



**"My Benefits Have Stopped. I Want to Come Back to Work Now."
The Employer's Obligation**

Gwendoline Allison
Valkyrie Law Group LLP
604.926.6681
gallison@valkyrielaw.com

One of the most difficult issues facing human resources professionals is handling disabled employees. A particular challenge occurs when an employee's disability benefits are terminated because the employee no longer meets the provider's definition of disability. With no income, the employee tends to seek to return to work, even though her ability to work may be questionable.

What must an employer do? In a decision released on March 31, 2010 (*Boehringer Ingelheim (Canada) Ltd./Ltee v. Kerr*), the BC Supreme Court confirmed that in such a situation, an employer must take active steps to inquire as to the employee's ability and engage in a search for an accommodation, **even if** the employer believes the employee is not fit to return to work. The court also confirmed that it is not the employee's responsibility to prove she is capable of returning to work in some form before the enquiry and accommodation processes are required.

The employee in question, Ms. Kerr, suffered from a condition that affected her vision. She received long term disability benefits for two years, then the insurer terminated her benefits. Ms. Kerr met with her employer and advised that she wanted to return to work. She also applied to have her disability benefits extended, on the basis that she continued to be disabled.

Over the next 28 months, the employer did little. It sought and obtained medical information but took no other steps to return Ms. Kerr to work. Eventually, Ms. Kerr filed a human rights complaint. The BC Human Rights Tribunal upheld the complaint and awarded significant damages. The Tribunal held that the failure to engage in an enquiry about whether Ms. Kerr could return to work constituted discrimination. Further, since the employer had taken no steps at all to accommodate Ms. Kerr, the employer had not discharged its duty to accommodate.

The employer sought a judicial review of the decision. The employer argued that its failure to respond to the request to return to work did not constitute discrimination. It argued that before an employer has to act, the employee must not only ask to return to work but also provide some objective evidence that she is able to return to work. Since Ms. Kerr had not done so when she made the request, and there was some evidence she was still disabled, the employer had no duty to act. The employer argued that until the employer received a medical report many months later, it was not possible to determine whether Ms. Kerr was capable of returning to work without accommodation or to develop a return to work plan.

The court rejected the employer's argument, stating that the Tribunal's decision was not only reasonable but correct.

Faced with this situation, a local government cannot take a "wait and see" approach. It must get involved and be proactive. It should immediately obtain medical reports on the employee's ability to return to work, and then engage in the search for accommodation.