

The Duty to Accommodate in the Canadian Workplace:

Leading Principles and Recent Cases

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Summaries of Leading Recent Accommodation Cases

Some of what follows are summaries of leading accommodation cases from labour arbitrators and human rights tribunals that I, along with Matthew Wilson, counsel at the Regional Municipality of Durham, have prepared for the on-line paid subscription service **accommodate.ca**, found at www.accommodate.ca. Designed for the Canadian industrial relations community by the Centre for Labour-Management Development in Winnipeg, this service provides a comprehensive summary each week of a seminal accommodation case arising from the Canadian workplace. You are invited to review the website.

1. Leading Principles of Accommodation

The essence of the duty to accommodate is straight-forward to state: employers and unions in Canada are required to make every reasonable effort, short of undue hardship, to accommodate an employee who comes under a protected ground of discrimination within human rights legislation. In most cases, the protected ground requiring an accommodation is a disability, although recent accommodation cases have involved other grounds such as religion,^[1] gender,^[2] and race.^[3]

While the general rule is easy to state, the outer boundaries of accommodation are much harder to determine. But this much is clear to date: the duty requires more from the employer than simply investigating whether any existing job might be suitable for a disabled employee. Rather, the law requires an employer to determine whether existing positions can be adjusted, adapted or modified for the employee, or whether there are other positions in the workplace that might be suitable for the employee.

The employer must accommodate up to the point of “undue hardship”. While there is no single definition in law of this term, the various decisions on accommodation make it clear that this effort must be substantial. The caselaw has clearly said that the employer’s must show that its attempts to accommodate were “serious”,^[4] “conscientious”,^[5] “genuine”,^[6] and demonstrated its “best efforts.”^[7] The Supreme Court of Canada in 1999 endorsed this threshold, stating that employers must establish that it is “impossible to accommodate individual employees ... without imposing undue hardship.”^[8] Once the employee has established a *prima facie* case that she or he

^[1] *Jones v. C.H.E. Pharmacy* (2001), 39 C.H.R.R. D/93 (B.C.H.R.T.); *Commission scolaire regionale de Chambly v. Bergevin* (1994), 115 D.L.R. (4th) 609 (S.C.C.).

^[2] *British Columbia (Public Service Employee Relations Commission) v. B.C.G.S.E.U.*, [1999] 3 S.C.R. 3.

^[3] *Re Town of Geraldton* (1998), 73 L.A.C. (4th) 260 (Murray).

^[4] *Krzmaric v. Timmins Police Services Board* (1997), 98 C.L.L.C. 230-004 (Ont. Div. Ct.).

^[5] *CUPW v. Canada Post Corp.* (1997), 6 Lancaster’s Equity and Accommodation Reporter 5 (May/June) (Ponak).

^[6] *Holmes v. Attorney-General of Canada* (1997), 97 C.L.L.C. 230-022 (F.C. T. D.), upheld on appeal, A-430-97 (QL 1999 FCJ #598), (29 April 1999).

^[7] *CAW, Local 3204 v. Royal Oak Mines* (1997), 6 Lancaster’s Equity and Accommodation Reporter 3 (May/June) (R. Bird).

^[8] *British Columbia, supra*, note 2, at para. 54.

has a mental or physical disability that requires employment accommodation, the burden then shifts to the employer to prove that every reasonable effort was made to accommodate the employee's disability.

The duty to accommodate is a fundamental legal obligation. It comes from three sources: (i) the applicable human rights legislation; (ii) rulings from the Supreme Court of Canada; and (iii) rulings of labour arbitrators and human rights tribunals. The Supreme Court rulings are where labour and employment lawyers primarily look for direction in this area. In a series of important decisions that began in 1985,^[9] the Supreme Court of Canada has said that:

- Human rights legislation has a quasi-constitutional place in Canadian law, and all other statutes, policies and practices – public and private – cannot be inconsistent with it.
- Discrimination may be entirely unintentional, yet it will be in violation of human rights statutes if a person under a protected ground is treated differentially and adversely for no justifiable reason.
- Accommodation is a significant human rights obligation, and must be a central feature in the Canadian workplace.
- The duty rests on three sets of shoulders, with *employers*, *unions* and the *employee seeking the accommodation* all assuming legal responsibility for ensuring the success of an accommodation request.
- The primary responsibility rests with the employer, because it has the ultimate control over the workplace. Once it receives a request, it must initiate the accommodation search.
- The union must co-operate with the accommodation process, and not unreasonably block a viable accommodation option.
- The employee is expected to participate in the accommodation process, and cannot refuse a reasonable accommodation offer.
- Collective agreement provisions are to be respected, but they may have to be waived if they unreasonably block a viable accommodation option or if they treat individuals who are protected by human rights legislation differently without a compelling justification.

In three seminal decisions in 1999 and 2000,^[10] the Supreme Court of Canada has clarified and broadened the extent of the duty. It has stated that:

^[9] *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970; *Central Alberta Dairy Pool v. Alberta (Human Rights Commission)*, [1990] 2 S.C.R. 489; *O'Malley v. Simpson-Sears*, [1985] 2 S.C.R. 536.

^[10] *Québec (Commission des droits de la personne et des droits de la jeunesse) v. Montréal (City)*, [2000] 1 S.C.R. 665; *Grismer v. British Columbia (A.G.)*, [1999] 3 S.C.R. 868; *British Columbia (PSERC) v. British Columbia Government and Service Employees' Union*, *supra*, note 2.

- Accommodation measures must be taken unless it is *impossible* to do so without imposing undue hardship.
- The undue hardship threshold is high.
- Employers and unions must be sensitive to the various ways that individual capabilities may be accommodated.
- Workplace standards – such as lifting requirements or work schedules – that unintentionally distinguish among employees on a protected human rights ground (i.e., disability, gender, religion, etc.) may be struck down or modified. Employers must build liberal conceptions of equality into workplace practices.
- Courts, labour arbitrators and human rights tribunals are to take a strict approach to exemptions from the duty to accommodate. Exemptions are to be permitted only where they are reasonably necessary to the achievement of legitimate business-related objectives.

In *British Columbia (PSERC) v. British Columbia Government and Service Employees' Union* (“*Meiorin*”),^[11] its most comprehensive decision on accommodation to date, the Supreme Court said that employers must ask themselves a series of questions when considering an employee request for accommodation. These questions include:

- (i) Have alternative approaches been investigated that do not have a discriminatory effect, such as individual testing?
- (ii) If alternative standards have been investigated and found to be capable of fulfilling the employer’s purpose, why were they not implemented?
- (iii) Is it necessary to have all employees meet the single standard for the employer to meet its legitimate purpose? As well, could standards reflective of group or individual differences and capabilities be established?
- (iv) Is there a way to do the job that is less discriminatory while still accomplishing the employer’s business objectives?
- (v) Is the standard properly designed to ensure that the desired qualification is met without placing an undue burden on those to whom the standard applies?
- (vi) Have other parties in the workplace – the union and the individual employee seeking accommodation – fully assisted in the search for a solution?

The *Meiorin* decision has since become the contemporary touchstone for accommodation analysis by labour arbitrators, human rights tribunals and the courts.^[12] The significance of the judgement lies in its articulation of a unified three-step test for determining the existence of

^[11] *Ibid.*

^[12] Several perceptive articles have been written about the importance of *Meiorin*: C. Sheppard, “Of Forest Fires and Systemic Discrimination: A Review of *British Columbia (Public Service Employee Relations Commission) v. B.C.G.S.E.U.*” (2001), 46 *McGill Law Journal* 533; K. Schucher, “Weaving Together the Threads: A New Framework for Achieving Equality in Workplace Standards” (2000), 8 *Canadian Labour and Employment Law Journal* 325; D. Pothier, “BCGSEU: Turning a Page in Canadian Human Rights Law” (1999), 11 *Constitutional Forum* 19; and T. Witelson, “From Here to Equality: *Meiorin*, *TD Bank*, and the Problems with Human Rights Law” (1999), 25 *Queen’s Law Journal* 347.

discrimination, and whether it is unjustified under human rights law. This test signifies not so much a break with the recent developments in human rights and accommodation law as it does a synthesis of the prevailing principles, while discarding what had not worked, and raising the threshold for compliance.

The Supreme Court's three-step test in *Meiorin* simultaneously combines the previously distinct legal approaches towards analyzing "direct" and "adverse effect" discrimination, and, in doing so, ends the prevailing confusion over how and when to apply these tests. When assessing the validity of a challenged standard or practice, a legal decision-maker is required to ask the following three questions:

- i) Has the employer adopted the challenged standard or practice for a purpose *rationaly connected* to the performance of the job?
- ii) Has the employer adopted the standard in an *honest and good faith belief* that it is necessary to fulfil the work-related purpose? And
- iii) Is the standard *reasonably necessary*, in that it would be impossible to accommodate an individual employee without imposing undue hardship upon the employer?

With the arrival of this unified test, discrimination analysis is now more straight-forward and more comprehensive. The three step test begins with a general review of the particular work performed, then moves to assessing the employer's subjective intent for creating the standard, and finally focuses on the accommodation of the individual worker and the defences that the employer can erect to attempt to justify either the standard or its particular application. If the employer fails any one of the steps, then it is in breach of its duty not to discriminate. The essence of the new approach in *Meiorin* has been to require employers to accommodate the characteristics of individual employees as much as reasonably possible, while taking a strict approach to any exceptions from the accommodation duty.

2. Undue Hardship

An employer and/or a union are required by law to accommodate an employee, unless the required accommodation would result in undue hardship to the employer and/or the union. The

Supreme Court of Canada in *Central Alberta Dairy Pool*^[13] and *Renaud*^[14] laid out the important aspects of the “undue hardship” test.

In *Central Alberta Dairy Pool*, the Supreme Court developed a non-exhaustive list of six factors that it said were relevant to what constitutes “undue hardship”.^[15] They are:

- Financial cost
- Impact on a collective agreement
- Problems of employee morale
- Interchangeability of the work force and facilities
- Size of the employer’s operations; and
- Safety

In addition to these six classic undue hardship factors, an unarticulated seventh factor now appears to be emerging: *the legitimate operational requirements of a workplace*. While labour arbitrators and human rights tribunals have not yet formalized this new factor, recent decisions indicate an allowance for undue hardship in the workplace that does not easily fit within the classic six factors.

A labour board or human rights tribunal that is applying these factors will balance them with the right of the employee seeking an accommodation to be free from discrimination. Rarely will all of these factors come into play in any one single case. While the Supreme Court itself did not lay out these undue hardship factors in any order of importance, it is clear from the subsequent caselaw that some of these factors have significantly more weight than others. *Safety* and the *size* of the employer’s operations are frequently invoked by employers, and legal decision-makers have treated them with some consideration. *Provisions of a collective agreement* have been given an intermediate importance, as have the *legitimate operational requirements of a workplace*. Relatively little regard has been given to the defence of *employee morale*. Similarly, very few

^[13] *Supra*, note 9.

^[14] *Supra*, note 9.

^[15] Note that in Ontario, the *Human Rights Code*, in s. 17(2), lists only three factors that would amount to an undue hardship consideration: cost, health and safety requirements, and outside sources of funding. The Ontario Human Rights Commission states, in its Policy and Guidelines on Disability and the Duty to Accommodate (Toronto, OHRC, 2000), that there are “no other considerations, other than those that can be brought into those three standards” that can be properly considered under Ontario law (p. 27). Some arbitrators have indicated that the undue hardship factors are limited to those listed in the Code: i.e., *Ingersoll (Town)*, [2003] O.L.A.A. No. 554 (Williamson). However, other labour arbitrators in Ontario have regularly relied upon the longer *Central Alberta Dairy Pool* list. This question remains to be resolved in law.

cases have accepted *cost* as a legitimate undue hardship factor in the specific circumstances. The issue of the *interchangeability of the workforce* and operations has generally been subsumed within the size of the employer factor.

As noted earlier, the amount of hardship to satisfy the accommodation duty must be substantial. *Renaud* involved a case of religious accommodation, but the ruling applies equally to issues of disability. The Supreme Court emphasized that an accommodation request which involved some inconvenience or operational upset would be insufficient to meet the test. In *Renaud*, the Court said:

More than mere negligible effort is required to satisfy the duty to accommodate. The use of the term ‘undue’ infers that some hardship is acceptable; it is only ‘undue’ hardship that satisfies this test....Minor interference or inconvenience is the price to be paid for religious freedom in a multicultural society.^[16]

The various factors have been commented upon in various accommodation decisions during the past 10 years:

Financial Cost:

This is a frequently cited factor by employers when raising an undue hardship defence. Cost is a factor very much tied to the size and viability of the enterprise. As with the other factors, the employer would have to prove that the cost would be substantial in order to be found to be “undue.” the issue of “cost” is one of the identified undue hardship factors.

Accommodation law has not yet come to a settled consensus on the precise meaning of the term. One line of decisions has said that an employer can only satisfy the “cost” factor if the expense of an accommodation would threaten the very viability of the employer’s operations (i.e., something akin to bankruptcy). In *Quesnel v. London Educational Health Centre*,^[17] an Ontario Board of Inquiry under the *Human Rights Code* stated that:

...cost would amount to undue hardship only if it would alter the *essential nature* or *substantially affect the viability* of the enterprise responsible for the accommodation.

^[16] *Supra*, note 9, at para. 19.

^[17] (1995), 28 C.H.R.R. D/474 (Ont. Bd. Inq.).

And in *Re Zettel Manufacturing Ltd.*,^[18] Arbitrator Reilly stated that :

If the Employer was able to show a high level of pervasive, irresolvable financial distress and corporate insecurity attributable to the accommodation, the level of harm may then be such that the business could no longer accommodate the Grievor's illness...

Another line of decisions is emerging, which suggests a less rigorous threshold. While not yet clearly articulated, it seems to suggest that the employer is entitled to conduct a balancing analysis, which would weigh the cost of the accommodation against the likely productive return from the employee requiring the accommodation. In most (but not all) cases, whatever approach is chosen would probably lead to the same result. The Supreme Court of Canada, in *Grismer v. British Columbia Superintendent of Motor Vehicles*^[19], has offered a more imprecise assessment of cost, but warned that legal decision-makers must be cautious about accepting a low threshold:

...one must be wary of putting too low a value on accommodating the disabled. It is all too easy to cite increased cost as a reason for refusing to accord the disabled equal treatment.^[20]

In a distinct, but analogous case, the Supreme Court of Canada in *Newfoundland (Treasury Board) v. N.A.P.E.*^[21] stated that cost in a challenge under s. 15 of the *Charter of Rights and Freedoms* would have to amount to a severe fiscal crisis in order to justify a government's move to override equality rights: "...courts will continue to look with strong scepticism at attempts to justify infringements of *Charter* rights on the basis of budgetary constraints."^[22] However, the Court did say that a financial emergency, which threatened the very viability of the state, would, in appropriate cases, permit the infringement.

