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Labour & Employment Law Bulletin

Court of Appeal finds Attendance Management Program Discriminatory


Coast Mountain Bus Company Ltd. v. National Automobile, Aerospace, Transportation and General Workers of Canada (CAW-Canada), Local 111, 2010 BCCA 447 (B.C.C.A.)

In a recent case, the British Columbia Court of Appeal found that Coast Mountain Bus Company's attendance management program discriminated against employees with disabilities and was not justified on the basis of *bona fide* occupational requirements.

Coast Mountain Bus Company implemented an attendance management program ("AMP") consisting of the following steps:

1. The employer identifies employees who have a high rate of absence. Each employee is asked to attend an informal interview, and is given the opportunity to explain the absences. The employee is informed that he or she must take all reasonable steps to minimize absences.
2. The employee attends a "Level 1" interview. The employer expresses the concern that the employee's absences are high. The employee is told that he or she is only required to provide medical information to the company's occupational health nurse.
3. The employee attends a "Level 2" interview. The employee is asked to obtain a medical assessment. Where a chronic illness is at issue, accommodation may be discussed with the company's occupational health nurse.
4. The medical assessment is considered. The employee attends a "Level 3" interview at which specific attendance guidelines are communicated. The employee is told that, if the employee's absences continue to exceed the average absence rate for transit operators, then termination may result. All of the employee's absences, including absences caused by a disability, are considered in this comparison.
5. If the employee's absences exceed the attendance guidelines, management representatives meet and decide whether to terminate the employee.

The Court of Appeal decided that the program was discriminatory for two primary reasons. First, under the AMP, employees with disabilities would advance more quickly as a result of



incurring absences caused by the disability. Second, employees were held to a uniform standard based upon average absence rates — rates calculated without regard for the fact that disability may cause elevated absence levels. The employer failed to establish that accommodating employees with a disability would necessarily result in undue hardship, and the AMP was therefore found to be discriminatory.

Employers with attendance management programs should review their programs to ensure they do not impose an absenteeism standard that does not take into account the fact that disability may result in elevated absences. Individual employees with disabilities must be considered on a case-by-case basis. Accommodating employees with disabilities should involve case-specific standards, and an analysis of the costs, and other possible hardships, associated with accommodation.

For more information please contact a member of our Labour & Employment Group.

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