

Member's Quarterly

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Feature

Voluntary Retirement Precludes Claim of Ongoing Loss of Earnings

Accommodated employee can't have it all

It wouldn't be a stretch to say that most employees welcome retirement when the time comes. However, many employees may not contemplate the impact voluntary retirement might have on their lives, particularly in relation to workplace injuries.

In *Vautour v Workplace Health, Safety and Compensation Commission*, 2019 NBCA 82 (CanLII), the New Brunswick Court of Appeal considered the impact of retirement in the context of the workers' compensation regime. The workers' compensation regime is a no-fault scheme funded by employers which provides benefits to employees who are injured in workplace accidents and provides immunity from lawsuits arising from those accidents for workers and employers.

The appellant, Wendy Vautour, was employed as a court stenographer. Ms. Vautour developed bilateral elbow tendonitis. As a result, Ms. Vautour filed a workers' compensation claim which was accepted. Ms. Vautour was put off work, received earning replacement benefits, completed a number of medical examinations and treatments and was moved to an accommodated position which was suitable in relation to her medical restrictions. A little over a year later in October 2017, Ms. Vautour was again put off work due to tendonitis and her claim was re-opened as a result of a recurrence. During that time, Ms. Vautour applied for retirement leave effective December 1, 2017. In September 2018, the Workplace Health, Safety and Compensation Commission (the "Commission") advised Ms. Vautour that her earning replacement benefits would cease effective December 1, 2017, as she had applied for retirement leave effective that date and there were no medical reports supporting ongoing disablement.

Ms. Vautour appealed the Commission's decision to the Workers' Compensation Appeals Tribunal (the "Tribunal"). The Tribunal upheld the decision of the Commission, finding that the employer had properly accommodated Ms. Vautour and that her loss of earnings benefits ended upon her voluntary retirement as she chose to retire rather than seek further accommodation, thus ending any earnings loss.

Ms. Vautour appealed the Tribunal's decision to the New Brunswick Court of Appeal. Ms. Vautour argued that the Tribunal misinterpreted various provision of the *Workers' Compensation Act* (the "Act") including the meaning of "loss of earnings" and "suitable occupation"; failed to consider the merits of the case; reversed the burden of proof; and breached its duty of procedural fairness. She also argued that the Tribunal applied the wrong test for disablement when it determined that she had been suitably accommodated by the employer and ignored relevant medical evidence. The crux of Ms. Vautour's reasoning was that because the Commission re-opened her claim due to a recurrence and she was paid loss of earnings benefits, in the absence of any medical evidence to the contrary, her disablement was ongoing. Ms. Vautour alleged that she retired because she was unable to work without pain.

The New Brunswick Court of Appeal rejected Ms. Vautour's arguments, noting that Ms. Vautour retired before seeking further accommodation from her employer; failed to produce any evidence to rebut the Commission's contention that she had been appropriately accommodated by her employer; and there was no further medical evidence that indicated her disability continued beyond December 1, 2017. Ms. Vautour's assertion that retirement was due to her inability to work without pain was not supported



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by any medical evidence and her decision to retire was voluntary, which relieved the Commission from any further responsibility to pay for benefits or to proceed further with her claim. Ms. Vautour also failed to provide any evidence to support her position that she had not been appropriately accommodated when she made the decision to retire. The Court dismissed the appeal and confirmed that loss of earnings benefits are not paid to employees like Ms. Vautour, who have been appropriately accommodated, have available employment and choose to retire. In this particular case, retirement may not have been all it was cracked up to be.

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