Although cost has rarely been accepted by arbitrators and human rights tribunals as a compelling undue hardship factor in the specific circumstances of a particular case, a recent decision by the Ontario Divisional Court in *Roosma v. Ford Motors Co.*^[23] suggests that it may not be an entirely unavailable argument. The *Roosma* decision involved an issue of religious

^[18] (2005), 140 L.A.C. (4th) 377.

^[19] *Supra*, note 10.

^[20] *Ibid*, at para. 41.

^[21] [2004] SCC 66.

^[22] *Ibid*, para. 72. Also see *Nova Scotia (Workers' Compensation Board) v. Martin*, [2003] 2. S.C.R. 504: "the budgetary considerations in and of themselves cannot normally be invoked as a free-standing pressing and substantial objective for the purposes of s. 1 [of the *Charter*]." Para. 109.

^[23] (2002), 21 C.C.E.L. (3d) 112.

accommodation for two auto workers whose faith did not permit them to work on a Friday evening. The Court ruled that, despite the size and wealth of the employer, the proposed accommodation of allowing the two employees to have every Friday evening off “...came with significant costs and obligations affecting others, as well as safety and quality concerns.”

An employer seeking to argue that a proposed accommodation could not have been accomplished without substantial costs amounting to undue hardship must be prepared to present their case with detailed financial and accounting evidence. The Supreme Court of Canada stated in *Grismer* that “impressionistic evidence of increased expense will not generally suffice.”

Finally, factors such as the financial cost of methods of accommodation are to be applied with common sense and flexibility in the context of the factual situation of any particular case. The Supreme Court of Canada observed in *Chambly v. Bergevin*^[24] that what may be entirely reasonable in times of prosperity could impose an unreasonable financial burden upon an employer in times of economic restraint.

In sum, costs will only amount to an undue hardship if they can be established to be:

- related to the accommodation;
- provable, and not based on surmise or speculation; and
- so substantial that, at the very least, they would outweigh the long-term productive benefit that would likely accrue to the employer. Arguably, the test on “cost” might be that set so high such that the cost had to either change the essential nature of the operation, or substantially impact upon its financial viability.

Safety:

The issues to examine here are whether the proposed accommodation would pose a safety risk to (i) other employees or to (ii) the employee seeking an accommodation. For example, if an employee whose religious beliefs compelled him to wear a beard, then an employer might be justified in removing him from his particular position in a sawmill because he was unable to shave his beard in order to wear a mandatory breathing apparatus in times of emergency. In such a case, the established danger would extend beyond the affected employee to other sawmill

^[24] [1994] 2 S.C.R. 525, at p. 546. Also see *Meiorin*, *supra*, note 2, at para. 63.

workers who relied upon this employee for assistance in emergencies. In such a case, where there would be a real and significant increase in the magnitude of risk, the undue hardship safety factor would be proven.^[25]

However, if the only safety issue is to an employee himself or herself, then the undue hardship threshold will be usually much higher. Suppose an employee could not wear a hard hat on a construction site for religious reasons. This employee understood and accepted the small amount of risk involved, and there was no safety risk to other employees. In such a case, the likelihood of the employer establishing an undue hardship would be remote.^[26]

These considerations are expressed in the 2000 accommodation guidelines issued by the Ontario Human Rights Commission. In these guidelines, the Commission states the factors it considers relevant to the health and safety risk:

- The willingness of a person with a disability to assume the risk in circumstances where the risk is to his or her own health or safety;
- Whether the modification or waiving of the requirement is reasonably likely to result in a serious risk to the health or safety of others;
- The other types of risk legally tolerated at the place of work; and
- The types of risks tolerated within society as a whole.

The Supreme Court in *Meiorin* and *Grismer* clearly indicated that zero-tolerance safety rules, while defensible from a purposive point of view, may fail the accommodation duty if they do not build in concepts of equality. It warned that such standards cannot be inflexibly or blindly applied. In the two decisions, agencies of the British Columbia government had consulted with external technical experts to develop new standards for forest fire fighting (*Meiorin*) and for highway traffic safety (*Grismer*). Yet, in neither case did the government agency nor the technical experts truly considered ways to ensure that disadvantaged persons were not disproportionately affected by the standards, even while maintaining reasonable safety standards. The Court ruled that, when developing and applying safety standards, employers and institutions must accept that some moderate level of risk might be reasonably necessary in order to ensure

^[25] *Pannu v. Skeena Cellulose Inc.*, [2000] B.C.H.R.T.D. No. 56.

^[26] See the remarks of Madame Justice Wilson in *Alberta Human Rights Commission v. Central Alberta Dairy Pool*, *supra*, note 9, regarding the Supreme Court of Canada's re-appraisal of its earlier decision in *Canadian National Railway Co. v. Canada (Human Rights Commission)*, [1987] 1 S.C.R. 1114 ("Bhinder").

the success of an accommodation. As well, employers must present “cogent” evidence to establish to safety argument, because “anecdotal or impressionistic evidence” concerning the magnitude of risk will invariably be insufficient.^[27]

Size of the Operation

The larger the operation, the more likely it is that it can afford to permit a wider range of accommodations for an employee with a disability. What may amount to a prohibitively expensive or disruptive accommodation for a small workplace may be found to be entirely affordable or doable for a larger one. In *Chambly, Commission scolaire regionale v. Bergevin*, the Supreme Court of Canada ruled that:

...in a large concern, it may be a relatively easy matter to replace one employee with another. In a small operation replacement may place an unreasonable or unacceptable burden on the employer.^[28]

Interchangeability of the Workforce and Facilities

This factor relates to the flexibility of the operations. The board or court reviewing the accommodation dispute is to ask: are the workforce and/or facilities large enough or complex enough or adaptable enough to be able to implement (for example) a flexible work schedule or a light-duty work load or a re-bundling of work assignments, without undue hardship? This factor is frequently linked to the size of the operations, since many larger workplaces would have the variety of jobs and classifications to be able to create flexible accommodations for particular needs.

Provisions of a Collective Agreement:

A viable accommodation can override the provisions of a collective agreement, unless the proposed accommodation would *significantly* interfere with the rights of other employees.

^[27] For a creative application of the new safety standard, see *Shuswap Lake General Hospital v. B.C.N.U.*, [2002] B.C.C.A.A.A. No. 21 (Gordon).

^[28] [1994] 2 S.C.R. 525, at p. 546.

However, recent rulings have said that, before trumping a collective agreement, other less intrusive accommodations must be investigated first by the employer.

Only when no other appropriate accommodation is possible should a proposal that would interfere with collective agreement rights be adopted. Even then, a proposed accommodation that would cause the loss of another employee's job (i.e., bumping a senior employee out of a job), or granting super-seniority to an accommodated employee (i.e., red-lettering her or him, so that he or she couldn't be bumped) would amount to an undue hardship because of its impact upon the job interests of other employees.

In *Renaud*, the Supreme Court stated that:

The employer must establish that actual interference with the rights of other employees, which is not trivial but *substantial*, will result from the adoption of the accommodating measures... *While the provisions of a collective agreement cannot absolve the parties from the duty to accommodate, the effect of the agreement is relevant in assessing the degree of hardship occasioned by interference with the terms thereof.* Substantial departure from the normal operation of the conditions and terms of employment in the collective agreement may constitute undue interference in the operation of the employer's business.^[29]

[Italics added]

Seniority rights have been the biggest area of friction when accommodation proposals run up against negotiated provisions in a collective agreement. The emerging rules on reconciling this tension state that:

- Collective agreement rights are important, and accommodation proposals that do not interfere with bargained entitlements must be exhaustively explored first.
- Significant job rights – such as an incumbent's job position – are not to be interfered with by an accommodation. This would amount to an undue hardship.
- Less important job entitlements, where no actual loss of a position is involved, would be eligible candidates for an accommodation. An example would be a posted vacancy. Here, the interference with collective agreement rights, while real, would not be seen as significant, because no incumbent would be displaced from his or her actual job.

The Legitimate Operational Requirements of a Workplace

^[29] *Supra*, note 9, at para. 20.

While not yet a clearly stated and defined undue hardship factor, the legitimate operational requirements of a workplace has been accepted by a number of recent arbitration decisions. For example, several recent labour arbitration decisions have indicated that an employer which has attempted to accommodate an employee with a serious substance-abuse problem has satisfied the undue hardship threshold where the employee has made several unsuccessful attempts to return to the workplace, and continued rehabilitation holds no assurance of a future success.^[30]

Similarly, an employer is not required to accommodate an employee request for a significant number of paid religious holidays that exceeds the standard Christian holidays bargained during collective negotiations.^[31] Nor is a large employer obligated to continue to employ an employee with depression whose illness had resulted in frequent and unpredictable absences.^[32] In these cases, the cited undue hardship does not fall within cost or safety or any of the other classic factors. While this inchoate factor remains vague and imprecise, which increases the possibility of its misuse, arbitrators and the courts have expressed a functional need to find a place for it within the accommodation analysis.

Employee Morale

The Supreme Court in *Renaud* said that, while the impact of a proposed accommodation on other employees must be a consideration in determining whether undue hardship exists, some caution and care must be applied with this factor. The Court clearly distinguished between concerns over legitimate rights (i.e. protection of seniority) and concerns based on stereotypical or discriminatory reactions (i.e. an unwillingness to work alongside a person with a disability, without seeking to understand the true abilities of the person). It stated that:

The reaction of employees may be a factor in deciding whether accommodation measures would constitute undue interference in the operation of the employer's business. In *Central Alberta Dairy Pool*, Wilson J. referred to employee morale as one of the factors to be taken into account. It is a factor that must be applied with caution. The objection of employees based on well-grounded concerns that their rights will be affected must be considered. On the other hand, objections based on attitudes inconsistent with human rights are an irrelevant consideration.^[33]

^[30] *Re International Forest Products Ltd.* (2001), 101 L.A.C. (4th) 111 (Munroe); *Re Uniroyal Goodrich Canada Inc.* (1999), 79 L.A.C. (4th) 129 (Knopf); *Re Toronto District School Board* (1999), 79 L.A.C. (4th) 365 (Knopf).

^[31] *Ontario (Ministry of Community and Social Services) v. O.P.S.E.U.* (2000), 50 O.R. (3^d) 560 (C.A.).

^[32] *C.U.P.W. v. Canada Post Corp.* [2001] B.C.J. No. 680 (C.A.).

^[33] *Supra*, note 9, at para. 30.

The concerns raised by the Supreme Court over the potential misapplication of the employee morale defence have significantly restricted its subsequent use as a serious undue hardship factor. In *Meiorin*, the Court insisted that “...the attitudes of those who seek to maintain a discriminatory practice cannot be reconciled” with human rights legislation.^[34] However, the concerns of other employees about the possible impact of an accommodation was given recognition in *Roosma v. Ford Motor Co.*^[35] Here, the Ontario Divisional Court held that employee morale was a legitimate undue hardship concern of the automaker when it refused to allow Friday evening off for two employees for religious reasons because of the impact the weekly absences would have on other employees.

^[34] *Supra*, note 2, at para. 80.

^[35] .

3. Responsibilities of Unions

In *Renaud*,^[36] the Supreme Court of Canada ruled that unions have a responsibility, together with employers, to accommodate employees protected by human rights legislation. Like an employer, a union cannot rely upon a collective agreement provision to escape its accommodation responsibilities. However, also like an employer, a union can refuse a proposed accommodation if it would result in undue hardship to other members of the bargaining unit. The *Renaud* decision stated that a union can breach its accommodation duty in one of two ways: first, by signing a collective agreement that contains a discriminatory provision (even if it opposed the provision at the bargaining table), and second by standing in the way of a reasonable accommodation proposal.^[37]

A significant area of uncertainty in the current law on the accommodation duty is the union's exposure to liability for a discriminatory provision in the collective agreement that it jointly bargained with the employer. It is clear that a union would bear some joint liability with an employer for a discriminatory clause that they both had willingly negotiated. However, the union's legal exposure is much less certain in circumstances where it had either opposed, or subsequently sought to remove, the offending provision. While the predominant approach by legal decision-makers has been to recognize that a union should not bear any *per se* liability where it made genuine efforts, either at the bargaining table or afterwards, to oppose a discriminatory provision, a recent Alberta Court of Queen's Bench judgement has challenged this direction.

^[36] *Supra*, note 9.

^[37] See *Stewart v. Samuels* (2001), 39 C.H.R.R. D/326 (B.C.H.R. Trib.), where the union was cleared of liability because the evidence did not demonstrate that it either participated in the discriminatory conduct (abetting racist behaviour) or prevented the employer from accommodating the affected employee.

The predominant approach is illustrated in *Ministry of Health and O.P.S.E.U. (Pazuk)*,^[38] a 1994 decision of the Ontario Grievance Settlement Board. On the facts, the collective agreement expressly provided that, for the purpose of determining severance pay entitlement, an employee's continuous service was not to include any period in which he or she was receiving long-term disability payments. (The grievor had been on long-term disability for almost ten years, and sought to have this time credited for the purpose of severance pay). In its decision, the Grievance Settlement Board held that the restriction constituted indirect discrimination, and directed the employer to include the time spent on long-term disability in calculating the grievor's severance pay. A unique feature of this case was that, because the union had attempted in bargaining to amend the provision in order to comply with human rights legislation, the arbitration board concluded that the union was not jointly liable with the employer, even though it was a signatory to the offending clause. This ruling indicated a move away from earlier decisions that a union's agreement to an unlawful provision will invariably result in a finding of joint liability for losses suffered by the complainant.^[39] However, other early decisions that had challenged this joint-liability approach had nevertheless ruled that if the union has displayed unwillingness to change an offensive collective agreement provision, despite the employer's urging, it may still be held jointly liable.^[40]

Furthermore, a union can avoid human rights liability by taking the initiative to propose alternative solutions to a request for accommodation, and being prepared to waive parts of the collective agreement in ways that would not disrupt the rights of other employees. In *Drager v. I.A.M.*,^[41] a human rights tribunal ruled that, although the union had participated in the formulation of a discriminatory clause in the collective agreement, it was not liable because it had shown flexibility regarding seniority and shift rights. Similarly, in *Thomson v. Fleetwood Ambulance Service*,^[42] a board of inquiry held that the union's efforts over the years to remove discriminatory provisions restricting vacation pay entitlement were sufficient to absolve it of liability.

