesses not specifically within federal jurisdiction.

It is contrary to federal and provincial human rights legislation to "refuse to employ or continue to employ" a person because of a disability.[3] Where an employee believes that there has been discrimination on the basis of a disability, various remedies may be sought from the appropriate Human Rights Tribunal. The onus is on the employee to establish a *prima facie* case of discrimination. If the *prima facie* case is established, the onus then shifts to the employer to show that the terms of employment were altered because of a *bona fide* occupational requirement ("BFOR"). If the employer is successful in establishing a BFOR defence, the employee's complaint is dismissed. If the employer is unsuccessful in establishing the BFOR defence, the Tribunal may impose various remedies including reinstatement; compensation for loss of wages; and damages for hurt feelings.

Three issues must therefore be addressed: first, what constitutes a "disability"; second, what must the employee prove to establish a *prima facie* case of discrimination; and finally, how can the employer establish a BFOR defence. This paper addresses each of these issues.

DEFINITION OF "DISABILITY"

The federal legislation defines "disability" as "any previous or existing mental or physical disability [including] disfigurement and previous or existing dependence on alcohol or a drug".[4] In *Desormeaux*, the Canadian Human Rights Tribunal acknowledged that "...this section is of limited assistance... in that the definition that it provides is somewhat circular".[5]

At the provincial level, the Code does not even attempt to define "disability". However, the BC Ministry of Attorney General has indicated that the term should be read to include mental illness, developmental delay, learning disability, drug or alcohol addiction, and HIV/AIDS.[6]

The Supreme Court of Canada has provided significant guidance with respect to the concept of disability, indicating that the term should be applied broadly. In *Boisbriand*,[7] it indicated that a "handicap":[8]

> may be the result of a physical limitation, an ailment, a social construct, a perceived limitation or a combination of all of these factors. Indeed, it is the combined effect of all these circumstances that determines whether the individual has a 'handicap' for the purposes of the [Québec Charter of Human Rights and Freedoms].

The B.C. Human Rights Tribunal has noted that the Supreme Court of Canada:[9]

> ...made it absolutely clear in *Boisbriand* that its statements with respect to the concept of 'handicap' under the Quebec Charter apply with equal force to the concept of 'disability' under both the Canadian Charter of Rights and Freedoms and other human rights legislation, such as the Code.

The definition of "disability" is therefore flexible, and employers should keep this in mind when assessing an employee's absence.

PRIMA FACIE DISCRIMINATION

A *prima facie* case of discrimination is "one which covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in the complainant's favour in the absence of an answer from the respondent-employer".[10] Specifically, the complainant must show:[11]

> ...(1) the existence of a distinction, exclusion or preference, in this case the dismissal and the refusal to hire; (2) that the distinction, exclusion or preference is based on [an enumerated ground], [*sic*] and (3) that the distinction, exclusion or preference has the effect of nullifying or impairing the right to full and equal exercise of human rights and freedoms.

The first step of the test involves a determination of whether there is differential treatment with reference to the appropriate comparator group. The Federal Court has indicated that in cases of alleged discrimination on the basis of disability, where the complainant was innocently absent, the appropriate comparator group should be "those with attendance problems, both able-bodied and disabled".[12]

BONA FIDE OCCUPATIONAL REQUIREMENTS

Both the federal and provincial legislation provide that, where the refusal to employ or continue to employ an individual is based on a BFOR, there is no discrimination.[13] Whether or not a criterion is a BFOR is based on consideration of a series of factors. The analysis is substantially the same at both the federal and the provincial level, although there are minor distinctions, as discussed below.

The analytical framework for determining whether a *prima facie* discriminatory employment standard is a BFOR was set out by the Supreme Court of Canada in *Meiorin*.[14] The Court ruled that, once an employee has made out a *prima facie* case, the employer had to satisfy a three-part test:[15]

> An employer may justify [a *prima facie* discriminatory standard] by establishing on the balance of probabilities:
>
> (1) that the employer adopted the standard for a purpose rationally connected to the performance of the job;
>
> (2) that the employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfilment of that legitimate work-related purpose; and
>
> (3) that the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer.

