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EMPLOYERS MAY NOT ELECT TO RETAIN A REPLACEMENT EMPLOYEE IN FAVOUR OF AN EMPLOYEE RETURNING FROM MEDICAL LEAVE

The complainant in *Bateman v. Prime Time Sports*, 2012 BCHRT 230, was hired to work at Prime Time Sports in November 2009. At the time of hire, the complainant disclosed that she was scheduled to undergo a surgery that would require four to eight weeks' recovery. She learned of the date of her surgery one month after being hired and the employer was by all accounts very accommodating. Due to complications with the surgery, the complainant required additional time off work. She attended at her workplace on March 26, 2010 to complete a form and ask when her employer would like her to return to work. The employer indicated that the complainant's services were no longer required and terminated her employment.

A replacement employee, who was paid less than the complainant, was hired during the complainant's absence. At the hearing, the employer took the position that the complainant's employment was terminated due to her poor performance. The employer admitted to wanting to retain the replacement employee because she did a better job in comparison to the complainant.

The BC Human Rights Tribunal (the "Tribunal") has held in at least one previous case that where an employee is dismissed while on pregnancy leave and her replacement remains employed, a *prima facie* case of discrimination is established. The Tribunal held a similar analysis should apply in the case of an employee who suffers from a disability and was absent from work on medical leave.

The Tribunal held that in the circumstances, the performance issue did not justify the termination. But for the medical leave, the employer would have had no opportunity to compare the complainant's performance with her replacement's performance and, accordingly, her disability played a role in the termination decision.

The Tribunal referred to *Human Rights Commission v. Newfoundland and Labrador (Minister of Health and Community Services)* (*"Newfoundland"*), 2009 NLCA 9, where the Supreme Court of Newfoundland and Labrador (Court of Appeal) came to an opposite conclusion. In that case, an employee was dismissed after her pregnancy. The employer argued that pregnancy was not a factor in the decision to terminate but, instead, the decision was made because a customer preferred the replacement employee. The Court of Appeal dismissed the appeal and concluded that pregnancy was not a factor in the decision to terminate because the customer preferred the replacement employee.

The Tribunal held that the *Newfoundland* case was a departure from the approach in other jurisdictions, particularly the approach in British Columbia. The *Newfoundland* case was based on the employer's intention, without regard for the effect of the decision.

The Tribunal awarded the complainant two months' wage loss and $5,000 to compensate for injury to dignity, finding that the new employee was preferred (and the complainant subsequently dismissed) because the complainant suffered a disability and took a medical leave. As such, the disability was a factor in the employer's decision to terminate and the decision violated the BC *Human Rights Code*.

Commentary

Throughout Canada, there is legislation to protect an employee's job while she is on pregnancy leave. An employee on such a leave should have no concern that by availing herself of the statutory leave, her employment may be adversely impacted. Human rights legislation may extend the same protection to employees who are absent from work on medical leave, as a result of a disability. Employers should be aware that even where there are legitimate business reasons for preferring a replacement employee (i.e., he or she outperforms the previous employee, is more efficient, or provides better customer service), a decision to dismiss the employee returning from medical leave is unlikely to be defensible, at least in British Columbia.