^[38] Unreported, March 7, 1994 (Ont. G.S.B.). See "Is exclusion of disability period from calculation of service discrimination?", 10 *Lancaster's Charter Cases/ Human Rights Reporter* (May 1994) 1.

^[39] *Gohm v. Domtar Inc.* (1990), 12 C.H.R.R. D/161 (Ont. Bd. of Inquiry), aff'd (1992), 89 D.L.R. (4th) 305 (Ont. Div. Ct.).

^[40] *Thorne v. Emerson Electric Canada Ltd.* (1993), 18 C.H.R.R. D/510 (Ont. Bd. of Inquiry).

^[41] (1994), 20 C.H.R.R. D/119 (B.C.C.H.R.).

^[42] (1995), 96 C.L.L.C. 145,054 (Ont. Bd. of Inquiry).

However, a ruling from the Saskatchewan Labour Relations Board indicates that a union's duty of fair representation towards a member with a disability may well be more onerous than in conventional cases. In *K.H. and C.E.P., Local 1-S*,^[43] a union member suffering from depression was fired for his inability to follow management orders and to get along with fellow employees. The union filed a number of grievances on his behalf, but dropped the matter prior to arbitration. When K.H. claimed that the union breached its duty to represent him fairly, the Saskatchewan Labour Relations Board upheld his complaint. While, in the Board's view, the union may have handled the grievances diligently "from the point of view of the normal operation of the grievance procedure", overall the union had ". . . failed to take sufficient account of the [mental] disability experienced by K.H., and . . . they therefore discriminated against him in handling his grievance".^[44] The Saskatchewan Board emphasized that, while representing members with a mental disability may present a particular challenge, the union bore a higher onus to ensure that the needs of disabled members were not disregarded through inadvertent workplace discrimination.^[45]

The ruling that has revived the joint-liability rule is *Starzynski v. Canada Safeway Ltd.*^[46] The parties had negotiated a major severance package for laid-off employees. One of the eligibility requirements was that an employee had to have worked a stipulated number of hours in the previous 52 weeks. This requirement had the effect of excluding approximately 30 employees who were off work on long-term disability leave. The Alberta human rights tribunal concluded that this requirement gave rise to discrimination on the basis of disability. Although the union had made some efforts to support the affected employees after the signing of the package (by helping them to file complaints, among other things), the tribunal found that these measures did

^[43] (1997), 98 C.L.L.C. 143,157 (Sask. L.R.B.).

^[44] *Ibid.*, at 143,171.

^[45] See, however, *B.O. and C.U.P.E., Local 59* (2001), 2001 C.L.L.C. 220-045 (Sask. L.R.B.), where another employee with a severe mental illness complained that his union did not fairly represent him following his attempt to retract his resignation, which he tendered while suffering from depression. The Saskatchewan Labour Relations Board affirmed the *K.H.* decision that a union must make special efforts when representing an employee with a mental illness. However, in this case, it ruled that there was insufficient evidence to conclude that the union had improperly decided not to process his grievance.

^[46] (1999), 2000 C.L.L.C. 230-007 (Alta. H.R.C.C.).

not cure the original discrimination. It held the union and the employer equally liable for the damages owed to the complainants:

Since the duty to accommodate in this case arose from the direct participation in the formation of a discriminatory provision in the collective agreement, then the union must take a pro-active role in finding a remedy for the problem created. The union in these circumstances cannot sit back and force the employer to be the sole party accommodating the employees affected . . . the liability is to be shared equally between the employer and the union.

On appeal, the Alberta Court of Appeal upheld the tribunal's decision,^[47] ruling that the union had made insufficient efforts to persuade the membership to accommodate the sub-group of members who had a disability.^[48] Leave to appeal to the Supreme Court of Canada was subsequently denied.

^[47] [2003] ABCA 246.

^[48] See also *Oster v. I.L.W.A., Local 400*, [2000] C.H.R.D. No. 3, where the Canadian Human Rights Tribunal held that the union failed to accommodate a member by not referring her to a posting on a ship as a cook/deckhand. The union maintained that the referral was impractical because the ship did not have separate sleeping quarters for women. The Tribunal found that the union had not considered alternatives, such as opposite-shift arrangements.

Federal Labour Board sets guidelines for unions

The Canadian Industrial Relations Board has held that the union had not adequately represented an employee in a duty to accommodate case. The Board laid out four guidelines to follow when dealing with accommodation and workplace issues.

Legal Citation

Bingley (Re), [2004] C.I.R.B.D. No. 32; Canadian Industrial Relations Board, October 12, 2004.

Facts

The complainant had worked as a courier driver for Purolator Courier for approximately 25 years. In 1999, she was diagnosed with basal cell carcinoma, a form of skin cancer. She had surgery to remove a small lesion from her nose and required further surgery to repair the disfigurement.

The conditions of her return to work was that she wear a large brimmed hat (instead of the uniform cap), use sun screen and reduce her daily hours of work to a maximum of eight.

Upon her return to work, the complainant's hours of work were not reduced. A return visit to her physician led to a diagnosis of stress. Again, it was emphasized by her physician that her hours of work should be reduced. Eventually, in March 2000, the complainant submitted a medical note stating that she could not work more than eight hours per day.

In April 2000, the employer removed her from her regular shift because it felt that she was unfit to perform her duties since she was unable to work the requisite nine-hour shift. After some persistence by the complainant, the union filed a grievance.

During this time, the grievor was assigned other modified duties, which had the impact of reducing her overall hours of work and thus reducing her wages. In June 2000, the company's doctor examined the complainant and determined that there was no physical or emotional disorder that required a maximum workday of eight hours. The union determined that it was necessary for the complainant to see an independent specialist for an examination.

In January 2001, the complainant learned that her regularly assigned route had been reduced to a six-hour shift and had been posted for others to apply. She was not informed of this by either the union or the company. In March 2001, the grievor began working a courier route with a maximum eight-hour shift.

The independent medical examination revealed that there was no justification for a shortened workday. However, this issue was no longer relevant since the Company had altered the work schedule so that all employees worked an eight-hour shift.

The complainant asked her union to seek compensation from the Company for lost wages between April 19, 2000 and March, 2001. On April 2, 2002, the union informed the complainant that it would not be pursuing this matter to arbitration.

The complainant filed an unfair labour practice complaint against the union, alleging a breach of the duty of fair representation. The matter was heard by the Canadian Industrial Relations Board.

Analysis

The complainant argued that the union did not seriously support her request for accommodation and did not attach any credence to her claim for monetary redress. She also argued that the union did not take reasonable steps to finding her a suitable position to temporarily accommodate her needs for an eight-hour workday.

The union argued that it had taken every step available to ensure that the complainant's rights were protected. It stated that it had investigated the complaint, vigorously advanced the complainant's issues, and advised her of the progress.

The Board reviewed the caselaw extensively and relied on *Central Okanagan School District no. 23 v. Renaud*, [1992] 2 S.C.R. 970 (SCC), for the principle that a union's responsibility is engaged when it causes or takes part in the work policy that is the source of the discrimination. According to the Board, the duty to accommodate requires the union to be reasonably cooperative with the employer in working accommodation measures that to some extent may conflict with the collective agreement.

After an extensive review of the caselaw on the union's duty of fair representation, the Board provided a list of guidelines that were relevant in matters relating to the duty to accommodate:

- i) whether the union's intervention was reasonable where the employer failed to implement appropriate accommodation measures;
- ii) whether quality of the process that allowed the union to come to its conclusion was reasonable;
- iii) whether the union went beyond its "usual" procedures and applied an extra measure of care in representing the employee; and
- iv) whether the union applied an extra measure of assertiveness in dealing with the employer.

The Board held that the union's intervention was not reasonable. The union had taken the employer's word at face value that because the complainant could not work more than eight hours per day, she was unfit for work. According to the Board, the union should have made a stronger effort to seek appropriate accommodation.

The Board held that, procedurally, the union had not satisfied its duty. While there were extensive communications between the complainant and the union, the union's efforts fell short of the standard expected by the Board. The Board commented that there was no apparent logic

in having scheduled a third medical examination for the complainant. The Board noted that the union was responsible for delay in communications, second-guessing of the original doctor's diagnosis, and skepticism about the severity of the cancer.

The Board held that the union did not go beyond its usual procedures in representing the grievor. In duty to accommodate cases, the Board expects a higher standard of representation from the union.

Finally, the Board held that the union did not apply an extra measure of assertiveness in dealing with the employer. The union tacitly accepted the employer's conclusion that the complainant's inability to work more than eight hours made her unfit for work.

In conclusion, the union failed to adequately represent the complainant in the search for an accommodation. The Board remitted the matter back to the Board's Regional Director to assist the parties to find common ground for redress. It ordered the union to pay for the complainant to have independent counsel during this process. It also ordered the union to pay \$5,000 for the complainant's legal fees.

Implications for Unions

This is a significant case for unions since the Board laid out four clear guidelines that it expects in a duty to accommodate case. Clearly, the Board expects a higher standard of representation from a union where a disabled employee is seeking accommodation. Typically, labour relations legislation only prohibits treatment that is arbitrary, discriminatory or in bad faith. While this remains true in duty to accommodate cases, due to the nature of the issue, unions will be held to a higher standard.

Implications for Employers

A recent decision from the Ontario Labour Relations Board illustrates the role that the employer has in these types of cases. In *Del Van Demark v. C.A.W. Canada v. TDS Automotive Canada Inc.* (March 29, 2005) (Ont. Labour Relations Board), the union did not pursue a grievance to arbitration since the grievor had refused to provide additional medical information to the employer. The employer had determined that the duty to accommodate had been satisfied and it terminated the grievor's employment. In denying the complaint, the Ontario Labour Relations Board acknowledged the extensive communications between the employer, the union, and the grievor regarding its efforts to provide accommodation. The Board also recognized the employer's efforts to obtain a clear understanding of the grievor's medical restrictions and the fact that the grievor had refused to provide such information. As a result, the Board held that there was nothing unreasonable about the union's refusal to pursue the grievance to arbitration.

Employers should communicate to employees through the union and involve the union, as much as possible, in the accommodation process. In this case, there was a joint modified work committee that had determined that the grievor could return to work. The cooperative efforts between the union and the employer, in this case, led to a successful result.

Court of Appeal upholds complaint against employer and union

The Saskatchewan Court of Appeal held that the City of Regina and its Union failed to accommodate a disabled employee and properly compensate him for damages as a result of a discriminatory seniority system. The decision is the latest chapter in a long dispute that began in 1999.

Legal Citation

Regina (City) v. Kivela, [2006] S.J. No. 195 (Sask. C.A.); Saskatchewan Court of Appeal, April 5, 2006.

Facts

The Complainant had worked for the City of Regina since July 1982. Despite having cerebral palsy (which causes a lack of control over the muscles and impairs speech), Mr. Kivela worked as a truck driver. Usually, the City hired employees to start as laborers and expected them to work their way up to the position of truck driver. However, Mr. Kivela could not perform the duties of a labourer, so the City allowed him to start as a truck driver. This involved hauling gravel, slag, asphalt and snow. Upon being hired, the City modified his truck in order to accommodate his disability. Modifications included an extra step into the truck, raised floor boards and special hand levers.

In 1994, the City purchased semi-trailer trucks, which required an A-1 driver's license. Due to his disability, Mr. Kivela was unable to obtain this license. As a result, his hours were significantly reduced. On a number of occasions, he finished his duties before his shift ended and was told by his co-workers to "get lost for an hour or two". While Mr. Kivela still received his regular wages, he felt embarrassed by this treatment.

Mr. Kivela's co-workers were not always tolerant of his disability. On one occasion, Mr. Kivela had a parking sign made to reserve a spot for him. He needed the parking spot to be free of dirt and grease in order to prevent him from slipping. The sign ended up in the garbage and a message was written on the blackboard that said, "Gary could take his cane and shove it". To further embarrass him, co-workers mimicked his slurred speech over the radio. While Mr. Kivela reported these incidents to his supervisor, nothing was ever done to his satisfaction.

To make matters worse, Mr. Kivela was a casual employee. Although he never performed the duties of a labourer, he was paid the wages of a labourer until his seniority allowed him to obtain the classification of a truck driver. (Under the collective agreement, seniority was accumulated according to hours worked, which meant that Mr. Kivela – with his limited work hours due to his disability – repeatedly slipped down the seniority list in comparison to junior employees who worked more hours.) Once he had enough seniority to be paid as a truck driver, his union negotiated a pay scale with the City, which reduced his pay by 4% to reflect the jobs and duties that he was unable to perform.

Mr. Kivela persistently tried to obtain permanent status with the City, which was usually earned through the seniority system. Permanent status meant that employees had priority in job selection over casual employees. Over his 16-year career, Mr. Kivela was continually denied permanent status. In 1996, the City and the Union reached an agreement that provided Mr. Kivela with enough seniority to never be passed by other another casual employee. The agreement, however, was not retroactive, and Mr. Kivela did not receive full seniority for his prior years of service. Under the agreement, Mr. Kivela was allowed to obtain additional hours by crossing work boundaries and accepting other work.

Mr. Kivela became very stressed about his employment with the City. He was diagnosed with reactive depression and a paranoid personality. In the winter of 1999, Mr. Kivela formerly requested permanent status and the need for further accommodation. The City agreed to some of his requests but made it clear that he would not be given permanent status.

Before he returned to work in the 1999 season, Mr. Kivela resigned. He filed a complaint with the Saskatchewan Human Rights Commission alleging discrimination based on a disability. The complaint was filed against both the City and the Union.

Human Rights Tribunal

The Human Rights Tribunal upheld the complaint against both the union and the City. It held that an hours-based seniority system was discriminatory since the Complainant was unable to work additional hours as a result of his disability.