It is fairly easy to determine whether the first and second steps of the test have been met. Consequently, the analysis usually turns on the third step of the test, and specifically on the factors that may be considered when determining whether there is undue hardship to the employer. This is where the minor differences between federal and provincial jurisdiction arise.

The federal legislation establishes three specific factors to be evaluated when evaluating whether there is undue hardship: health, safety and cost.[16] Human rights legislation in some provinces also indicates specific factors to be considered. However, the British

Columbia Code does not provide this guidance. The Supreme Court of Canada in *Meiorin* made it clear that, unless specific factors are "expressly included or excluded by statute",[17] the analysis of undue hardship must include consideration of a broad variety of factors. Among the relevant factors are:[18]

> ...[F]*inancial cost, disruption of a collective agreement, problems of morale of other employees, interchangeability of work force and facilities. The size of the employer's operation* may influence the assessment of whether a given financial cost is undue or the ease with which the work force and facilities can be adapted to the circumstances. Where *safety* is at issue both the magnitude of the risk and the identity of those who bear it are relevant considerations. [Emphasis added.]

Therefore, whereas the federal framework is arguably limited to a consideration of health, safety and cost, the provincial analysis requires examination of a non-limited set of factors.

DESORMEAUX AND *PARISIEN*

Desormeaux and Parisien were bus operators with the Ottawa-Carleton Regional Transit Commission (OC Transpo). Both were dismissed on the basis of chronic innocent absenteeism.

Desormeaux was employed with OC Transpo from March 1989 to January 1998. During that period she missed *365 full days and 24 part days* of work on the basis of various health problems, including bronchitis, surgery, gall bladder problems, ovarian cysts, kidney stones, back injury, stress and a broken ankle. The main reason for her absences was, however, migraine headaches.

Parisien was employed with OC Transpo from November 1977 to February 1996. During the last 12 years of his employment, he was absent a total of *1644 full days and 33 part days*, due to a number of stressful events in his life. He was diagnosed with post-traumatic stress disorder (PTSD) in May 1991, subsequent to which he was periodically on disability leave and in receipt of workers' compensation benefits. In May 1994, his medical advisor indicated that he could return to work, but after returning to work Parisien again required hospitalization and was off work until shortly before his dismissal.

OC Transpo advised Desormeaux of the concerns about her level of absenteeism on several occasions, but despite such advice, the absences continued. In Parisien's case, OC Transpo maintained that he was accommodated by being assigned modified hours and duties.

Following their termination of employment, both Parisien and Desormeaux filed grievances in connection with their dismissals. The grievances led to expedited arbitrations before the Honourable George W. Adams, Q.C., who dismissed the grievances, upholding the dismissals.[19] Both individuals then filed complaints with the Canadian Human Rights Commission (the "Commission"), alleging that they had been discriminated against in the matter of their employment on the basis of disability. The complaints were referred to the Canadian Human Rights Tribunal (the "Tribunal") for a hearing.

OC Transpo initially challenged the Commission's jurisdiction to entertain the complaints, but those challenges were dismissed by the Tribunal.[20] The complaints therefore proceeded to a hearing before the Tribunal.

In *Desormeaux*, the Tribunal found that she had established a *prima facie* case of discrimination and found that OC Transpo had failed to meet the third *Meiorin* requirement (accommodation to the point of undue hardship). The Tribunal ordered Desormeaux reinstated with the seniority and benefits she would have received had her employment not been terminated, as well as compensation for loss of wages and any tax liabilities resulting from that award; special compensation of $4000; and interest on all amounts owed.

Similarly, in *Parisien*, the Tribunal found that he suffered from a disability (PTSD) and that OC Transpo's decision to terminate his employment was based at least in part on his medical condition. OC Transpo had failed to meet the third *Meiorin* requirement and therefore Parisien's dismissal could not be justified. Accordingly, the Tribunal ordered Parisien reinstated, with the seniority and benefits he would have received had he not been dismissed as well as compensation for lost wages, statutory deductions and any resulting tax liability; special compensation of $3,500; and interest.

