

Absent more than 365 days in nine years, dismissed employee wins reinstatement, damages from Canadian Human Rights Tribunal

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Desormeaux v. Ottawa-Carleton Regional Transit Commission (January 14, 2003), a decision by the Canadian Human Rights Tribunal, is not likely to give much comfort to employers concerned about controlling the level of innocent absenteeism in the workplace. The decision, which favoured the complainant employee, is all the more noteworthy because it follows the employee's unsuccessful grievance of her dismissal before an arbitrator.

Hired in 1989 as a bus driver, Francine Desormeaux had missed at least 365 full days and 24 part days due to a variety of ailments during the course of her nearly nine years of employment with the Ottawa-Carleton Regional Transit Commission (OC Transpo). Her ailments included migraine headaches, bronchitis, gall bladder, flu, back injury, ovarian cysts, kidney stones and a broken ankle. Although Desormeaux's high absenteeism had been treated in the early years as a disciplinary matter, by 1996, OC Transpo had implemented an attendance management policy, under which the employer was required to determine whether chronically absent employees suffered from a disability requiring accommodation.

By 1997, a year in which Desormeaux missed 41 full days, 14 of which were due to migraines and 21 of which were due to kidney stones, the employer exercised its right under the collective agreement to request a certificate from her doctor attesting to her fitness to work. Desormeaux's physician gave an account of her current ailments, but indicated that the only one with possible long-term consequences was her problem with migraines. The physician indicated further that the migraines would likely not "significantly interfere with [Desormeaux's] ability to perform her duties on a regular full-time basis". The letter was silent on whether Desormeaux suffered from a disability or whether she required any workplace accommodation. No one from OC Transpo followed up with the physician or sought to obtain an independent medical assessment.

Shortly after receiving the physician's letter, the employer met with Desormeaux and a union representative. The Tribunal found as a fact that, at this meeting, the union representative had raised the possibility that Desormeaux's migraines could constitute a disability under human rights legislation. Despite having been informed of the disability issue, OC Transpo still took no steps, as contemplated under the attendance management program, to determine whether Desormeaux suffered from a disability and whether any accommodation could be offered.

Some three months after this meeting, on January 30, 1998, Desormeaux's employment was

terminated. During this three-month period, she had missed seven days of work, all due to migraines, and all documented by her physician. She was also late for work on two occasions, due to having slept in.

In the meeting at which she was terminated, Desormeaux informed the employer that all of her absences had been due to migraines, and the union suggested that she was disabled and required accommodation. The employer responded that the physician's letter had indicated that Desormeaux was capable of maintaining regular attendance, and stated that, in view of Desormeaux's recent record of absenteeism, it had concluded that the prognosis for reliable attendance was poor. The employer indicated, therefore, that its decision to terminate Desormeaux would stand. Desormeaux grieved her dismissal and, after losing at arbitration, she filed a complaint with the Canadian Human Rights Tribunal.

TRIBUNAL: A *PRIMA FACIE* CASE OF DISCRIMINATION

Before the Tribunal, OC Transpo took the position that Desormeaux was not disabled within the meaning of the *Canadian Human Rights Act*, and that if she was disabled, this was not the reason for her termination. It contended that there was insufficient evidence to establish that she suffered from migraines, as the diagnosis had not been made by a neurologist, but by a family physician. Further, the other ailments responsible for her poor attendance were transitory in nature, and did not rise to the level of disabilities. The Tribunal rejected these 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 Desormeaux's headaches were chronic and incapacitating indicated that they should be seen as disabilities under the legislation.

Turning to the employer's argument that Desormeaux had not been terminated for reasons of disability, the Tribunal stated that, whether or not one viewed the other medical reasons for her absences as amounting to disabilities, it was clear that a significant portion of her absences were due to her headaches. Pointing to human rights case law, the Tribunal noted that it is not necessary that discriminatory considerations be the *only* motivation behind the actions at issue for a human rights complaint to succeed. The fact that Desormeaux was disabled, and that her disability formed at least part of the reason for her termination meant that a *prima facie* case of discrimination had been established, the Tribunal ruled.