The Tribunal held that there was no evidence that granting Mr. Kivela additional seniority credits or changing the seniority system would have caused undue hardship to the City, to the Union, or to other employees. Furthermore, Mr. Kivela experienced harassment and discrimination from fellow co-workers in the workplace. Nothing meaningful was undertaken by the City to prevent this type of behavior in the workplace.

The Tribunal awarded Mr. Kivela \$8,541.00 for the difference between his wages and the actual wages he should have received between 1992 and 1995. It also awarded Mr. Kivela full compensation for the wages and benefits he would have received between 1999 and 2003 with interest. Finally, Mr. Kivela was reinstated and awarded \$10,000 for hurt feelings and injury to his dignity. The City and the Union were equally liable for the damages.

Both the City and the Union sought judicial review to the Saskatchewan Court of Queen's Bench.

Saskatchewan Court of Queen's Bench

It was argued, before the Court, that the parties had taken steps to accommodate the Complainant and the discriminatory seniority system had been changed to comply with the law.

The Court disagreed. It held that the seniority system had a discriminatory impact which the City and Union failed to address. The Court stated that the City and Union were too late in creating a plan to maintain the Complainant's seniority. Furthermore, they did not provide the Complainant with the benefits that he should have been entitled to. The Court overturn the Tribunal's conclusion on the issues related to harassment since no arguments were put forward by the Human Rights Commission.

Other than the conclusion on harassment, the Tribunal's decision was upheld.

Both the City and the Union appealed to the Saskatchewan Court of Appeal.

Court of Appeal

The Court of Appeal reviewed the caselaw on the appropriate standard of review and determined that it was necessary for the Tribunal's decision to be correct on all matters of law.

On the issue of whether the Tribunal erred in concluding that the parties failed to accommodate the Complainant, the Court of Appeal upheld the Tribunal's decision. The Court accepted that the parties made an effort to correct the seniority system when it discovered the discriminatory effect on the Complainant. However, they did nothing to repair the damage that was already done.

The parties also argued that it was inappropriate for the Tribunal to award damages for the period beyond his resignation since there was no causal link between the Complainant's resignation and the discrimination. The Court of Appeal held that there was sufficient evidence to demonstrate that the Complainant would not have resigned but for the discrimination. It was also appropriate for the Tribunal to exercise its statutory authority and place the Complainant in the position that he would have been had the discrimination not occurred.

On the issue of harassment, the Court of Appeal concluded that the lower Court erred in not examining the damages award as it related to the findings of harassment. The Court accepted that at least some part of the award of \$10,000 was for harassment, which was ultimately dismissed by the lower Court. The Tribunal was ordered to reconsider the damages award accordingly.

In conclusion, the Court of Appeal upheld the original award of the Tribunal.

Implications for Employers

It is fairly common for employers to take proactive steps once it is discovered that a rule, policy or practice has a discriminatory effect on a particular employee. However, it is rare for employers to consider compensating that employee for any damages in the past. When called upon by a human rights tribunal or labour arbitrator to justify its actions, there will be an examination on whether the employee has suffered such damages as hurt feelings, injury to dignity or self respect. Furthermore, any lost work opportunities may also be a factor in an award for damages.

In some cases, employers may want to consider compensating an employee for damages as a result of a discriminatory rule, policy or practice outside of the formal complaint process.

Implications for Unions

Unions can be held liable for discriminatory collective agreement provisions. It is not enough to wait until the next round of negotiations to address the issues. In order to reduce the liability and avoid a human rights complaint, unions should formally advise the employer of the discriminatory provision and request an opportunity to re-write the provision to ensure that it

complies with the human rights legislation. Otherwise, the union may become a party to a human rights complaint in addition to allegations of breaching its duty of fair representation.

Kivela points out the importance of unions carefully examining the impact of their seniority systems upon employees who might be protected by human rights legislation. Seniority systems that place unjustified barriers to the accumulation of seniority, or unnecessarily block job transfers from one bargaining unit to another within the same place of work, or unintentionally create job ghettos for women or minorities might very well be found to be discriminatory by human rights tribunals.

4. Responsibilities of Employees

The Supreme Court of Canada in *Renaud*^[49] wrote that the search for accommodation in the workplace is a multi-party responsibility. Along with the employer and the union, the individual employee must also actively participate in identifying an appropriate accommodation. When the employer, or the employer and the union jointly, have made a reasonable proposal, the employee has a duty to facilitate its implementation: “The [employee] cannot expect a perfect solution. If a proposal that would be reasonable in all the circumstances is turned down, the employer’s duty is discharged”.^[50] More recently, in *Canpar and U.S.W.A., Local 1976*,^[51] Arbitrator Michel Picher restated the principle in more detail:

^[49] *Supra*, note 9.

^[50] *Ibid.*

^[51] (2000), 93 L.A.C. (4th) 208 (M.G. Picher). See also *Quigley v. Ocean Construction Supplies* (2002), C.H.R.R. Doc. 02-054 (Can. H.R. Trib.).

. . . it is not the obligation of the company under the Canadian *Human Rights Act* to necessarily offer an employee the precise accommodated assignment that he or she might demand. If the employer offers to the employee a work opportunity involving substantially similar working conditions and earning opportunities . . . in a manner that does not involve any significant adversity to the employee, it has fulfilled its obligation of reasonable accommodation.^[52]

The obligations of an employee who is seeking accommodation were well illustrated in *GSW Heating Products Co. and U.S.W.A.*^[53] In this case, an employee was unable to return to work as a stuffer operator for a chimney insulation manufacturer as a result of a variety of ailments that included a serious back injury. The employer eventually discharged him for excessive innocent absenteeism. Prior to the discharge, the employer had selected several jobs which met the restrictions set out by the employee's doctor. The employer then allowed the employee to choose the one he liked best. The employee found the standing and bending painful, but he made no effort to identify the problem or to assist in finding a solution. Nor had he accurately described the job to his doctors so that they could suggest modifications. The arbitrator found that the grievor could have ameliorated the difficulty by using a chair and asking that his raw materials be placed on a table. On the facts, the arbitrator ruled that, in light of the grievor's lack of cooperation, the employer had satisfied its duty to accommodate.

Other recent rulings have applied the judgment in *Renaud* to define the scope of the employee's responsibility. In *Guibord v. The Queen*,^[54] the Federal Court, Trial Division, ruled that when a disabled employee refuses an offer of alternative employment at another location, she or he must provide a reasonable explanation for the refusal. The refusal must be based upon more than mere reluctance to accept a different job. The Court also stated that the employer was entitled to reject suggestions for accommodation offered by the employee and her doctor, since they were not compatible with the employer's operational requirements.

In *T.C.C. Bottling Ltd. and R.W.D.S.U., Local 1065*,^[55] an arbitrator ruled that the grievor was required to accept accommodation in a lower-paying position. Moreover, as part of the accommodation arrangement, the arbitrator upheld restrictions on the operation of motorized

^[52] *Ibid.*, at 214.

^[53] (1996), 56 L.A.C. (4th) 249 (Barrett).

^[54] (1996), 97 C.L.L.C. 230-019 (F.C.T.D.).

^[55] (1993), 32 L.A.C. (4th) 73 (Christie).

vehicles and the handling of dangerous materials, and a requirement that the grievor wear protective clothing at all times. In *Alcan Rolled Products Co.*,^[56] Arbitrator Gray reiterated the dictum in *Renaud* that the employee bears a duty to assist in securing a proper accommodation. If the employee suffers a series of relapses in her or his treatment for drug or alcohol addiction, and breaches the attendance obligations imposed by a last chance agreement, she or he may be in default of the duty. In *Canadian Pacific Ltd. and B.M.W.E.*,^[57] the arbitrator ruled that an employee seeking accommodation, in circumstances where no permanent positions are available, must be prepared to accept retraining and offers of temporary work. In *Turanich v. Saskatchewan (Dept. of Municipal Government)*,^[58] a board of inquiry dismissed the complaint of an employee who had dyslexia and a learning disability, in part on the ground that he failed to cooperate with ongoing accommodation efforts and exercised poor judgement in quitting instead of applying for disability benefits. And in *St. Paul's Hospital and H.E.U. (Smeding)*,^[59] an employee with pain in his right shoulder refused the employer's proposed accommodation, even though it met the conditions set out by the employee's physician. In these circumstances, Arbitrator Jackson held that, once the employee had declined the accommodation offer, the employer had discharged its legal duty.

However, it must be remembered that the initial burden to accommodate rests with the employer. It must initiate the effort to investigate the possibilities for accommodation, and then consult with the employee^[60] and the union. In *Marc v. Fletcher Challenge Canada Ltd.*,^[61] a British Columbia Human Rights Tribunal rejected the company's argument that an employee with a disability had to establish that there was a job in the mill in which her needs could be accommodated. The Tribunal pointed out that "[t]here is no obligation on the complainant to originate a solution in the search for accommodation, although she may make suggestions". But once the employer has exhausted available accommodation possibilities, the onus shifts to the employee who is seeking accommodation to suggest viable alternatives, or to present new

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[57] (1996), 57 L.A.C. (4th) 129 (M.G. Picher).

[58] (2000), 37 C.H.R.R. D/209 (Sask. Bd. of Inquiry).

[59] (2001), 96 L.A.C. (4th) 129 (Jackson).

[60] *Martin v. 3501736 Inc. (No. 1)* (2001), 41 C.H.R.R. D/88 (B.C.H.R. Trib.).

[61] (1998), 35 C.H.R.R. D/112 (B.C.H.R. Trib.).

medical evidence. In *Sault Area Hospitals and S.E.I.U., Local 268*,^[62] an employee attempted, and failed, on five occasions to return to work. On each occasion, the employer, with the union's cooperation, had created a modified work program designed to fit the employee's medical limitations. Following each failure, the employer invited further input from the union and the employee, and gave consideration to their suggestions. Arbitrator Whitaker held that, in the circumstances, the accommodation duty demanded no more from the employer.

To sum up, an employee seeking accommodation has three responsibilities: (1) to actively cooperate with the employer and/or the union in identifying possible modes of accommodation; (2) where appropriate, to offer a reasonable explanation for his or her refusal to accept a proposed accommodation; and (3) to accept a reasonable proposal that meets the employer's operational requirements.

No right to “perfect solution”

The B.C. Human Rights Tribunal relied on long-standing accommodation principles to dismiss a case when the Complainant failed to cooperate in the accommodation process. Ruling that there is no right to a perfect solution, the Tribunal dismissed an allegation of discrimination based on disability.

Legal Citation

Van Leening v. College of Physical Therapists of British Columbia [2006] B.C.H.R.T.D. No. 357; July 28, 2006, B.C. Human Rights Tribunal.

Facts

The Complainant had qualified and began practicing as a Registered Physiotherapist since 1981. In 1986, he was involved in a serious car accident and, as a result of his injuries, he became a C-6 quadriplegic. This left him using a wheelchair for mobility with limited control over his elbows and wrists. He has no hand control and limited sensation in his thumb and index finger.

After his accident, he placed himself on inactive status and suspended his membership with the College of Physical Therapists of British Columbia. In 1995, he asked the College to reinstate his membership and suggested that he be registered in the Limited Registration category since he could not perform physical therapy on patients. He was denied by the College since he could not qualify under the College's by-laws as a Registered Physical Therapist. The Limited Registration category was meant for individuals attending a school program.

^[62] (2001), 96 L.A.C. (4th) 168 (Whitaker).

The relevant College by-law (s.31(1)) stated:

A person must be fully registered as a physical therapist and is entitled to use the title physical therapist, physiotherapist or registered physiotherapist or registered physical therapist if the person:

(g) satisfies the registration committee that the registrant's ability to practice is not impaired by a physical or mental impairment or addiction to any substance and....

As a result of pressure by the Complainant, the College changed its by-laws and created a new category of Limited Physiotherapist for individuals who could not practice as a fully qualified therapist. The by-law was ultimately passed by the College in 2001.

The Complainant applied under the new by-law for the Limited Registration and was told that he would be accepted provided his "...registration would be limited to consulting (theoretical), teaching or acting on an advisory basis, and that rather than directing patient treatment...qualified physical therapists would carry out [his] suggestions for treatment."

The Complainant rejected these conditions and applied for a full status as a physical therapist. The College discussed the Complainant's application for full status and ultimately denied him.

The Complainant filed a human rights complaint against the College alleging discrimination based on a disability and a failure to satisfy the duty to accommodate.

Analysis

The Complainant argued that the definition of physical therapy used by the College was outdated and no longer relevant. He acknowledged that he was unable to perform "hands-on" therapy, but argued that he had the right to continue to practice other forms of physical therapy. He took the position that the College's denial of his full status as a physiotherapist was based solely on his disability.

The College argued that it had attempted to accommodate the Complainant by revising its standard of "Limited Registration" and creating a new status for him. To date, he was the only person to apply under the new status.

The B.C. Human Rights Tribunal stated that the B.C. *Human Rights Code* prohibited a trade union, employer's organization or occupational association from discriminating against any person based on a disability. There was no issue that the Complainant suffered from a disability under the protections of the *Code*. While he was not required to be registered by the College in order to perform his duties, the Complainant was clearly denied full status as a result of his disability. This, according to the Tribunal, satisfied the Complainant's onus to establish a *prima facie* case of discrimination.

Once a *prima facie* case of discrimination was established, the onus shifted to the College to justify its standard using the three-part test from the Supreme Court of Canada's *Meiorin* decision.

The Tribunal accepted that the College's standards were adopted in good faith and were rationally connected to the fulfillment of its purpose or goals. According to the Tribunal, the College was responsible for addressing the Complainant's situation without compromising its legitimate objects, including protecting the public.

The Tribunal also found that the College attempted to accommodate the Complainant's restrictions when it amended the "Limited Registration" category and created a new status for him. Once it had made the offer to provide accommodation, it was incumbent on the Complainant to cooperate in the College's efforts. The Tribunal cited the Supreme Court of Canada's decision in *Central Okanagan School District No. 23 v. Renaud* (1992), 16 C.H.R.R. D/425:

When an employer has initiated a proposal that is reasonable and would, if implemented, fulfil the duty to accommodate, the complainant has a duty to facilitate the implementation of the proposal. If failure to take reasonable steps on the part of the complainant causes the proposal to founder, the complaint will be dismissed. The other aspect of this duty is the obligation to accept reasonable accommodation. This is the aspect referred to by McIntyre J. in O'Malley. The complainant cannot expect a perfect solution. If a proposal that would be reasonable in all the circumstances is turned down, the employer's duty is discharged.

