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## Federal Court quashes reinstatement of absentee OC Transpo bus drivers

In *Desormeaux v. Ottawa-Carleton Regional Transit Commission*, a judgment rendered on December 23, 2004, a judge of the Federal Court of Canada has overturned two decisions of the Canadian Human Rights Tribunal that reinstated two employees who had been terminated after having been absent from work for 365 days in nine years and 1,700 days in 12 years respectively. The Tribunal's decisions had raised concerns that employers would be obliged to accommodate employees who were simply unable to maintain an acceptable level of attendance at work. (For a report of the Tribunal's decision, see "[Absent more than 365 days in nine years, dismissed employee wins reinstatement, damages from Canadian Human Rights Tribunal](#)".) Another significant aspect of the Court's decision was its ruling that excessive absenteeism constituted undue hardship.

### DESORMEAUX

The complainant in the case was a bus driver with the Ottawa-Carleton Regional Transit Commission (OC Transpo) who had suffered from a variety of ailments including migraine headaches, bronchitis, gall bladder problems, flu, back injury, ovarian cysts, kidney stones and a broken ankle. The complainant's family physician had advised OC Transpo that the migraines were the only ailment with possible long-term consequences. The physician had also indicated that the migraines likely would not interfere significantly with the complainant's ability to perform her duties on a full-time basis, but had not indicated whether the complainant suffered from a disability.

Before the Tribunal, OC Transpo had taken the position that the complainant was not disabled within the meaning of the *Canadian Human Rights Act* and that, even if she was, that was not the reason for her termination. It had contended that there was insufficient evidence to establish that the complainant suffered from migraines, as the diagnosis had not been made by a neurologist but by a family physician. Moreover, the other ailments responsible for the complainant's poor attendance were transitory in nature and did not rise to the level of a disability.

The Tribunal had rejected those arguments, holding that a diagnosis of migraines was within the competence of the complainant's family physician and that, even if the complainant did not suffer from migraines, the fact that her headaches were chronic and incapacitating indicated that they should be seen as a disability under the legislation. The Tribunal had gone on to hold that the complainant had been terminated because of her disability and that the employer had failed to discharge its duty to accommodate her.

### COURT: COMPLAINANT'S MIGRAINES NOT A DISABILITY

In striking down the Tribunal's decision, the Court noted that, in order to establish a *prima facie* case of discrimination, complainants have the burden of proving that

1. they were subjected to differential treatment;
2. the differential treatment was based on a prohibited ground of discrimination (in this case, disability); and
3. the differential treatment nullified or impaired their human rights.

The Court held that the Tribunal's ruling in relation to the second part of the test had been unreasonable, and that the complainant had not demonstrated that she suffered from a disability. The Court expressed the view that the Tribunal had erred in accepting the evidence of the complainant's family physician as the basis for a finding that the complainant's migraine headaches amounted to a disability. The Court noted that the physician had been qualified to give expert evidence as a family physician – not as a neurologist – and, accordingly, ruled in favour of the employer.

## PARISIEN

The Court also quashed another decision of the Tribunal in *Parisien v. Ottawa-Carleton Regional Transit Commission*, which concerned a different OC Transpo employee who had been terminated after missing nearly 1,700 days over 12 years. In the *Parisien* case, the Court held that, while the Tribunal's finding of a *prima facie* case of discrimination had been reasonable, its conclusion that the employer had failed to accommodate the complainant to the point of undue hardship was not.

The employer had argued that, in cases involving innocent absenteeism dismissals, the accommodation aspect of the discrimination analysis may not be necessary because an employer implicitly takes into consideration whether an employee can be accommodated to the point of undue hardship when it assesses the employee's prognosis for regular and reliable attendance.

This view had been rejected by the Tribunal, which held that there are two stages involved in a review of innocent absenteeism dismissals. The first is conducted in accordance with labour relations law and the second with human rights law. It had expressed the view that the arbitrator who had originally dismissed the grievance had failed to deal with the issue of undue hardship and had merely made a "blanket statement" that the complainant had been "amply accommodated in the past to no avail" and that, therefore, it was "not a case where the employer has failed to accommodate a disability".

The Tribunal, noting that all employers must be prepared to accept some level of absenteeism from all employees, had held that "tolerating" absenteeism was in fact an acceptable type of accommodation. Moreover, it had stated that toleration of absenteeism was not the only form of accommodation the employer could have considered. It had faulted the employer for taking the position that the complainant could work only as a bus operator and for not exploring the possibility of offering him alternate duties. Finally, it had held that, even if toleration of the complainant's future absenteeism was the only accommodation available, the steps that the employer would have had to take to backfill for the complainant did not meet the threshold of undue hardship.

## COURT: EXCESSIVE ABSENTEEISM CONSTITUTES UNDUE HARDSHIP

The Federal Court rejected the Tribunal's ruling that it was not sufficient for the employer to take the position that, once it had established that the complainant's prognosis for regular attendance was poor, it had satisfied its duty to accommodate. The Court held that the employment relationship is subject to human rights legislation – but only as long as that

relationship is not undermined by an employee's inability to perform his or her part of the bargain:

"[T]he 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 that service. Excessive innocent absenteeism has the potential to nullify that relationship... . [T]here comes a point when the employer can legitimately say that the bargain is not completely capable of performance."

Therefore, the Court ruled, the Tribunal had erred in requiring the employer to tolerate the complainant's "horrendous" rate of absenteeism.

### In Our View

This decision is a reminder that the quality of medical evidence is open to challenge by employers. It should be noted that the Court did not deal with the Tribunal's finding in *Parisien* that the complainant had shown that he was willing to cooperate in finding a way to rehabilitate him in another position and assure his full reintegration back into the OC Transpo workforce, but that the employer had failed to investigate this possibility. Presumably, if alternative and productive work had been available and the complainant had been able to maintain acceptable attendance levels in the alternate position, it is arguable that he could have been accommodated short of undue hardship. However, the proposition that permanent erratic attendance levels – however innocent the cause – ought not to be tolerated is sound and consistent with most accommodation case law.

Please note that on January 24, 2005, Desormeaux filed a notice of appeal of the trial judge's decision in the *OC Transpo* case. We will keep readers informed of developments.

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