OC Transpo applied for judicial review of the Tribunal's decisions. It submitted that the Tribunal had erred in finding that a *prima facie* case of discrimination existed for both Desormeaux and Parisien. With respect to Desormeaux, OC Transpo took the position that there was no evidence that she suffered

from migraine headaches, and that even if she did, there was no evidence that the headaches constituted a disability. In Parisien's case, OC Transpo acknowledged that he suffered from a disability, but argued that the problem was not due to the disability, but rather his inability to regularly attend work. OC Transpo argued that, in the alternative, if a *prima facie* case of discrimination existed, then the Tribunal erred in finding that there had been a failure to accommodate by OC Transpo.

The Commission argued that the Tribunal had correctly found *prima facie* discrimination, and that it did not err in dealing with the duty to accommodate.

The Federal Court overturned the Tribunal's decisions.[21] In Desormeaux's case, it agreed with OC Transpo that there was no *prima facie* case of discrimination: the Tribunal had erred in finding that she suffered from a disability. In Parisien's case, notwithstanding that "the record is clear that Mr. Parisien had a horrendous history of absenteeism prior to the diagnosis of PTSD...",[22] the court concluded that there was sufficient evidence for the Tribunal to reasonably find *prima facie* discrimination. However, under the *Meiorin* analysis, the court found that the Tribunal's finding that there had not been sufficient accommodation by OC Transpo was unreasonable. It wrote that:[23]

> The factual context here is the employment relationship. That relationship is subject to the Act, but the fact remains that the nature of the bargain between the parties is that the employee will appear for work on a regular and reliable basis and the employer will pay for the service. Excessive innocent absenteeism has the potential to nullify that relationship....
>
> ...
>
> The record here shows a horrendous level of absenteeism from the time Mr. Parisien began his employment with the employer. The absenteeism of 1,644 full days and 33 part days is only a portion of the absenteeism, that is from 1984 to February 1996. That appears to be a rate in excess of 30%. It is not reasonable, in my opinion, to require the employer to tolerate this.

Accordingly, the dismissals were restored. Ms. Desormeaux appealed the decision of the Federal Court to the Federal Court of Appeal.

The Federal Court of Appeal released its judgment in the *Desormeaux* case on October 3, 2005 allowing the appeal of the Federal Court decision and restoring the decision of the Canadian Human Rights Tribunal.

Mr. Justice Linden wrote the judgment for the court holding:[24]

> Hence, prima facie discrimination being established, it was necessary to determine whether OC Transpo's standard of reasonable and regular attendance was a bona fide occupational requirement (BFOR). As the Tribunal correctly stated, the applicable three-stage test was set out in British Columbia (Public Service Employee Relations Commission) v. BCGSEU, [1999] 3 SCR 3 at para 54 ["Meiorin"]. To qualify as a BFOR, the employer must show that the standard was (1) adopted for a purpose rationally connected to the performance of the job; (2) adopted pursuant to an honest and good-faith belief; and (3) is reasonably necessary to the accomplishment of the legitimate work-related purpose. A standard is considered 'reasonably necessary' if the employer can demonstrate that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship on the employer.

The court noted that although the Tribunal reviewed the third part of the test extensively, this was not addressed by the Federal Court. The court relied on the finding of the Tribunal that the employer had not considered the accommodation alternatives prior to the termination of Ms. Desormeaux's employment. OC Transpo has sought leave to appeal the Federal Court of Appeal decision to the Supreme Court of Canada. The Federal Court decision in *Parisien* was not appealed to the Federal Court of Appeal. In light of the decision in *Desormeaux*, the Federal Court decision in *Parisien* may have limited jurisprudential value.[25]

In *McRae v. International Forest Products Ltd.*,[26] the British Columbia Human Rights Tribunal allowed the complaint to Mr. McRae whose employment was terminated on the basis of non-culpable absenteeism. Mr. McRae was employed by International Forest Products Ltd. for over 28 years. In 2002, he was diagnosed with Amyotophic Lateral Sclerosis (ALS). At the time of the termination of his employment he was unable to work and was in receipt of long-term disability benefits and Canada Pension Plan benefits. Arbitrator Stan Lanyon dismissed the grievance filed by the employees whose employment was terminated for non-culpable absenteeism. Stan Lanyon had found that the economic circumstances of the employer and

its intention to avoid substantial severance payments that would have been paid to the permanently disabled employees did not breach the provisions of the *Human Rights Code*. The British Columbia Human Rights Tribunal found that the employer did breach the *Human Rights Code* because the decision to terminate the employment of Mr. McRae was related to his disability.