In the Tribunal's view, the Complainant sought a perfect solution. Specifically, he would only be satisfied with the Full Registration despite the fact that he did not need the Registration in order to perform his ongoing responsibilities. The Tribunal concluded that the College had attempted to accommodate the Complainant to the point of undue hardship. Based on the Complainant's refusal to cooperate in the process, the complaint was dismissed.

Implications for Employers

The principles articulated by the Supreme Court of Canada in *Renaud* continue to be actively relied on by arbitrators and tribunals despite being articulated 15 years ago. Employers are not required to find the most desired accommodation for an employee. In order to satisfy the duty to accommodate, employers are only required to make a reasonable offer of accommodation. If this is rejected by the employee, the duty to accommodate ends. If this occurs, employers must be able to demonstrate to an arbitrator or tribunal that the original offer of accommodation was, indeed, reasonable under the circumstances. This will be a fact-driven analysis.

Implications for Unions

This case was based on the section of the British Columbia human rights legislation applying to trade unions, employers' organizations and occupational associations. Similar provisions exist across Canada. In Ontario, s. 6 of the *Human Rights Code* states:

Every person has a right to equal treatment with respect to membership in any trade union, trade or occupational association or self-governing profession without

discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, family status or disability.

Membership in trade unions is subject to the same standards as employer organizations. Thus, in some cases (particularly where religious beliefs are inconsistent with trade union values), trade unions may be required to accommodate an individual within their organization. As this case illustrates, while the trade union is not expected to compromise its standards, it must turn its mind to whether accommodation is possible without causing undue hardship.

No duty to create valueless position

An Ontario arbitration board held that it was not possible to provide accommodation for an 8-week period since the grievor could not perform the essential functions of any position. The Board held that there was no obligation to create a position that did not add value for the employer.

Legal Citation

Ottawa-Carleton District School Board v. Ontario Secondary School Teachers' Federation, District 25 (Plant Support Staff Unit) (Abdulle Grievance), [2007] O.L.A.A. No. 137 (Albertyn); Ontario Labour Arbitration, March 24, 2007.

Facts

The grievor worked as a regular part-time custodian for the Ottawa Carleton District School Board since July 3, 2001. She was hired on a contract for the duration of each school year, from September to June. Through a bidding process, she was able to secure a 6.5-hour shift sharing between two schools.

In August 2003, the grievor injured her lower back at work. She was off work on a short term disability leave and in receipt of WSIB benefits until November 2003. She returned to work on a gradual basis, but eventually was off again in February 2005.

In April 2005, the grievor met with her union and the School Board to discuss another attempt at returning to work. Her restrictions included: (i) no lifting over 10 lbs; (ii) the ability to change positions as required; and (iii) no mopping/sweeping. The parties agreed on a return to work plan and outlined suitable duties that were consistent with the medical restrictions. During this period, the grievor remained working at one school so that the light duties from other custodians were assigned to the grievor. The grievor worked with other custodians who performed the heavier work of the job.

Typically, each summer, custodians are able to bid for summer work in the schools. This work often more heavy work, such as moving desks, clearing furniture, scrubbing and sanitizing floors, etc. In June 2005, the grievor was advised that she would not be offered summer work as

a result of her medical restrictions. The School Board advised the grievor that it could not offer modified work since it involved heavy lifting and working alone in a locked school.

The union filed a grievance alleging a failure to provide suitable accommodation for the grievor.

Analysis

The School Board argued that it was not required to create a new position for the grievor as part of its obligation to provide accommodation. Furthermore, the grievor had never formally requested accommodation and this should affect the validity of the grievance. Finally, it would have caused undue hardship to accommodate the grievor since another custodian would need to be hired to assist her.

The Union argued that the duty to accommodate extended beyond the regular school year and into the summer period. This meant that she was entitled to modified work that was suitable for her medical restrictions. In the Union's view, the School Board failed to examine whether accommodation was possible short of undue hardship.

Arbitration Board Chair C. Albertyn agreed with the Union's position that the duty to accommodate extended beyond the regular school year contract and into the new period of employment in the summer. However, the grievor was only able to perform 5 to 10% of her regular duties. While the School Board could accommodate this during the school year, the summer period presented more difficulties since custodians generally worked alone. During these months, there was not the range of duties available to custodians.

The Chair stated that the onus was on the School Board to demonstrate that it performed the undue hardship analysis and that there were no positions reasonably available for the grievor. In the Chair's view, the Board had fulfilled this obligation when it showed that the grievor was unable to perform the essential duties of any of the summer positions. The Chair stated:

The duty to accommodate does not require an employer to create a position it does not need... and in this case there was no place or position in which the grievor could reasonably have been accommodated, given what the grievor could do and the work the Board wished to have done.

In conclusion, the School Board's position was upheld, and the grievance was dismissed.

Implications for Employers

An increasing number of arbitrators are being persuaded that an accommodated position must add value to the workplace. If the employer is able to demonstrate that the union's proposed accommodation would add no value, then it is more likely that such accommodation would cause undue hardship. This principle was applied by the Chair in this case, when he stated:

In these circumstances, to have created a position with its core duties removed to accommodate the grievor would have been a valueless exercise for the employer. It would have been an undue hardship.

Often times, the question is whether the accommodated position productively contributes to the objectives of the workplace.

Implications for Unions

In this case, the Arbitrator rejected the Employer's position that the grievor should have requested accommodation at a different school. The onus is not solely on the employee or union to initiate the request or develop the idea of accommodation. While there is an obligation to cooperate and facilitate accommodation, a grievor will not be held responsible if he/she has not suggested how the specific accommodation would be developed. Notwithstanding that the duty to accommodate is a multi-party obligation, arbitrators have held that employers are responsible for putting forward the accommodation proposal or solution. A union or employee's failure to generate an idea will not be fatal to the case.

Retraining period was reasonable

The B.C. Human Rights Tribunal held that an employee should have accepted a proposed accommodation of working in a lower rated position but at the pre-injury wage rate until he became fully retrained. As a result of the employee's refusal, the Company satisfied its duty to accommodate.

Legal Citation

Lyons v. Taylor Gas Liquids Ltd., [2007] B.C.H.R.T.D. No. 13; British Columbia Human Rights Tribunal Decision, January 9, 2007.

Facts

The Complainant had worked for Taylor Gas Liquids Ltd. since 1999. He was initially hired as an Operations Technician 2 and eventually became an Operations Technician 1 in January 2002, which was the highest paid position in the bargaining unit.

In June 2003, the Complainant was seriously injured in a non-work related motorcycle accident. He was off work for approximately 18 months and in receipt of long term disability benefits. During this time, he required several knee operations and underwent physiotherapy.

The Complainant was deemed suitable for return to work by the LTD insurer in April 2005. When he spoke with representatives of the Company about returning to work, he was advised that he would not get his old job back. Rather, he would be placed in a "utility" position as a rail car loader until he was fully re-trained. It was the Company's position that the Complainant's skills and knowledge were out-of-date as a result of his lengthy absence from work.

According to the evidence, the "utility" position was more physically demanding than Operations Technician 1 classification. The Complainant was advised that his wage rate would be frozen at the pre-injury rate. However, since it was a different shift, he would not have access to the same overtime provisions and shift differential premiums. The Complainant was told that he could either accept the new position until he was fully re-trained to perform the Operations Technician 1 duties or accept a severance package from the Company.

The Complainant opted for a severance package and resigned from his employment. He subsequently filed a human rights complaint against the Company alleging discrimination based

on a disability and failure to provide suitable accommodation as required under the B.C. *Human Rights Act*.

Analysis

As part of his allegations, the Complainant alleged that he had been given an ultimatum: accept the “utility” position or be fired. The B.C. Human Rights Tribunal did not accept this allegation. Rather, it determined that the Complainant was given the option of accepting the “utility” position or taking a severance package. The Tribunal’s analysis focused on whether the actions of the Company in this context were discriminatory.

The Tribunal stated that the onus was on the Complainant to establish that his disability adversely affected his ability to perform the requirements of his job and that the Company ought to have known about his need for accommodation. After reviewing the evidence, the Tribunal concluded that the Complainant satisfied this onus. It determined that the Complainant was off work due to a disability which was within the Company’s knowledge. The Company had proposed to return the Complainant to a position that was paid at a lower rate (overall, including overtime and premiums). Therefore, his continuing employment with the Company was adversely affected by his disability. This was a *prima facie* case of discrimination.

The onus shifted to the Company to establish that its standards were a *bona fide* occupational requirement using the three part test set out by the Supreme Court of Canada in *British Columbia (Public Service Employee Relations Comm.) v. B.C.G.E.U. ("Meiorin")* (1999):

1. it adopted the standard for a purpose or goal that was rationally connected to the performance of the job;
2. it adopted the standard in an honest and good faith belief that it was necessary to the fulfilment of that legitimate work-related purpose or goal; and,
3. the standard was reasonably necessary to the accomplishment of that legitimate work-related purpose or goal.

It was the Company’s position that it was necessary for the Complainant to meet the physical and technical requirements of the position. According to the Company, the Complainant needed a re-training period before he could be placed in the Operations Technician 1 classification. Based on the evidence, the Tribunal accepted the Company’s position.

Applying this standard to the *Meiorin* test, the Tribunal determined that it was a standard rationally connected to the performance of the job. The Tribunal also concluded that the performance standards were adopted in good faith.

In order to establish that the standard was reasonably necessary to the accomplishment of the legitimate work-related purpose, the Company was required to establish that it was impossible to accommodate the Complainant without imposing undue hardship. As part of the accommodation

analysis, the Tribunal identified that there was an onus with the Complainant to cooperate in the process. According to the Tribunal,

The process necessarily involves an exchange and refinement of information, and cooperation speeds the process along.

In this case, the Complainant refused to consider the return-to-work proposal because he did not want to earn less money. The Tribunal found that, when the Company proposed the accommodation in a lower classified position, but at the pre-injury wage rate, the Complainant refused without explanation. In the Tribunal's view, this was not a reasonable refusal.

Therefore, the Company satisfied its onus under the third part of the *Meiorin* test. It was unable to accommodate the Complainant without causing undue hardship.

The complaint was dismissed.

Implications for Employers

It is generally accepted by arbitrators that employees do not have a legal right to the most preferred accommodation. Rather, human rights law requires employers to offer reasonable accommodation to the employee based on any medical restrictions. If the offer of employment is at a lower wage rate, arbitrators expect employers to establish that it was not possible to provide accommodation in a position with a comparable wage rate. In this case, the offer of accommodation was at the pre-injury wage rate. The only financial loss to the Complainant was the lack of overtime and shift premiums. The Tribunal did not treat this as a reduced wage rate overall.

Implications for Unions

Retraining and recertification periods are more common in positions that require up-to-date skills, knowledge and abilities. In some cases, following a lengthy absence, it is a reasonable expectation that the employee will undergo a retraining or recertification period. In these circumstances, unions should seek the following information from the employer:

- i) the specific skills, knowledge and abilities that need retraining;
- ii) the anticipated length of time to re-acquire the skills, knowledge and abilities;
- iii) the specific steps that the employer is willing to take to ensure that the employee's learning plan will be effective and efficient; and
- iv) the wage rate to be paid, including any progression of the wage rate during this period.

With this information, the Union can make an informed decision about whether the employer's proposed accommodation complies with the human rights legislation and the collective agreement.

Employee's obligations not absolute

The B.C. Supreme Court upheld an arbitrator's reinstatement of an employee who was terminated for violating a last chance agreement. The Court reasoned that an employee's duty to facilitate the accommodation was not absolute, and that it was necessary to consider all of the reasons, including the impact of the disability, for failing to comply with a last chance agreement.

Legal Citation

Canada Post Corp. v. Canadian Union of Postal Workers, [2007] B.C.J. No. 2553 (B.C.S.C.); British Columbia Supreme Court, November 29, 2007.

Facts

The grievor worked for Canada Post as a letter carrier for approximately 18 years. In 2004, she was terminated for excessive absenteeism. The grievor's absences were largely caused by addiction to drugs and alcohol as well as gynecological issues. When the Union's grievance proceeded to arbitration, the parties entered into a Last Chance Agreement ("LCA") that placed a number of conditions on the grievor.

Under the LCA, the grievor was required to participate in substance abuse treatment and undergo the recommended surgeries for her gynecological issues within a twelve month period. She was then required to provide verification that she complied with these conditions and also to verify that she was ready to return to work.

For the most part, the grievor was able to seek counseling for substance abuse and remain sober. However, as a result of a dispute with her physician, ongoing participation in the substance abuse program, and personal family issues, there was some delay in scheduling the surgery. In January 2006, the grievor provided a medical report to Canada Post stating that her surgery was scheduled for a date in six weeks, which was beyond the timelines set out in the LCA. The grievor also provided a signed consent form allowing her medical information to be sent to Canada Post.

In February 2006, Canada Post terminated the grievor's employment for breaching the LCA. Specifically, the grievor had not complied with the timeframe for the scheduled surgery and she had not verified that she was fit to return to duties.

The Union pursued a grievance to arbitration alleging discrimination based on a disability.

Analysis

Arbitration Award

The Arbitrator ruled that there were strong and compelling reasons to vary the penalty imposed by Canada Post. It is noteworthy that the LCA specifically stated that a discharge could be altered by an arbitrator if he/she was convinced that there were compelling reasons to do so.

Specifically, the Arbitrator found that the grievor had complied with the fundamental part of the LCA (i.e. obtaining treatment for substance abuse). The obligation to verify her fitness to return to work was an ancillary part of the LCA according to the Arbitrator. However, the failure to undergo the surgery in the required time period was a fundamental violation of the Agreement and required a careful analysis of the grievor's explanations.

The Arbitrator accepted that the delay in the surgery was outside of the grievor's control. There was no evidence that the surgery could have been booked within the time period stipulated in the LCA since she was without a physician. In addition, the grievor was dealing with personal and family issues, while also focusing on her substance abuse treatment. Canada Post was aware that the surgery had been booked and also knew that this was not a case of flagrant non-compliance.

As a result, the grievor was reinstated.

Canada Post sought judicial review of the Arbitrator's Award.

Judicial Review

The British Columbia Supreme Court determined that it would only quash the arbitrator's award if it was patently unreasonable. In other words, the Arbitrator's reasons for the decision must have some basis in the merits of the decision.

