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Supreme Court of Canada Clarifies the Duty to Accommodate

On July 17, 2008, the Supreme Court of Canada in *Hydro-Québec v. Syndicat des employé-e-s de techniques professionnelles et de bureau d'Hydro-Québec*, 2008 SCC 43 clarified that there are limits to the employer's duty to accommodate. As Madame Justice Deschamps stated for the unanimous court:

> The employer's duty to accommodate ends where the employee is no longer able to fulfill the basic obligations associated with the employment relationship in the foreseeable future.

Background

This case involved the termination of an employee who missed 960 days of work during the seven years that she worked for her employer, Hydro- Québec. The absences were due to many medical problems. The main medical problem was a personality disorder that resulted in the employee having difficulty interacting with her supervisors and co-workers.

Over a seven year period the employer had provided numerous accommodations, including: light duties, assignment to different supervisors and lengthy leaves of absence. At the time of her termination, the employee had been absent for five consecutive months, her attending physician had recommended that she stop work for an indefinite period of time and the psychiatric assessment obtained by the employer indicated that the employee would not be able to "work on a regular and continuous basis without continuing to have absenteeism problems as in the past."

While an arbitrator dismissed the employee's grievance on the basis that the grievor was "unable in the reasonably foreseeable future, to work steadily and regularly as provided for in the contract (of employment)", the Quebec Court of Appeal overturned the arbitrator's decision and made the following two findings: (i) the employer had to show that it was 'impossible' to accommodate the employee's medical condition; and (ii) the duty to accommodate has to be assessed at the time of the decision to dismiss the employee and should not consider the previous time the employee was absent.

Supreme Court of Canada Decision

Proving Undue Hardship

The SCC overturned the decision of the Quebec Court of Appeal and held that undue hardship does not require the employer to show that it is "impossible" to accommodate the employee. Rather, what is required is proof of undue hardship which can take many forms based on the circumstances of the employee and the employer. The SCC defined the duty to accommodate as ensuring

> [t]hat persons who are otherwise fit to work are not unfairly excluded where working conditions can be adjusted without undue hardship. However, the purpose of the duty to accommodate is not to completely alter the essence of the contract of employment, that is, the employee's duty to perform work in exchange for remuneration…The employer does not have a duty to change working conditions in an fundamental way, but does have a duty, if it can do so without undue hardship, to arrange the employee's workplace or duties to enable the employee to do his or her work.

Since every employee's medical condition and every workplace is unique, the SCC declined to set strict guidelines as to what constitutes undue hardship. However, in regard to cases of chronic absenteeism the court stated that "if the employer shows that, despite measures taken to accommodate the employee, the employee will be unable to resume his or her work in the reasonably foreseeable future, the employer will have discharged its burden of proof and established undue hardship."

Time of Accommodation

The SCC held that the decision to dismiss an employee must be based on an "assessment of the entire situation". This includes: (i) the employee's past absences; (ii) accommodations that the employer has previously provided; and (iii) the medical evidence at the time of dismissal.

Impact on Employers

This decision confirms that the duty to accommodate is not limitless and that the purpose of the duty accommodate is to assist employees to perform productive work for the employer. The duty to accommodate does not require the business to be excessively hampered by accommodating the employee or to maintain a position for an employee who will be unable to return to work in the reasonably foreseeable future.

While this clarity from the SCC is helpful, it should not change an employer's approach to workplace accommodation issues. The employer continues to be required to conduct an assessment of accommodation options in the workplace and prior to reaching the point of undue hardship the employer is required to provide the employee with various accommodation options. In the case of the chronically absent employee, to establish that the point of undue hardship has been reached the employer needs to establish that the employee's past absences are excessive and that, based on the available medical evidence, the employee will be unable to return to work in the reasonably foreseeable future.

Supreme Court of Canada Defines a "Bona Fide Pension Plan"

With mandatory retirement abolished in British Columbia, a concern for employers has been the impact of the change on their pension, retirement and group insurance plans. Section 13(3)(b) of the British Columbia *Human Rights Code* provides that the provisions of the *Code* pertaining to discrimination in employment do not apply:

> As it relates to marital status, physical or mental disability, sex or age, to the operation of a bona fide retirement, superannuation or pension plan or to a bona fide group or employee insurance plan, whether or not the plan is subject to a contract of insurance between an insurer and the employer.

The unsettled question was: what is a "bona fide" retirement, superannuation or pension plan? The Supreme Court of Canada recently answered this question in *New Brunswick Human Rights Commission v. Potash Corporation of Saskatchewan*, 2008 SCC 45 in the context of the New Brunswick *Human Rights Code* which contained an exemption for bona fide pension plans similar to British Columbia.

Madame Justice Abella, for the majority of the court, held that the use of the term "bona fide" in the context of a pension plan is different from its use in human rights legislation in the context of a "bona fide occupational requirement". "Bona fide occupational requirement" has a well established meaning in human rights legislation requiring the employer to justify the occupational requirement and undertake the process of accommodating employees to the point of undue hardship.

In contrast the legislature's use of use of "bona fide" with respect to pension plans was designed to protect pension plans from being destabilized by the prohibition of mandatory retirement. For a pension plan to be "bona fide" it must be "a legitimate plan, adopted in good faith and not for

the purpose of defeating protected rights." It is the plan itself that is evaluated, not the actuarial details or mechanics of the terms and conditions of the plan.

Therefore, so long as the employer is relying on a pension or insurance plan enacted in good faith and not for the purpose of defeating protected rights, it does not have a further duty to accommodate an employee who is adversely impacted by a pension or insurance plan due to their age. As Abella J. stated:

> Unless there is evidence that the plan as a whole is not legitimate, therefore, it will be immune from the conclusion that a particular provision compelling retirement at a certain age constitutes age discrimination.

If you would like more information on the issues discussed in this briefing please contact any member of the Labour and Employment Group listed below.

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