IMPLICATIONS FOR THE WORKPLACE

Attendance management remains an important aspect of the management of human resources despite the recent high-profile decisions of arbitrators, human rights tribunals and the courts defining the duty to accommodate. The legal doctrines of "frustration" and "innocent absenteeism" have not been eliminated as a result of the expansion of the law defining the duty to accommodate. Of particular importance is the following statement by Linden J.A. of the Federal Court of Appeal in the *Desormeaux* decision where he held:[27]

> There is nothing in the Tribunal's decision to require employers to indefinitely maintain on their workforce employees who are permanently incapable of performing their jobs. Nor are employers required to tolerate an excessive of absenteeism or substandard performance. On the unusual evidence in this case, this complainant is fully capable of doing her job, when she is not suffering from one of her periodic headaches. Moreover, her future rate of headache-related absenteeism is predicted to be at a level which her employer could easily accommodate without undue hardship. The employer has therefore merely been required to reasonably accommodate her as mandated by the Canadian Human Rights Act and according to the legal test of undue hardship established in Meiorin, supra.

An Absenteeism Program needs to be viewed as a tool for determining where a duty to accommodate may arise. In cases where the absence is disability-related, it will be necessary to determine what accommodation is necessary and what are the costs of providing such accommodation. Not all accommodation requests will be reasonable. Further, not all accommodation requests will need to be granted. Each accommodation request will need to be assessed on its merits in accordance with a principled approach and the developing jurisprudence in this area.

Employees will be expected to clearly articulate the nature of their disability and the specific nature of the accommodation required. Personal privacy and older jurisprudence that limited an employers' right to access personal medical information may need to be given further consideration in light of the expanding duty of employers to accommodate physical and mental disabilities of employees.

CONCLUSION

The decision of the Federal Court of Appeal in *Desormeaux* is consistent with the *Keays v. Honda Canada Inc.*[28] decision in the way that it has elevated the importance of protecting employees from discrimination on the basis of disability. The decision is also consistent with the recent decisions of the Supreme Court of Canada holding that employment is of fundamental importance in Canadian Society and that employment contracts should not be treated like other commercial contracts. The legal standards applied to large employers will result in more frequent and varied requests for accommodation. Employers need to be prepared for these requests by establishing a disability management program that carefully balances the interests involved and negotiate terms of employment that will meet these requirements in the law.

The imminent elimination of mandatory retirement may provide a basis for further consideration and development in the law regarding the nature of employment obligations when performance levels do not meet the expectations of the employer and the standards agreed to at the time that employment is offered. Those decisions are yet to come.

An Attendance Management Program that reflects the development of the legal duty to accommodate remains a useful tool for the management of human resources despite the higher standard expected of employers in satisfying the duty.

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* These materials were prepared for the Insight Conference, Duty to Accommodate held in Vancouver, BC, October 24-25, 2005.

1 R.S.C. 1985, c. H-6 (the "Act").

2 R.S.B.C. 1996, c. 210 (the "Code" or "British Columbia Code").

3 The Act, s. 7; The Code, s. 13.

4 The Act, s. 25.

5 *Desormeaux v. Ottawa – Carleton Regional Transit Commission*, [2002] C.H.R.D. No. 1 at para. 64 (QL).

[6] British Columbia Ministry of Attorney General, *Human Rights in British Columbia* (June 2003), AG04029-7W, 03/2004.