The Court rejected Canada Post's first argument that it was denied procedural fairness during the hearing because it missed the opportunity to provide a reply argument on written submissions filed after the hearing had concluded. The Court said that it was, at best, a technical infringement that did not prejudice Canada Post's case.

The crux of the analysis focused on whether the Arbitrator was correct in the application of the principles of accommodation. Canada Post argued that the Arbitrator inappropriately took into account the grievor's disability when evaluating whether she had satisfied her own duty to cooperate in the process. The Court rejected this argument and stated that an employee's duty to facilitate the accommodation was not absolute. According to the Court:

A Grievor need only demonstrate that he or she took reasonable steps to facilitate accommodation...The lengths to which an employee is able to go to ensure success may vary depending on the extent of his or her disability.

The Court agreed with the Arbitrator that there were compelling circumstances for non-compliance with the LCA. Specifically, the grievor had a dispute with her physician, was struggling with substance abuse, and also dealing with personal and family issues. Collectively, this caused some delay in the scheduling of the surgery.

The Arbitrator's decision to reinstate the grievor despite the violation of the LCA was upheld by the Court.

Implications for Employers

Last chance agreements continue to be an effective way to deal with workplace accommodations involving substance abuse. However, employers must not be too rigid in applying the terms of such agreements. There must be flexibility and understanding if certain conditions are not completely satisfied by the employee. In this case, the Court ruled that employers must consider the context in which the failure to comply with the LCA occurred. If there is a flagrant violation then an employer will have a strong case to exercise its rights under the Agreement. On the other hand, if the employee can present a reasonable explanation for the violation, is prepared to take immediate corrective action, and there is no damage as a result, an employer will be expected to give due consideration to a more flexible approach.

Implications for Unions

In this case, the Court addressed the issue of an employee's disability affecting their ability to facilitate the accommodation process. According to the Court, an employee is required to take reasonable steps to ensure a successful accommodation process. Of course, this begs the question: "what is reasonable?". The Court explained,

When considering what is reasonable, it seems to me to be entirely appropriate to consider how the disability might continue to affect the Grievor. To hold otherwise would circumscribe inappropriately the scope of human rights legislation.

If the Union can demonstrate that the grievor's disability has impacted the employee's ability to comply with the terms of a LCA, there will be a more compelling argument to alter the penalty imposed on the employee as a result of the breach.

5. Mental Illness and Addictions

Labour arbitrators and human rights tribunals have repeatedly held that employers bear a considerable onus to ensure that employees with mental illnesses or substance addictions are

appropriately accommodated.^[63] The accommodation duty remains active, even when an employee did not disclose the illness or addiction to the employer,^[64] violated a last chance agreement while in the throes of an illness or addiction,^[65] or displayed obvious signs of the illness at work, even when engaged in problematic behaviour.^[66] As well, arbitrators have accepted that both denial and relapses are integral aspects of the diseases of substance addictions and mental illnesses, and employers must be prepared to tolerate some interference with the production process, up to the point of undue hardship, in order to satisfy the accommodation duty.^[67] While safety sensitive and zero-tolerance rules in the workplace are significant features of a modern workplace, they cannot be advanced to defeat an accommodation if a tolerable range of risk could be employed that would permit an employee with a mental health or addiction disability to productively work.^[68] Likewise, an employer cannot impose inflexible or unrealistic production standards if that would defeat an ongoing accommodation for an employee with a mental disability.^[69] Finally, post-discharge evidence of active and fruitful rehabilitation efforts by terminated employees with a substance addiction have regularly persuaded labour arbitrators that the accommodation duty has not been exhausted and a productive employment relationship is still possible.^[70]

However, the employer's duty to accommodate is not without boundaries. Arbitrators and human rights tribunals have accepted that, given the nature of an addiction disease, the employee must play an active and positive role in combating his or her own disability. While denial may be a

^[63] The leading cases are: *Gordy v. Oak Bay Marine Management Ltd.; Shuswap Lake General Hospital*; and *Vancouver Police Board and Teamsters, Loc. 31 (James) (Re)* (2002), 112 L.A.C. (4th) 193 (Germaine).

^[64] *Sealy Canada Ltd.; Mager v. Louisiana-Pacific Canada Ltd.* (1998), 98 C.L.L.C. 145,374 (B.C.H.R.T.); *Canada Safeway Ltd. and U.F.C.W., Loc. 401, Re* (1992), 26 L.A.C. (4th) 409 (Wakeling), aff'd (1993), 10 Alta. L.R. (3d) 51 (Q.B.).

^[65] *McNaughton*.

^[66] *City of Surrey and C.U.P.E., Local 402 (Bubela) (Re)* (2006), 147 L.A.C. (4th) 386 (Burke).

^[67] *Sealy Canada Ltd.; Uniroyal Goodrich Canada Inc. and U.S.W.A., Loc. 677 (N.S.) (Re)* (1999), 79 L.A.C. (4th) 129 (Knopf); *St. Paul's Hospital and H.E.U., Re* (1995), 47 L.A.C. (4th) 423 (Bluman).

^[68] *Gordy; Shuswap Lake General Hospital; Vancouver Police Board*.

^[69] *Zettel Manufacturing Ltd and C.A.W.-Canada, Loc. 1524 (Hauss) (Re)* (2005), 140 L.A.C. (4th) 377 (Reilly).

^[70] *Gates Canada v. U.S.W.A., Local 9193*, [2006] O.L.A.A. No. 683 (Reilly); *Sifto Canada Inc. v. C.E.P., Local 16-0 (Schultz)*, [2006] O.L.A.A. No. 361 (H.D. Brown); *Natrel Inc. and Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees, Loc. 674 (Patterson) (Re)* (2004), 134 L.A.C. (4th) 142 (Albertyn); *Canada Post Corp. v. C.U.P.W. (C.M. Grievance)*, [2004] C.L.A.D. No. 226 (Jolliffe). As in these cases, labour arbitrators have generally found a way around the ostensible restrictions posed by the Supreme Court of Canada in *Quebec Cartier v. Quebec*, [1995] 2 S.C.R. 1095 against the use in labour arbitration of post-discharge evidence, such as medical documentation of rehabilitation efforts.

central feature of an addiction disease, it is not a destiny, and employees with addictions are expected to confront the seriousness of their disability, and demonstrate progress in managing their illness.^[71] As such, employers' decisions to terminate addicted employees because their recovery efforts on their own behalf were inadequate have been upheld when the employee would not accept responsibility for his work conduct,^[72] or when the employee insists that his continued drinking would not harm his rehabilitation program.^[73] Extended but unsuccessful efforts by an employer to provide an accommodation to an addicted employee who has been unable to manage his or her illness have resulted in the denial of the terminated employee's grievances or complaints.^[74] An employer, regardless of size or resources, is not expected to indefinitely provide rehabilitation accommodations to addicted employees; the British Columbia Court of Appeal has suggested as a rule of thumb that three relapses will meet the undue hardship limit in most cases.^[75]

In spite of the burgeoning accommodation caselaw on mental illness and addictions, a common approach among labour arbitrators and human rights tribunals to assessing issues of accommodating addictions and mental illness in the workplace has proven to be elusive. The difficulty arises from several sources. First, these illnesses are often the underlying features of workplace behaviour issues that, but for the disability which has caused some degree of cognitive impairment, would be *prima facie* culpable acts justifying discipline and even dismissal. Second, addictions and, to a lesser degree, mental illnesses require some degree of patient awareness of their disability, as well as a personal commitment to their own recovery. Arbitrators, in particular, have not had an easy time reconciling accommodation principles with traditional workplace and arbitral approaches towards personal employee responsibility for misconduct and recovery.

^[71] *Sifto Canada Inc. ibid.*

^[72] *Town of Richmond Hill v. C.U.P.E., Local 905 (Doobay)*, [2004] O.L.A.A. No. 418 (Brent).

^[73] *City of Thunder Bay v. C.U.P.E., Local 87 (Alexa)*, [2004] O.L.A.A. No. 152 (Carrier).

^[74] *Eddy Specialty Papers v. I.B.E.W., Local 956 (Lewis)*, [2007] O.L.A.A. No. 30 (Albertyn); *Kellogg Canada Inc. v. B.C.T.W. & G.M., Local 154-G (Fickling)*, [2006] O.L.A.A. No. 375 (Roberts); *Pacific Blue Cross, Restigouche Health Services Corp. and C.U.P.E. (Lyons) (Re)* (2003), 128 L.A.C. (4th) 97 (Bruce).

^[75] *Health Employers Association of British Columbia v. B.C.N.U.* (2006), 54 B.C.L.R. (4th) 113 (C.A.). Also see *Restigouche Health Services Corp., ibid.*

Among arbitrators and tribunals, three different schools can be identified. On one end of the spectrum, a minority of labour arbitrators and tribunals have adopted a *discipline* approach. In this line of cases, the arbitrator forthrightly acknowledges the applicability of the duty to accommodate, but generally places the duty not as a foundation tool of non-culpable analysis, but rather as a secondary mitigating factor once the grievor's culpability has been determined.^[76] This model has attracted relatively little support, as it appears to abdicate any substantive application of the accommodation duty. In the middle of the spectrum is the *hybrid* model, which has created a half-way house by intertwining traditional disciplinary analysis with accommodation principles. This model is reflective of the concerns by some labour arbitrators about abandoning the application of culpability when employment misconduct has been proven, particularly in addiction cases where there appears to be some quasi-voluntary aspects to the employee's disability.^[77] The hybrid approach, which has been developed primarily by arbitrators and the courts in British Columbia, has yet to articulate a principled and consistent approach towards the demanding disability accommodation standards reflected in *Meiorin* and *Grismer*. Finally, at the other end of the spectrum lies the *disability* approach. This model seeks to determine whether the purported misconduct is linked to an underlying disability. If a persuasive nexus is established, then the arbitral inquiry becomes focused on whether the accommodation duty was properly applied, and any application of culpability falls off the table.^[78] The disability model is the most proximate to the *Meiorin* and *Grismer* requirements, but it remains to be seen whether it can develop enough flexibility to adapt to the myriad challenges that mental illness and addiction issues present in the Canadian workplace.

^[76] *Benoit v. Bell Canada (Quebec)* (2004), 51 C.H.R.R. D/30; *York Region Board of Education and O.S.S.T.F. (Re)* (1999), 84 L.A.C. (4th) 90 (Shime); *Toronto Transit Commission and A.T.U. (Re) (Geobey)* (1997), 72 L.A.C. (4th) 109 (Shime).

^[77] *Algoma Tubes Inc; Kemess Mines Ltd v. I.U.O.E., Local 115*, 147 L.A.C. (4th) 129 (B.C.C.A.); *Winnipeg (City) and A.T.U., Local 1505 (Levesque) (Re)* (2006), 147 L.A.C. (4th) 162 (Graham); *City of Surrey*, *supra* note 202. In *Kootenay Boundary Regional Hospital v. B.C.N.U. (Bergen)* (2006), 147 L.A.C. (4th) 146, the British Columbia Court of Appeal upheld the application of the hybrid approach by an arbitrator and ruled that: "Addiction, as a treatable illness, requires an employee to take some responsibility for his rehabilitation program".

^[78] *Shuswap Lake General Hospital; Vancouver Police Board*.

“Hybrid” analysis upholds discharge

A B.C. labour arbitrator upheld a discharge for breaching a last chance agreement and being dishonest about drug use. Applying the “hybrid” analysis, the Arbitrator ruled that further accommodation of the grievor’s disability would cause undue hardship to the employer.

Legal Citation

Molson Canada v. Brewery, Winery and Distillery Workers, Local 300 (Chrysler Grievance), [2007] B.C.C.A.A.A. No. 197 (V. Ready), British Columbia Labour Arbitration Award, July 19, 2007.

Facts

The grievor had worked for Molson Canada for almost 27 years. In January and February 2006, he was absent without leave due to personal problems including an addiction to crack cocaine. At the time, he had marital problems that were complicated by various lifestyle choices.

In February 2006, the grievor met with the Company to discuss his return to work. Out of concern for the grievor's well-being, the Company agreed to a return to work program that was drafted as a Last Chance Agreement ("LCA"). The LCA stipulated that the grievor would undergo a drug test after he had completed a rehabilitation program paid for by the Company.

After signing the LCA and enrolling in the rehabilitation program, the grievor withdrew because he felt that it was not helping him and instead enrolled in a five week treatment program. Once again, the Company paid the costs of the program. In October 2006, the grievor was scheduled for a drug test by the Company pursuant to the LCA but failed to attend because of a car accident. Following this incident, the grievor tested positive for cocaine in a subsequent drug test.

When he met with the Company, the grievor denied using cocaine or any other drug. On October 25, 2006, the grievor was terminated for breach of the LCA and dishonesty.

The Union filed a grievance alleging discrimination based on a disability.

Analysis

The Employer argued that this was a "hybrid" case in that the violation of the LCA justified an immediate dismissal despite being related to a disability. It also took the position that there was a culpable component to the case since the grievor had been dishonest about his cocaine use. Finally, it presented evidence that it had provided accommodation by allowing time off from work and paying for the rehabilitation programs.

The Union acknowledged that the LCA was a form of accommodation, but argued that the *Human Rights Code* required further efforts. In addition, any dishonesty must be examined in the context for his disability which was a mitigating factor.

Arbitrator Vince Ready extensively reviewed recent caselaw on the mixture of discipline and disability. He relied on the line of British Columbia decisions which have ruled that arbitrators should separate culpable conduct from non-culpable conduct when the employee suffers from a disability.

Arbitrator Ready cited from the BC Labour Relations Board in *Fraser Lake Sawmills* (B.C.L.R.B 390/2002):

It is in the hybrid fact context and particularly in cases involving dishonesty that the conceptual difficulty arises. In such circumstances, the addiction is relevant in that it has influenced the conduct of the employee, but has not dominated it to the extent that the

employee's actions have been found to be totally non-voluntary. In other words, the employee has not completely lost control over conduct as a result of the addiction. To the extent that control has been lost, the conduct is non-culpable. The portion of the misconduct in which choice and control were present is culpable.

Arbitrator Ready determined that the grievor had violated the LCA by failing the drug test. However, there was no compelling reason to not uphold the content of the Agreement.

