

# Downsizing and the Liability Risks of Laying Off Employees on Medical and Disability Leave



Being on leave doesn't prove a general force reduction layoff is disability discrimination.

Times are hard and many employers simply need to reduce staff to stay in business. And that raises a very ticklish question: Can you layoff employees who are currently on medical or disability leave? One reason companies are so reluctant to do this is the risk of liability for disability discrimination. However, even though most employees on medical or disability leave are deemed disabled under human rights laws, Canadian courts and tribunals have consistently ruled that laying off employees on medical leave as part of an overall restructuring may be acceptable provided that the employee's disability doesn't factor into the decision.

## **The *O'Grady v Bell Canada* Case**

A recent example is the 2018 ruling by the BC Human Rights Tribunal in a case involving the layoff of a Web Specialist with 19 years of service while she was on disability leave with mental health issues. The company had been working with the Specialist on a gradual return to work plan. So, news that she was being laid off along with 2,500 other employees as part of a corporate restructuring came as a shock, especially since it meant she no longer qualified for long-term disability benefits. The Specialist claimed that her disability and benefits factored into the decision to put her on the layoff list and filed a human rights complaint. The company denied the charge and contended that the layoff was purely the result of company-wide downsizing.

### **Key Point 1: Being on Medical Leave Doesn't Prove Disability Discrimination**

The Tribunal agreed with the company. The Specialist had the burden of proving that there was a connection between the layoff and the disability. The mere fact that she was on medical leave wasn't enough. "Looking at the whole of the evidence, the termination of an employment relationship while an employee is on disability leave does not give rise to an irrefutable presumption of discrimination on the ground of disability," the Tribunal explained. The Specialist had to come up with something

more “concrete” to support her allegation. And she couldn’t do it. So, the Tribunal tossed the claim without a trial.

## **Key Point 2: Duty to Accommodate Doesn’t Require Exemption from Restructuring**

The Tribunal also rejected the Specialist’s contention that the company violated its duty to accommodate her by not exempting her from layoff while she was on medical leave. The duty to accommodate doesn’t “require an employer to maintain an existing position for an employee [on leave] while it underdoes reorganization.” The Tribunal continued, “a restructuring employer may even replace the employee, so long as its decision is untainted by discriminatory considerations” [[O’Grady v. Bell Canada](#), 2018 CHRT 34 (CanLII), December 21, 2018].

## **What It Means**

Although it came down over a year before the COVID-19 outbreak, the *O’Grady* case has implications for future situations. And it’s not an outlier. Other courts and tribunals, both in and outside BC, have also ruled that being on medical or disability leave doesn’t shield an employee from a legitimate and wider staff reduction as long as the employer can demonstrate that the disability played no role in the decision.

**Example 1:** A federal court found no discrimination in laying off an employee on disability leave as part of a restructuring, especially since it was the employee who initiated the severance talks which led to a negotiated settlement satisfactory to both sides. The fact that the employee was on disability leave at the time of layoff wasn’t a “smoking gun” of an intent to discriminate, the court concluded [[Kerr v. Bell Canada](#), 2007 FC 1230 (CanLII), November 23, 2007].

**Example 2:** The Ontario Human Rights Tribunal found that terminating a radio technician 6 days before he was supposed to return from disability leave with a head injury was a legitimate business decision made in the face of an economic downturn that resulted in the elimination of other positions and senior officials. The Tribunal found “no evidence, save for the [technician’s] suspicions and the unfortunate timing, that his disability was a factor in the decision, directly or indirectly” [[Hill v. Spectrum Telecom Group Ltd.](#), 2012 HRT0 133 (CanLII), January 18, 2012].

**Example 3:** A federal court dismissed the disability discrimination case of an employee whose position was eliminated due to restructuring on the eve of his return from disability leave. The duty to accommodate doesn’t require an employer to “hold a legitimate corporate reorganization in abeyance pending the resolution of an affected employee’s disability,” noted the court, adding that an employee caught up in a legitimate restructuring has no special ‘right’ to be maintained in his existing position simply because” he’s on disability leave [[Tutty v. Canada \(Attorney General\)](#), 2011 FC 57 (CanLII), January 18, 2011].

## **How to Protect Yourself**

Although it’s a morally tough thing to do, you can layoff employees who are on or returning from medical or disability leave as part of a general downsizing as long as their disabilities in no way factor into your decision. Moreover, the duty to accommodate doesn’t require you to exempt employees from such layoffs simply because they’re disabled.

However, there's a pretty strong chance that employees who get laid off will **think** you committed disability discrimination and try to sue you for damages or even reinstatement. At that point, it will come down to the evidence. The employee will have the burden of proving that disability factored into the equation. While the mere fact that employees were on leave when the pink slip came down won't be enough, you could be done in by other evidence linking the disability to the layoff. So, it's incumbent on you to keep clear written records documenting:

- The business factors that made it necessary to engage in downsizing;
- The financial basis for determining that it was necessary to downsize to deal with these business losses; and
- Perhaps most importantly, the criteria you used to select the positions to eliminate and employees to layoff, which must be objective and in no way related to an employee's disability, race, age, religion, sex, family status or other ground protected from discrimination by human rights laws.