

Absentee OC Transpo driver reinstated, again

In *Desormeaux v. Ottawa-Carleton Regional Transit Commission* (October 3, 2005), the Federal Court of Appeal has restored an order of the Canadian Human Rights Tribunal that reinstated an OC Transpo bus driver who had been terminated after being absent from work for 365 days over the course of nine years. The Federal Court of Canada had quashed the Tribunal's order (see "[Absent more than 365 days in nine years, dismissed employee wins reinstatement, damages from Canadian Human Rights Tribunal](#)" on our Publications page and "[Federal Court quashes reinstatement of absentee OC Transpo bus drivers](#)" on our What's New page).

Desormeaux's ailments included migraine headaches, bronchitis, gall bladder problems, flu, a back injury, ovarian cysts, kidney stones and a broken ankle. Before the Tribunal, OC Transpo had taken the position that Desormeaux was not disabled within the meaning of the Canadian Human Rights Act and that, even if she was, that was not why she had been terminated. It had contended that there was insufficient evidence to establish that she suffered from migraines because the diagnosis had not been made by a neurologist but by a family physician. Moreover, the other ailments responsible for her poor attendance were transitory in nature and were not at the level of a disability.

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

The Federal Court had quashed this order, stating that the Tribunal had erred in accepting the evidence of Desormeaux's family physician as the basis for a finding that her migraine headaches amounted to a disability. The Court observed that a neurologist had diagnosed Desormeaux as having mixed migraine and tension headaches and held that it was unreasonable to give more weight to the opinion of a family physician than to that of a specialist. Accordingly, the Court ruled that, because Desormeaux was not disabled, the decision to dismiss her did not constitute discrimination.

APPEAL COURT: HEADACHES A DISABILITY

In overruling the lower court, the Federal Court of Appeal stated that, whether or not Desormeaux's headaches were migraines, the Tribunal had not been unreasonable in concluding that they amounted to a disability:

"[D]isability in a legal sense consists of a physical or mental impairment, which results in a functional limitation or is associated with a perception of impairment. In light of this test, there was evidence before the Tribunal upon which it could reasonably find that there was a disability because of the headaches, whether they were migraine headaches, migraine/tension headaches or some other type of severe headache condition. The report of

[the neurologist] did not really conflict with the evidence of [the family physician]; it may have been less forceful and more tentative, but, in any event, the Tribunal was persuaded on all of the evidence that there was disability on the basis of the headaches. The Tribunal's conclusion was certainly a reasonable one based on all the evidence and should not have been upset on judicial review.”

The Court of Appeal went to state that the Tribunal had also not erred in holding that OC Transpo would not have suffered undue hardship if it had continued to employ Desormeaux. The evidence showed that alternate assignments were available that would have reduced her absenteeism to some degree. Moreover, Desormeaux's future migraine-related absenteeism rate was estimated to be about 6.5 full days and 1.25 part days a year – well below the absenteeism rate of the top 25% of OC bus drivers. Yet no measures for accommodation had been explored by the employer before it dismissed Desormeaux. In the result, the order reinstating Desormeaux to her employment was restored.

In Our View

Perhaps anticipating concerns that may be raised among employers by an order to reinstate an employee with Desormeaux's rate of absenteeism, the Court, noting the “unusual evidence” in the case, affirmed that human rights law does not require employers to keep employees who are incapable of performing their jobs on the payroll:

“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 excessive 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... .”

Nonetheless, some may see this decision as requiring not the accommodation of disability but, rather, the accommodation of excessive innocent absenteeism.

Leave to appeal to the Supreme Court of Canada was filed on November 30, 2005. We will keep readers advised of any developments.

For further information, please contact [Lynn Harnden](#) at (613) 940-2731.

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