DUTY OF ACCOMMODATION NOT MET

The next major issue to resolve was whether OC Transpo had discharged its duty to accommodate Desormeaux to the point of undue hardship. In order to make this determination, it was necessary to ascertain Desormeaux's health status at the time she was terminated. The Tribunal found that there was no evidence to suggest that Desormeaux's health problems were in any way linked and also found that, by the time of her termination, her migraine problem was the only health issue likely to cause long-term attendance problems.

This conclusion permitted the Tribunal to examine the issue of accommodation only in relation to Desormeaux's migraine problem, which had caused her to miss some 57 full days and 11 part days over the course of 8.75 years of employment. This translated into 6.5 full days and 1.25 part days per year of absence due to migraines. The Tribunal held that this was the most likely prognosis for Desormeaux's future attendance and that this was well below the absenteeism rate for 25% of OC Transpo bus drivers.

Although OC Transpo had argued that intermittent, last-minute absences were more challenging to deal with than long-term absences, the Tribunal did not accept that a large employer such as OC Transpo would incur undue hardship in keeping on a driver with Desormeaux's rate of migraine-related absenteeism. It noted that the employer maintained what was referred to as the "spare board", a pool of some 100 drivers without specific routes whose function was to fill in for absent drivers on an *ad hoc* basis:

"OC Transpo employs a large workforce, and bus operator duties are largely interchangeable. OC Transpo recognizes that on any given day a certain number of its bus operators will be unable to attend work. Because of the time-sensitive nature of the service it delivers, OC Transpo makes provision for these absences through the use of the spare board system, a system that appears to generally work quite well. On the evidence before me, I am not persuaded that Ms. Desormeaux would cause an excessive drain on the spare board system in the future. Accordingly, I am not satisfied that OC Transpo has established that it would have suffered undue hardship if it had continued to employ Ms. Desormeaux."

Further, the Tribunal expressed the view that it may have been possible for OC Transpo to provide Desormeaux with non-driving duties, but that this possibility had not been explored. Also unexplored was the option of having Desormeaux work on the spare board. As spare board drivers are not always called upon to drive, an absent spare board driver would be less likely to cause a disruption in service.

As none of the available alternatives were considered, the Tribunal ruled that OC Transpo had not discharged its duty to accommodate. Rather, the Tribunal found, the employer had taken the position that all responsibility for improving the situation rested solely on Desormeaux's shoulders.

As a remedy, the Tribunal ordered that Desormeaux be reinstated with full compensation for lost wages since termination as well as interest, with no deductions for failure to mitigate her losses, and that this sum be grossed up to offset the tax consequences of receiving a lump sum payment. Further, it awarded her \$4,000 damages plus interest for mental distress.

In Our View

In discussing Desormeaux's history of illnesses and injuries, the Tribunal described these as being unrelated and self-limiting, and Desormeaux herself as being unlucky in terms of her health. While

this may be true, one wonders whether the artificial segregation of the migraine-related absences from the rest of her absences is really justified in the circumstances. By taking this view, the Tribunal appears to have lost sight of the fact that Desormeaux's total record of absenteeism was clearly excessive, and that, despite the opinion of her physician, there was no real promise of improved attendance in the future. For example, in the final full year of her employment alone, Desormeaux was off work for 41 full days, only 14 of which were due to headaches.

Under these circumstances, it appears that the accommodation suggested by the Tribunal was more than an accommodation of disability. Rather, it may have amounted to accommodation for an employee who, however innocently, is simply incapable of maintaining an acceptable level of attendance at work. In our view, this is more than should be expected of even a large employer and, in human rights terms, constitutes undue hardship on the employer. OC Transpo has indicated that it intends to appeal the decision.

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