

Special Edition - Attendance Management Programs

Coast Mountain Bus Company Ltd. v. CAW-Canada, Local 111, 2010 BCCA 447

In a decision released on October 15, 2010, the B.C. Court of Appeal substantially restored a BC Human Rights Tribunal decision which found that the way Coast Mountain applied certain aspects of its attendance management program (“AMP”) was discriminatory. The decision overturned a 2009 B.C. Supreme Court ruling.

The Coast Mountain program was a typical AMP in that it moved employees with above-average absenteeism rates through progressive “levels” if their attendance did not improve. The Court did not declare the whole of Coast Mountain’s AMP to be discriminatory, nor did it find that attendance management programs themselves are unlawful. The finding of systemic discrimination was based on the *particular way* parts of the program were applied to disabled employees.

The Court confirmed that it constituted *prima facie* systemic discrimination for the employer to place disabled employees at Level 3 of the AMP when the employees had exceeded the average absenteeism as a result of their disabilities. The Court further noted that employees with disabilities received adverse treatment when placed at Level 3 because the employer would consider it grounds for dismissal if their absenteeism level exceeded the average absenteeism rate for transit operators in either of the following two years.

The Court made it clear that employers cannot approach absenteeism for disabled employees under an AMP in the same way as they do for the rest of the workforce. An AMP must properly identify and accommodate employees living with disabilities that limit their ability to attend work regularly.

By Gabrielle Scorer with the assistance of Deborah Hall

The Good News for Employers:

Although the union was successful on most of the issues raised in this appeal there is some good news for employers:

- The Court confirmed that the mere application of the program to employees with disabilities did not constitute systemic discrimination. It was the way that the program was applied by the employer that resulted in systemic discrimination.
- The Court clarified the test for *prima facie* systemic discrimination.
- The Court confirmed that the BFOR analysis requires an employer to prove that it is not possible to accommodate the employee(s) *short of undue hardship*. The BFOR analysis did not require employers to prove that it was impossible to accommodate.
- The high cost of absenteeism may justify an attendance management program and establish a BFOR for non-disabled employees.
- The Court confirmed that it was not discriminatory for an employer to seek medical evidence to establish that an employee’s non-attendance at work was, in fact, due to a disability.
- The Court concluded that the Human Rights Tribunal did not have jurisdiction to order the employer to engage in mediated negotiation with the union over the attendance management program after the complaint was finally adjudicated.



The Court's Analysis:

The Court of Appeal confirmed that the test for *prima facie* discrimination was the same for both systemic and individual discrimination:

- (a) Does the employee have (or is s/he perceived to have) a disability?
- (b) Has the employee received adverse treatment?
- (c) Was the disability a factor in the adverse treatment?

The Court concluded that systemic discrimination cannot be proved on the basis of evidence of individual acts of discrimination. There must be evidence that the operation of procedures, policies, practices or attitudes has a negative impact against a group of employees with a protected characteristic and that there is a nexus between the negative treatment and the protected characteristic.

The Court confirmed that placement of employees with (or without) disabilities at Level 1 or Level 2 of the AMP was not discriminatory because the purpose of the AMP at those levels was to alert the employee of the employer's concern about attendance and, at Level 2, to obtain the medical information necessary to determine if the employee had a disability. There was no adverse impact. It was "not discriminatory for an employer to require an employee to establish that his or her non-attendance at work is due to a disability".

However, as noted above, the blanket application of Level 3 of the AMP to employees with disabilities was discriminatory. At Level 3 employees were warned that their employment may be terminated if they did not achieve certain attendance parameters over the next two years. Average absenteeism rates for all transit operators were used to establish the attendance parameters. Employees were advised that absence on LTD, STD and WCB would be taken into account in calculating absentee levels. At Level 3 of the AMP employment was clearly put at risk if the employee did not meet the expected attendance parameters. Absences related to disabilities would be used to assess attendance. Therefore, a *prima facie* case of systemic discrimination was established. The Court also held that it was discriminatory to place disabled employees at Level 3 as a result of the inclusion of partial days of absence while on gradual-return-to-work programs and the same applied to the inclusion of partial days in disabled employees' attendance records for the purpose of determining whether they exceeded attendance parameters set for them at Level 3.

The Court then considered whether the employer had established a *bona fide* occupational requirement (BFOR) to justify the discriminatory treatment of disabled employees. The well-known test for a BFOR is from *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees' Union (Meiorin Grievance)*, [1999] 3 S.C.R. 3:

1. The standard was adopted for a purpose or goal that is rationally connected to the function being performed;
2. The standard was adopted in good faith in the belief that it is necessary for the fulfillment of the purpose or goal; and
3. The standard is reasonably necessary to accomplish its purpose or goal, in the sense that the employer cannot accommodate persons with characteristics of the claimant without incurring undue hardship.

The Tribunal found the first two factors were established and the Court agreed. On the third factor, the Court confirmed that the *Meiorin* analysis did not require the employer to prove that it was impossible to accommodate the disabled employees. The *Meiorin* analysis required the employer to show that it would be impossible to accommodate without causing undue hardship.

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The employer did not provide any evidence about the cost of accommodating the disabled employees under the AMP. There was no evidence that not including days of absence due to disability as part of the attendance calculation for purposes of the AMP would result in undue hardship to the employer. The employer failed to establish a BFOR and failed to justify the *prima facie* discrimination.

The Court clarified that there was no reason to draw a distinction between disabled employees who suffered from “chronic and recurring disabilities” and those who were simply “disabled”. Where disabled employees suffered adverse treatment under the AMP, as long as their disability was a factor in the adverse treatment, the application of the AMP was discriminatory. There was no reason to distinguish those who suffered “chronic and recurring disabilities”.

On a separate point the Court of Appeal considered the jurisdiction of the Tribunal to order the employer to engage in Tribunal-assisted mediation following the adjudication of the complaint. The Court concluded that the Tribunal did not have jurisdiction to make this type of order. Once the complaint had been adjudicated upon the matter was resolved. The Tribunal had no jurisdiction to require the employer to engage in mediated negotiations with the union over any changes it decided to make to the AMP based on the Tribunal’s decision. The Court stated that it would be open to the employer to make revisions to its Program to change standards within the Program or to otherwise accommodate employees with disabilities and if the Union believed that the revised Program still had discriminatory effects, it could lodge another complaint with the Tribunal.

Lastly, the Court upheld the Tribunal’s decision to award damages to six individuals who had been placed at Level 3 of the AMP.

If you have any questions about this decision or how it may affect your workplace, please contact [Gabrielle Scorer](#) or any other lawyer at [Roper Greyell](#).

QUESTIONS? SUGGESTIONS?

If you have questions about this month’s Information Update or suggestions for topics you would like to see covered in future editions of the Update, please contact [Jennifer Russell](#) at jrussell@ropergreyell.com.

The purpose of this document is to provide information as to developments in the law. It does not contain a full analysis of the law nor does it constitute an opinion of Roper Greyell LLP or any member of the Firm on the points of law discussed. Interested parties are urged to seek specific advice on matters of concern and not to rely solely on the text of this bulletin.



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