

# 'WELCOME NEWS' IN B.C. COURT STATEMENT ON NON-CULPABLE ABSENTEEISM

By *Michael McKiernan*

**W**hat's an employer to do when it faces benefits costs for employees on long-term disability for up to 10 years?

## STATISTICS ON DISABILITY AND WORK

**42%**

of employees with disabilities needed at least one type of workplace accommodation



**79.5%**

of employees with disabilities who require an accommodation reported their employer had met at least one of their needs

Source: Statistics Canada's profile of the labour market experiences of adults with disabilities, 2012

Earlier this year, the B.C. Court of Appeal weighed in on the issue with a ruling that, while failing to interfere with an earlier finding that a municipality's decision to fire three employees in that situation was discriminatory, still contained some helpful comments for employers.

In *Langley (Township) v. Canadian Union of Public Employees Local 403*, the appeal court provided the "clearest statement yet" from a court in the province that employers can legally terminate employees for non-culpable absenteeism, says Drew Demerse, the lawyer who represented Langley in the case.

While firing a person because of a disability would normally result in a breach of federal and provincial human rights codes, the B.C. appeal court noted they contain an exception when the termination involves a *bona fide* occupational requirement, such as showing up for work.

"As a matter of general law, an employer may terminate an employee for non-culpable absenteeism. Work for pay is a [*bona fide* occupational requirement] that is an essential feature of the employment relationship," wrote B.C. Court of Appeal Justice Daphne Smith in the Jan. 3 decision.

"It is not discriminatory to terminate an employee who is unable to comply with this fundamental bargain, provided the employer has met its obligation to accommodate that employee," she added.

"This statement from the Court of Appeal will be welcome news for employers," says Demerse, a partner at Vancouver's Roper Greyell LLP.

## No prospect of return

The three Langley employees had already been off work for seven, eight and 10 years, respectively, with no prospect of return, when the city singled them out for termination as part of a 2013 review of long-term disability recipients who were also entitled to

employment benefits.

The terminations had no effect on the employees' disability payments, since their union, CUPE Local 403, administered that plan. But the move did cut them off from employer-sponsored benefits, including extended health, dental and group life insurance.

After the union grieved the firings, an arbitrator sided with the employees. Focusing on Langley's process for concluding it should fire them, he found the manner of their terminations was "arbitrary," "random" and, therefore, discriminatory.


Because the arbitrator used labour relations principles to come to his decision, the appeal court decided the provincial Labour Relations Board would be a better venue to hear Langley's appeal.

Ryan Anderson, a partner at Vancouver's Mathews Dinsdale & Clark LLP, says the passage of time between establishing the employees' incapacity for work and their ultimate termination allowed for the appearance that the decision to fire them carried the taint of an "ulterior motive." While Langley admitted that cost savings were a significant part of its decision, it maintained the determining factor was the permanent breakdown of the employment relationship.

"It's challenging to say that you've been able to accommodate them for the best part of a decade but that you can't go one more day. The triggering point was the cost," says Anderson.

## Lessons for employers

Anderson says employers can minimize their risks by tightening up their processes and monitoring employees' progress while on long-term disability.

"When you get to the point that the medical evidence shows they won't be coming back, then you can take action on the basis of the occupational requirement of being able to attend for work, rather than sitting on your hands for 10 years. Any time you dismiss someone who is absent due to a disability, it's going to be controversial. You need to proceed really delicately." 

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