In addition, there had been extensive accommodation efforts by the Company. Despite these efforts, the grievor had not been honest about his misconduct. This led Arbitrator Ready to the conclusion that any further accommodation would cause the Company undue hardship. He stated:

There is no evidence, medical or otherwise, to suggest that this dishonesty was connected to the grievor's disability and, as a result, it is culpable conduct worthy of discipline. Coupled with the efforts of the Employer to accommodate the grievor, it is my finding that the Employer has reached the point of undue hardship...

Based on these principles, the termination was upheld and the grievance was dismissed.

Implications for Employers

In this case, the Employer argued that the hybrid analysis should be applied because there was both non-culpable and culpable conduct. The non-culpable conduct was the grievor's failure of the drug test and breach of the last chance agreement. The culpable conduct was lying about his drug use. While the culpable conduct was serious, the Arbitrator was clearly influenced in his non-culpable analysis with the Company's extensive accommodation efforts. In cases where an employee suffers from an addiction-related illness, arbitrators are more likely to uphold a discharge in a "hybrid" case when there have been serious and long-term accommodation efforts.

Implications for Unions

The combination of dishonesty and an addiction-related illness present obvious challenges for the union at arbitration hearings. On the one hand, the union can argue that the original misconduct is caused by or related to the addiction and thus is non-culpable. On the other hand, the employee's dishonesty about the drug-use or misconduct may be culpable and not related to the addiction. In such cases, unions should advise the employee to be honest and forthright about the impact of the addiction on their decision-making ability. If the employee is not ready to admit to the illness, then medical evidence may be available to show that the dishonesty and denial are caused by the addiction. This would be compelling evidence that the dishonesty is non-culpable in nature and therefore exculpatory.

The hybrid approach, which dominates the approach towards disability and accommodation analysis in British Columbia, has yet to be formally adopted in the rest of the country. The benefit of the hybrid approach, argue its advocates, is that it allows employers some needed

flexibility when confronted with work misbehaviour fueled by an underlying addiction problem. Its weakness, maintain its critics, is that it unduly lowers the strict requirements of the accommodation duty in a manner that erodes the advancement of human rights. This debate will undoubtedly sharpen as unions and employers continue to wrestle with the appropriate location of the boundary around the accommodation duty.

Bi-Polar Disorder – Health and Safety - Accommodation

Gun stealing employee reinstated

An arbitrator recently reinstated a police civilian employee after she stole a gun and attempted suicide while suffering from bi-polar disorder. He found that she had fully recovered and posed no health or safety risks in the workplace.

Legal Citation

Vancouver Police Board and Teamsters, Loc. 31 (James) (Re) (2002), 112 L.A.C. (4th) 193 (R. Germaine); British Columbia Labour Arbitration, 14 November 2002.

Facts

Ms. Christine James, the grievor, had worked as a civilian employee for the Vancouver Police Board since 1980. She began working as a Fleet Attendant, and was eventually promoted to a Fleet Supervisor. Her primary responsibility was ensuring the proper storage and care of the facility's vehicles.

Ms. James testified that she had experienced bouts of depression as a teenager, which were spawned by a number of external events. Generally, she remained healthy throughout her

employment, until April 1994. At this point, Ms. James had trouble sleeping and heard constant noises. She also had problems at work, began losing weight, and became withdrawn. During this period, she also contemplated suicide.

On one occasion while at work, she noticed that the door to a gun locker was ajar. She testified that she interpreted this as a sign and heard a voice telling her to take the gun because that would “do the trick”. She took the gun and ammunition and placed it in a storage box at her home. The next day she phoned in sick, saying that she would be dead. Soon after, Ms. James was treated for depression and bi-polar disorder. Her health continued to deteriorate over the next few years and she never returned the gun or the ammunition.

In December 1997, Ms. James took a leave of absence. During her time off work, she abused alcohol and drugs. While inebriated, she unsuccessfully attempted suicide using the gun that she had stolen in 1994. The police were called, they retrieved the gun and launched an internal investigation. Ms. James eventually resigned and a medical letter, explaining her condition, was given to the Police Board. Ms. James was told that she would be reinstated if she successfully completed therapy and fully recovered from her depression. Although she had resigned, the Police Board arranged for disability benefits while she was in therapy.

In 2000, Ms. James indicated an interest in returning to work. The Police Board refused to reinstate her and explained that there were no appropriate positions available. The Board was primarily concerned with the safety risks posed by Ms. James’ depression. The Union filed a grievance on her behalf, alleging discrimination based on a disability contrary to the collective agreement and the B.C. *Human Rights Code*.

Analysis

The Police Board argued that Ms. James had fundamentally breached its trust by stealing and concealing the gun in 1994. The offer to reinstate Ms. James should not have been made, as it was too dangerous to allow her back into any Vancouver Police building. All attempts to find other jobs within the municipality had failed.

The Union argued that Ms. James had fully recovered from her depression and that she was fit to return to work. She posed no threat to herself or other workers. Furthermore, certain security measures had been taken, which significantly reduced the access by civilian employees to guns and ammunition.

Arbitrator Germaine considered whether Ms. James’ conduct was culpable or non-culpable. If it was culpable, then it was necessary to determine whether it amounted to just cause. If it was non-culpable and brought on by her disability, then the Arbitrator had to examine the Police Board’s duty to accommodate.

On the issue of culpability, the Arbitrator held that the conduct was non-culpable if the individual suffered from a condition that significantly impaired his/her ability to choose whether to refrain from engaging in the misconduct. In this case, Ms. James’ ability to make a sound

decision had been significantly impaired by depression. She was acting on an irrational suicidal manifestation of her disability and therefore, the conduct was non-culpable.

The Arbitrator went on to consider whether the Police Board had fulfilled its duty to accommodate. He recognized the Police Board's sincere efforts to encourage the grievor to attend therapy and that it was genuinely concerned for her health. However, it did not accommodate her to the point of undue hardship. At the crux of the Board's argument was whether it was unsafe to return Ms. James to the workplace. The Board argued that it was imperative to maintain a safe environment and this was especially important in a police station. The Arbitrator disagreed.

The Arbitrator found that, when examining health and safety concerns, the analysis must be focused on the individual's position within the particular workplace. The Fleet Supervisor position was not a safety sensitive position, the gun lockers had been removed and security had been increased, thus reducing any risk of reoccurrence. In addition, the medical evidence indicated that Ms. James had recovered from her illness. Therefore, the Arbitrator concluded that the safety risks were minimal and reinstatement would not cause undue hardship.

The grievor was reinstated, under the condition that she continued to have regular appointments with her treating physician and that she abstained from addictive substances.

Implications for Employers

Health and safety risks must be serious and not too remote in order to justify a dismissal. Employers should consider the risks associated with the employee's position only within his/her particular workplace. The scope of the analysis does not extend to the entire municipality or company. Rather, employers must focus on the risks that would arise in the employee's daily activities. Furthermore, the law clearly allows the employee to assume to some health and safety risk, provided it does not place other employees at serious risk. In this case, the arbitrator found that the employee had recovered and posed no reasonable danger either to herself or to others. In most cases in the workplace, the standard is not perfect safety, but reasonable safety.

Implications for Unions

The treatment of bi-polar disorder is difficult because of the possibility of relapse. Therefore, Unions should work with the employer to negotiate terms of reinstatement that support the treatment and therapy of the illness. For example, conditions may be placed on the employee to continue treatment for a specified period or refrain from consuming alcohol or drugs. Other options would be to gradually reintegrate the employee back into the workplace on a work-hardening program or on a part-time basis. By using these options, the Union will ensure that the employee is able to return to the workplace in a respectful and dignified manner.

Three relapses is too much says B.C. Court of Appeal

The British Columbia Court of Appeal upheld the termination of a nurse who suffered from a drug addiction. After a third relapse, the Court held that the employer could reasonably expect the employee to have taken steps towards rehabilitation.

Legal Citation

Health Employers Assn. of British Columbia v. British Columbia Nurses' Union, [2006] B.C.J. No. 262 (B.C.C.A.); British Columbia Labour Arbitration, February 14, 2006.

Facts

In 2003, the Health Employers Association of British Columbia terminated a registered nurse who worked at the Kootenay Boundary Regional Hospital. The nurse was addicted to drugs and had taken morphine and other drugs from the Hospital. After a positive urine sample determined that he had consumed drugs, he was terminated.

The employer acknowledged that the nurse suffered from a disability. At the arbitration hearing, it argued that, while it had accommodated the nurse, his conduct was a mix of both culpable and non-culpable conduct. Therefore, its decision to terminate the employment relationship for theft of the drugs (i.e. culpable conduct) was justified. It introduced evidence of two previous terminations for drug use and three previous arbitration awards related to his addiction and misconduct in the workplace. The most recent arbitration award reinstated the grievor on a last chance agreement, which formed the basis for the most recent termination.

An arbitrator overturned the dismissal and concluded that the employer failed to properly accommodate the nurse since it had not explored jobs that were not in high risk areas of the hospital.

The employer appealed the arbitrator's award directly to the British Columbia Court of Appeal.

Analysis

The Court of Appeal held that it had jurisdiction to hear the appeal since the arbitrator was interpreting a matter of general law outside of the B.C. *Labour Relations Act*.

The first issue before the Court was whether there was a *prima facie* case of discrimination. The employer argued that the union had failed to establish discrimination, which made any analysis of the duty to accommodate immaterial. It took the position that if the nurse was capable of taking steps to overcome his addiction, the employer's rule against using drugs was not discriminatory.

The Court of Appeal ruled that the duty to accommodate was not a free-standing issue in every case of discrimination. The duty to accommodate was only an issue once the applicant/complainant had proved that discrimination based on a prohibited ground had occurred. The Court reviewed the arbitrator's award and determined that the arbitrator had concluded that there was a connection between the nurse's disability and his misconduct. Therefore, the employer's termination, which was related to the grievor's disability, was *prima facie* discriminatory.

However, on the issue of accommodation, the Court of Appeal disagreed with the arbitrator's conclusions. The Court stated that the arbitrator failed to properly consider the nurse's previous two discharges for drug use. These two relapses were relevant factors in the decision to terminate the nurse. The Court also stated that the arbitrator failed to consider the duty on the employer to facilitate the accommodation process. The employer had already tolerated two previous relapses. The Court stated that:

The arbitrator's error, having correctly put the last chance agreement aside, was in failing to consider adequately or at all that [the employee] had received two prior employment opportunities to cope with his addiction, and had failed to do so. The employer's duty to accommodate Mr. Bergen was matched by his duty to facilitate the accommodation process.

The Court accepted the Hospital's argument that the nurse was in a position where public safety was crucial. It said that public safety must be considered in the context of accommodation.

In conclusion, the Court of Appeal allowed the appeal and upheld the employer's termination.

Implications for Employers

It is generally accepted that a relapse is a common setback during the rehabilitation process. But, how many relapses must an employer tolerate? Usually, employers are expected to tolerate several relapses before it can consider terminating the employment relationship. In this case, it was significant to the Court that the employee had two previous relapses prior to the discharge. The Court of Appeal was not willing to force the employer to endure a third relapse without some positive rehabilitation efforts by the employee.

Implications for Unions

In order to strengthen a case at arbitration, particularly when the issue involves a termination of an employee who relapsed, unions should introduce evidence of the rehabilitative steps taken by the employee. Arbitrators are invariably interested in knowing whether the employee took any positive steps following a relapse. If the union can demonstrate a genuine effort towards rehabilitation, an arbitrator will more likely consider reinstating the employee.

6. Drug Testing and Privacy

Another feature of the accommodation duty with a strong privacy element is the legal scope available to employers to test its employees for impairments or disabilities caused by drug or alcohol use. Tribunals, arbitrators and the courts have all emphasized that employee privacy is the dominant concern, and the employer must persuasively demonstrate that its particular workplace circumstances require the invasive use of drug or alcohol testing in some form.^[79] The starting point is *Entrop v. Imperial Oil Ltd.*,^[80] where the Ontario Court of Appeal in 2000, relying upon the *Meiorin* analysis, provided an influential judicial statement on the compatibility of different forms of drug and alcohol testing with accommodation and human rights norms. Employers may demand that their employees submit to impairment tests only when it can demonstrate the connection between: (i) the seriousness of the impairment; (ii) the safety requirements of the position; (iii) the reliability of the testing technology to measure impairment; and (iv) the flexibility of the workplace policy to accommodate an employee with a substance addiction. The employer must prove that its substance abuse policy is proportional to the actual requirements of the particular workplace, and its listed punishment for violations does not exceed what is required to ensure legitimate safety standards and production goals.^[81]

^[79] See *Imperial Oil Ltd. and C.E.P., Local 900 (Re)*, [2006] O.L.A.A. No. 721 (M. Picher) at para. 92: "...a drug test is an extraordinary and intrusive measure, justified only by the touchstone condition of reasonable cause."

^[80] (2000), 50 O.R. (3d) 18 (C.A.), rev'g in part (1998), 108 O.A.C. 81 (Div. Ct.), aff'g (1995), 23 C.H.R.R. D/196 (Ont. Bd.Inq.).

^[81] *Ibid.* at para. 100.

Turning to the varied impairment testing measures commonly used in the workplace, the Court of Appeal in *Entrop* maintained a critical eye. Random testing and pre-employment screening for drug use, the Court observed, was inherently unreliable in its present technology because, while it could accurately identify the presence of drugs in an employee's body, it could not reliably demonstrate impairment.^[82] Testing for recent alcohol use through breathalyzers, on the other hand, met the *Meiorin* test, because it could accurately detect impairment, and employees were given reasonably advanced notice of its possible use.^[83] As well, testing an employee for cause and after a workplace incident, such as an accident, is permissible if sufficient necessity is demonstrated by the employer.^[84] However, the requirement for mandatory employee disclosure of all past substance abuse was deemed to be too harsh and inflexible, as was the automatic reassignment of an employee out of a safety-sensitive position following the disclosure of a past substance abuse problem.^[85] And a requirement that an employee with a past substance abuse problem would have to demonstrate a minimum of two years' rehabilitation and five years' abstinence was overly broad, and not sufficiently tailored to accommodate the individual employee's recovery path short of undue hardship.^[86] In *Entrop*, the Court of Appeal intimated that employers must ensure that human rights, privacy and accommodation values are intimately interwoven throughout its drug testing policy, and that the policy is rationally and necessarily connected to the employer's legitimate business interests.

