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## **Accommodation Does Not Prevent Corporate Reorganization**

By: Jennifer Shepherd and Gulu Punia | Calgary

It's a common question. You're restructuring and an absent employee is impacted. Can you fire the employee if he or she is on disability or other leave? A recent Federal Court of Canada decision, [Tutty v. MTS Allstream Inc.](#) (PDF), has confirmed that the answer is "yes".

### **The Facts**

While employed with MTS, Charles Tutty suffered from a stress-related illness for which he took disability leave for a number of months. He was initially cleared to return to work on a gradual basis under the supervision of his treating physician and an independent Return to Work Coordinator, paid for by MTS. Eventually Mr. Tutty was cleared to return to work on a full-time basis at full salary - although his ability to work overtime hours or travel had yet to be assessed.

Before the assessment was completed, Mr. Tutty's position was eliminated through a corporate reorganization. MTS offered Mr. Tutty another position at the same salary, although with reduced responsibilities. But he declined the position. Not only did he not like what he called a demotion, he also assumed that the alternate position would require extensive overtime and travel - which he believed he was not able to do in light of his disability. When Mr. Tutty refused the alternate position, he was dismissed.

### **Human Rights Complaint**

Mr. Tutty filed a complaint with the Canadian Human Rights Commission. He claimed that MTS failed to reasonably accommodate his disability. Further, he claimed he was fired because of his disability.

The Commission dismissed Mr. Tutty's complaint. In doing so, the Commission said that MTS had made reasonable efforts to accommodate Mr. Tutty's disability. Further, his termination did not appear to be linked to his health status.

### **Federal Court Appeal**

Mr. Tutty appealed to the Federal Court of Canada. In agreeing with the Commission's decision, the Federal Court said:

- there was no question that MTS had accepted Mr. Tutty's disability at face value, even though Mr. Tutty's ability to work overtime and travel was a live issue at the time of his termination; and
- MTS met its duty to accommodate by implementing the gradual return to work plan and hiring the Return to Work Coordinator.

### **What the Decision Means**

This decision is an example of a successful accommodation effort. It provides further clarification to employers about their duties to employees with disabilities in a corporate restructuring. As the Federal Court said, "an employer's duty to accommodate does not ... require that it hold a legitimate corporate reorganization in abeyance pending the resolution of an affected employee's disability". Employers are entitled to carry on with their strategic planning as long as they make reasonable efforts to accommodate employees with disabilities.

The Federal Court also reaffirmed the principle stated in [Central School District No. 23 v. Renaud](#) that accommodation is a "two-way street". Employees must be open to reasonable workplace adjustments, including accepting positions with different or reduced responsibility where necessary. Although a Federal Court case, these principles apply to provincial cases too.

The dismissal of a disabled employee is fraught with risk. However, if that employee is properly accommodated during his or her employment and the termination of employment is not based on disability, the dismissal can be carried out. Beware though - if any part of the reason for the dismissal is based on disability, the employee's complaint may succeed.

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