

## Roper Greyell Case Law Update – April and May 2009

### Court Reverses Human Rights Tribunal Decision on Attendance Management

In a 2008 decision, the B.C. Human Rights Tribunal found that Coast Mountain Bus Company's Attendance Management Program (the "AMP") was discriminatory. The Tribunal allowed a complaint by CAW, Local 111 and found that the AMP resulted in systemic discrimination against some employees, in particular, employees with one or more chronic or recurring disabilities.

On March 25, 2009, the B.C. Supreme Court overturned that finding in *Coast Mountain Bus v. CAW-Canada*, 2009 BCSC 396 (CanLII).

The Court quashed a number of the Tribunal's findings, including that:

- the application of the AMP is discriminatory;
- the early placement of operators in the AMP is discriminatory;
- the AMP is discriminatory because it creates stress on those who are placed in it and who receive letters from the employer once they are placed in it; and
- the AMP is not a *bona fide* occupational requirement.

In terms of remedy, the Tribunal had, among other things, imposed the unusual remedy of Tribunal-assisted mediation and remained seized of the issues, a remedy which the employer argued led to the prospect of the Tribunal involving itself in rewriting the AMP.

The Court found that the Tribunal exceeded its jurisdiction in ordering Tribunal-assisted mediation and in attempting to remain seized of the matter.

The Court confirmed a number of useful principles for employers who are attempting to manage workplace absenteeism. These include:

- The law does not require an employer to show it is impossible to accommodate. All an employer is required to do is show it is impossible to accommodate without causing undue hardship:

*The test is not whether it was impossible for the employer to accommodate the employee's characteristics. The employer does not have a duty to change working conditions in a fundamental way, but does have a duty, if it can do so without undue hardship, to arrange the employee's workplace or duties to enable the employee to do his or her work.*

- Some form of attendance management is appropriate:

*... [T]he need to monitor the absences of employees who are regularly absent from work is a bona fide work requirement in light of the very nature of the employment contract and responsibility of the employer for the management of its workforce.*

- An employee seeking accommodation has responsibilities too:

*... [T]he employee seeking accommodation bears a "duty to facilitate the search for such an accommodation", in part by "bringing to the attention of the employer the facts relating to discrimination" ... [T]hat duty includes bringing to the employer's attention medical information that supports their need to be accommodated.*

*Coast Mountain Bus v. CAW-Canada is the latest in a series of recent court decisions that have helped inject a level of pragmatism and common sense into human rights law and attendance management. The pendulum has shifted and employers that have to deal with employee disability and attendance issues on an almost daily basis have certainly been placed in a better position than before.*

*If you have questions regarding the issues raised in this case law update and how they may affect you or your company, please do not hesitate to contact any lawyer at our firm.*

*Lawyer contact information can be obtained by contacting us at (604) 806-0922 or visiting our website at [www.ropergreyell.com](http://www.ropergreyell.com).*

\* Every effort has been made to ensure accuracy in respect of this case law update. The comments, however, are necessarily of a general nature. Clients and other interested parties are urged to seek specific advice on matters of concern and not to rely solely on the text of this case law update. \*