[7] *Québec (Commission des droits de la personne et des droits de la jeunesse) v. Montréal (City); Québec (Commission des droits de la personne et des droits de la jeunesse) v. Boisbriand (City)*, [2000] S.C.J. No. 24 (QL), 185 D.L.R. (4th) 385.

[8] *Ibid.*, at para. 79.

[9] *Morris v. British Columbia Railway Co.*, [2003] B.C.H.R.T.D. No. 14 at para. 206 (QL).

[10] *Ontario (Human Rights Commission) v. Simpsons Sears Ltd.*, [1985] S.C.J. No. 74 (QL), [1985] 2 S.C.R. 536 at para. 28.

[11] *Boisbriand, supra*, note 7, at para. 84.

[12] *Desormeaux v. Ottawa-Carleton Regional Transit Commission*, [2004] F.C.J. No. 2172 at para. 81 (T.D.) (QL).

[13] The Act, s. 15; The Code, s. 13.

[14] *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees' Union (B.C.G.S.E.U.) (Meiorin Grievance)*, [1999] S.C.J. No. 46 (QL), [1999] 3 S.C.R. 3 ("*Meiorin*").

[15] *Ibid.*, at para. 54.

[16] Section 15(2) of the Act states that "...it must be established that accommodation of the needs of an individual or a class of individuals affected would impose undue hardship on the [employer], considering *health, safety and cost*". [Emphasis added.]

[17] *Meiorin, supra*, note 14, at para. 63.

[18] *Central Alberta Dairy Pool v. Alberta (Human Rights Commission)*, [1990] S.C.J. No. 80 (QL), [1990] 2 S.C.R. 489 at para. 62.

[19] *Ottawa Carleton Regional Transit Commission and Amalgamated Transit Union, Local 279 (Grievance of Alain Parisien)*, heard November 20, 1998, decision dated December 4, 1998; *OC Transpo and Amalgamated Transport Union, Local 279 (Grievance of Francine Desormeaux)*, heard July 27, 1998, decision dated August 5, 1998.

[20] *Desormeaux v. Ottawa-Carleton Regional Transit Commission*, [2002] C.H.R.D. No. 22 (QL); *Parisien v. Ottawa-Carleton Regional Transit Commission*, [2002] C.H.R.D. No. 23 (QL).

[21] *Desormeaux v. Ottawa-Carleton Regional Transit Commission*, [2004] F.C.J. No. 2172 (T.D.).

[22] *Ibid.*, at para. 105.

[23] *Ibid.*, at paras. 114 and 117.

[24] *Desormeaux, supra*, note 12.

[25] *Ibid.*

[26] [2005] BCHRTD No. 462 (QL).

[27] *Desormeaux, supra*, note 12, at para. 21.

[28] [2005] O.J. No. 1145 (S.C.J.) (QL).

• AVOIDING PITFALLS IN EMPLOYMENT LAW* •

The Honourable Mr. Justice Randall Scott Echlin, Superior Court of Justice (Ontario)
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Employment law practitioners spend their careers assisting employers and employees to attempt to avoid pitfalls in every phase of the employment relationship.

At the commencement of any employer/employee relationship, the parties must have common expectations and an understanding of their respective duties and responsibilities. These can often be clarified in a written offer letter or employment contract addressing various aspects of relationship including for example, the employee's duties, remuneration, obligations on termination, how prior service with a former employer will be treated, and any restrictive convenants that may survive the employee's dismissal or resignation. The enforceability of employment policies and manuals will be dependent upon how they are introduced and communicated to employees. In addition, employers should be cautious in the pre-employment stage, as screening and selection of candidates must be carefully balanced with human rights concerns.

Once the employment relationship has commenced, the parties' ability to change the terms of the relationship will be more limited. Typically, an employer must be concerned about potential constructive dismissal complaints arising from fundamental changes to the terms and conditions of an employee's position or remuneration. Performance reviews and, in the case of the underperforming employee, progressive discipline ought to be carefully considered and consistently applied.

It is on the breakdown of the employment relationship that matters are most likely to become litigious. If the parties were clear in outlining the basis for the relationship, and expectations on its termination before entering into the relationship, conflict can be