After *Entrop*, labour arbitrators, human rights tribunals and the courts (on review applications) have held employers to strict standards regarding the content and the application of the drug testing policies, emphasizing the social and workplace values of dignity, integrity and privacy.^[87] Random and speculative drug testing – whether by breathalyzer, urinalysis, buccal swabs or

^[82] *Ibid.* at para. 99.

^[83] *Ibid.* at para. 106.

^[84] *Ibid.* at para. 114.

^[85] *Ibid.* at para. 118.

^[86] *Ibid.* at para. 124.

^[87] The current legal approach towards workplace drug testing is succinctly described by Arbitrator Michel Picher in *Imperial Oil Ltd. supra* note 79 at para. 101: "...to subject employees to an alcohol or drug test when there is no reasonable cause to do so, or in the absence of an accident or near-miss and outside of the context of a rehabilitation plan for an employee with an acknowledged problem is an unjustified affront to the dignity and privacy of an employee which falls beyond the balancing of any legitimate employer interest, including deterrence and the enforcement of safe practices."

other means – have been frequently struck down, unless they are a part of an agreed-upon rehabilitation program.^[88] Concern has been expressed about “zero-tolerance” standards which imposed an automatic termination of employment if any drug metabolites were found in an employee’s system while at work, because they fail to allow employees to be accommodated through a rehabilitation program, with the opportunity to return to work.^[89] Automatic no-hire drug testing policies at the pre-employment stage have also been struck down even when the employee was only a casual drug user, because these standards treated all potential employees as if they have a perceived disability and they offered no accommodation.^[90]

Notwithstanding the concern for the privacy and human rights of employees, legal decision-makers have stated that none of these new requirements abrogate the employers’ right to access whether their employees are capable of performing their duties safely.^[91] Employers have been permitted to utilize drug testing, including random testing, on employees in the following three defined circumstances: (i) the facts in a particular case justify the testing (i.e., an accident or near-miss; reasonable grounds to suspect drug use or impairment at work);^[92] (ii) express language in the collective agreement identifying specific and justifiable instances;^[93] or (iii) as part of an agreed-upon monitoring system for employees recovering from drug or alcohol abuse.^[94] The failure of an employee to participate in a justified drug test may be grounds for serious discipline.^[95] However, an employer’s imposition of random and pre-access drug and

^[88] *Imperial Oil Ltd, ibid.*; *Halter v. Ceda-Reactor Ltd.*, [2005] Alta. H.R.C.C.; *Kimberly-Clark Forest Products Inc. and P.A.C.E. International Union, Loc. 7-0665 (Re)* (2003), 115 L.A.C. (4th) 344 (Levinson); *Trimac Transportation Services-Bulk Systems and T.C.U. (Re)* (1999), 88 L.A.C. (4th) 237 (Burkett); *Canadian National Railway Co. and U.T.U., Re* (1989), 6 L.A.C. (4th) 381 (M. Picher).

^[89] *Milazzo v. Autocar Connaissanceur Inc. (No. 2)* (2003), 47 C.H.R.R. D/468.

^[90] *Alberta (Human Rights and Citizenship Commission) v. Kellogg Brown & Root (Canada) Co.* (2006), 267 D.L.R. (4th) 639 (Q.B.), leave for appeal accepted 2007 ABCA 175.

^[91] *Ibid.* para. 98. Also see *Procur Sulphur Services and C.E.P., Loc. 57 (Holden) (Re)* (1998), 79 L.A.C. (4th) 341 (Ponak).

^[92] *Suncor Energy Inc., Oil Sands and C.E.P., Loc. 707 (Pearson)* (2004) 128 L.A.C. (4th) 48 (Jones); *Canadian National Railway Co. and C.A.W.-Canada (Re)* (2000), 95 L.A.C. (4th) 341 (M. Picher).

^[93] *Imperial Oil Ltd., supra*, note 79, at para. 100.

^[94] *Gates Canada; Algoma Tubes Inc. v. U.S.W.A., Loc. 8748 (Smith)*, [2006] O.L.A.A. No. 768 (Randall); *Core-Mark International Inc. and U.F.C.W., Loc. 401 (T.M.) (Re)* (2005), 138 L.A.C. (4th) 237 (Sims); *DuPont Canada Inc. and C.E.P., Loc. 28-O (Re)* (2002), 105 L.A.C. (4th) 399 (P. Picher); *Fording Coal Ltd. and U.S.W.A., Loc. 7884 (Shypitka) (Re)* (2001), 94 L.A.C. (4th) 354 (Hope); *Esso Petroleum Canada and C.E.P., Loc. 614* (1994), 56 L.A.C. (4th) 440 (McAlpine).

^[95] *Imperial Oil, supra* note 79.

alcohol testing on its security employees at the request of a site contractor does not absolve it of its human rights responsibilities.^[96]

Workplace safety overrules perceived disability

The Alberta Court of Appeal ruled that a pre-employment drug testing policy prohibited workplace impairment and did not discriminate against an employee based on a perceived disability.

Legal Citation

Alberta (Human Rights and Citizenship Commission) v. Kellogg Root & Brown (Canada) Co., [2007] A.J. No. 1460 (Alb. C.A.); Alberta Court of Appeal, December 28, 2007.

Facts

In 2002, a recruiter for Kellogg Brown & Root (KBR) invited J.C. to apply for a position with the Company, which involved work on a project to expand the Syncrude upgrader refinery in Fort McMurray. As part of the application process, J.C. agreed to undergo a medical and drug test. He received an offer of employment subject to the results of the medical test and drug screen and was also advised that the policies and procedures of KBR formed part of his terms and conditions of employment.

After 9 days of work, the test results came back positive for tetrahydrocannabinol (“THC”). J.C. was asked to explain the results and he admitted to smoking marijuana prior to being hired. The Company discharged J.C. under its drug testing policy, which called for automatic termination.

There was no allegation that J.C. used marijuana at work and he made it very clear to the Company that he did not have an addiction to drugs.

Upon being terminated, J.C. filed a human rights complaint with the Alberta Human Rights and Citizenship Commission alleging discrimination based on physical and mental disability. The complaint proceeded to a full hearing before a human rights panel.

Analysis

Alberta Human Rights Panel

^[96] *Metropol Security, a division of Barnes Security Services Ltd. and U.S.W.A., Loc. 5296 (Drug and Alcohol testing) (Re)* (1998), 69 L.A.C. (4th) 399 (Whitaker). Also see *Finning (Canada) and I.A.M., Loc. 99 (Re)* (2005), 136 L.A.C. (4th) 129 (Sims).

Since the Complainant was not addicted to marijuana and KBR did not perceive him to be disabled, the Alberta Human Rights Panel concluded that there was no discrimination. While it may have been discriminatory against employees with a drug dependency, these were not the facts of this particular case. Thus, the drug testing policy was upheld.

The decision was appealed.

Alberta Court of Queen's Bench

On judicial review, the Court agreed that the Policy discriminated against individuals with drug-related disabilities. However, the Court went further and concluded that, under the Policy, the Company treated the employee as though he had a disability. In other words, it *perceived* that J.C. suffered from an addiction to drugs. The Court stated:

The Policy not only treats all prospective employees who test positive for drugs the same, it treats them as if they were drug dependent and further assumes that they are likely to report to work impaired. Even though [the employee] may not be drug dependent, the policy operates to treat him as such, and the requirement that he be tested for drugs with an automatic sanction for a positive test is prima facie discriminatory.

The Court went on to say that it would defeat human rights principles if employers could invoke a single standard for all employees to avoid a finding of discrimination based on perceived disability.

The Court also found that the Policy failed to provide any accommodation and thus violated the *Human Rights, Citizenship and Multiculturalism Act*.

(See Summary # 209)

KBR appealed to the Court of Appeal

Alberta Court of Appeal

The Court of Appeal rejected the Chambers judge conclusion that the Policy discriminated against the Complainant based on perceived disability. It found that the purpose of the Policy was to reduce workplace accidents by prohibiting workplace impairment. There was scientific evidence showing that casual use marijuana had lingering effects on individuals. The Policy had a laudable goal, according to the Court, of improving workplace safety.

The Court's decision narrowed in on the goal of safety as it analogized KBR's policy to the transportation industry:

We see this case as no different than that of a trucking or taxi company which has a policy requiring its employees to refrain from the use of alcohol for some time before the employee drives one of the employer's vehicles. Such a policy does not mean that the company perceives all its drivers to be alcoholics. Rather, assuming it is aimed at safety,

the policy perceives that any level of alcohol in a driver's blood reduces his or her ability to operate the employer's vehicles safely. This is a legitimate presumption. Its goal is laudable since carnage on the highways is a leading, but often ignored, cause of death nearing epidemic proportions. Extending human rights protections to situations resulting in placing the lives of others at risk flies in the face of logic.

Since there was no issue of discrimination, the Court ruled that it was not necessary to examine the accommodation issues.

The Court upheld KBR's appeal.

Implications for Employers

The law on discrimination based on a perceived disability is still developing. In general, employers cannot treat an individual as though he/she was disabled when there is no disability. This often arises in pre-employment testing when a test result erroneously indicates some level of physical or cognitive impairment. There is a fine line, however, in determining when there is a perceived disability. On this issue, the Court stated:

The jurisprudence has extended the prohibited grounds to include instances where an employer incorrectly perceives that an employee has a prescribed disability. In this case KBR's policy does not perceive Chiasson to be an addict. Rather it perceives that persons who use drugs at all are a safety risk in an already dangerous workplace.

In this case, the Court relied on the objectives of the Policy (i.e. emphasis on workplace safety) to reject the Union's argument that there was discrimination based on a perceived disability.

Implications for Unions

While the law on pre-employment drug testing is still in its infancy, the decision of the Court of Appeal is consistent with a recent Ontario judgment. See *Weyerhaeuser Co. (c.o.b. Trus Joist) v. Ontario (Human Rights Commission)* [2007] O.J. No. 640 (Ont. Sup. Ct.). In both decisions, the evidence did not support a conclusion that the employer actually perceived the employee as being disabled. While the Ontario decision focused on the consequences of a drug failure, the Alberta decision ruled that the aim of the Policy was directed at the employee because he admitted to continually using marijuana. Each case used different reasons to uphold a pre-employment drug testing policy.

Unions should not lose hope as both cases affirmed that there are accommodation obligations when an employee has a drug addiction. Also, both cases suggested that the pre-employment policy had to be appropriate for the particular industry in safety sensitive positions. It remains to be seen whether the Supreme Court of Canada will weigh in on the issue of pre-employment drug testing and the implied treatment of a perceived disability.

7. Modified Jobs

The most flexible accommodation tool available to employers is the re-bundling of existing job duties to create a modified position that can be productively performed by an employee with a disability. The accommodation duty clearly requires much more from employers than simply asking whether the employee can perform all of the duties of his or her existing job, or whether there might be a suitable job vacancy in the workplace.^[97] Rather, it demands that the employer imaginatively assess any and all reasonable possibilities, including reorganizing or reassembling existing jobs, searching in other work locations within the same business, waiving collective agreement provisions and work practices, and conducting an individualized work assessment.^[98] When exploring the possibilities for an accommodation, the employer is required to engage in a four-step job investigation process, which involves: (i) first determining whether the employee can productively fulfill his or her existing job as it is presently constituted; (ii) if not, then determining whether he or she can perform the core aspects of the original job in a modified or re-bundled form; (iii) if not, determining whether the employee can accomplish the duties of another job in its present form; and finally (iv) if not, then determining whether he or she could perform another job in a modified or re-bundled fashion.^[99] In most cases, the employer will have legally fulfilled its accommodation duty if it has thoroughly investigated, and has been genuinely unable to satisfy, all of these four steps.

In devising a modified or re-bundled position, an employer has to be prepared to strip a current job of its non-core functions and re-assign work among employees so as to create a productive work assignment for an employee who requires a disability accommodation that may consist entirely of reassembled light work duties.^[100] Any accommodation possibility has to attempt to

^[97] *Russo v. Lions Gate Trailers Ltd.*, (2006), 55 C.H.R.R. D/202; *Ontario Liquor Board Employees' Union v. Ontario (Liquor Control Board) (Di Caro)*, [2005] O.C.S.B.A. No. 60 (Dissanayake); *Muldoon v. Canada (Attorney General)* (2004), 249 F.T.R. 42 (F.C.); *Community Lifecare Inc. and O.N.A. (Clark) (Re)* (2001), 101 L.A.C. (4th) 87 (Howe); *Canada Safeway and U.F.C.W., Loc. 401 (Oliphant) (Re)* (2000), 89 L.A.C. (4th) 312 (Sims); *Greater Niagara General Hospital and O.N.A.(Re)* (1995), 50 L.A.C. (4th) 34 (H.D. Brown); and *Calgary District Hospital Group and U.N.A., Loc. 121-R* (1994), 41 L.A.C. (4th) 319 (Ponak)

^[98] *Mohawk Council of Akwesasne and Akwesasne Police Assn. (Re)* (2003), 122 L.A.C. (4th) 161 (Chapman).

^[99] *Ottawa-Carleton District School Board and O.S.S.T.F. (Re)* (2005), 141 L.A.C. (4th) 41 (Bendel).

^[100] *Toronto District School Board and C.U.P.E., Loc. 4400 (Shaw) (Re)* (2003) 120 L.A.C. (4th) 395 (Howe).

minimize an adverse impact upon other employees,^[101] although that might be allowed if no other reasonable accommodation is possible. Indeed, in some circumstances, the duty might require the employer to permit the employee with a disability to displace or bump another employee out of a position.^[102] Where a full-time employee with a disability can only work part-time hours, but requires the maintenance of full-time status in order to access workplace benefits, labour arbitrators have directed the continuance of the full-time status if the cost does not amount to an undue hardship for the employer.^[103] Similarly, an alternative work scheduling program that excluded workers with disabilities who were on a reduced work week was found to be discriminatory, because it denied them the opportunity to participate in a cost-neutral program available to other employees, solely on account of their disabilities.^[104]

Employer ordered to transfer disabled employee

The B.C. Human Rights Tribunal ordered a company to transfer an employee after he had been denied a job posting because, in the company's view, the transfer would cause it undue hardship. The company's argument failed because it did not make any enquiries about whether such a transfer would have actually amounted to undue hardship.

^[101] *Edgell v. Board of School Trustees, District No. 11* (1996), 97 C.L.L.C. 145,079 (B.C.C.H.R.).

^[102] *Tenneco Canada Inc; Mohawk Council of Akwesasne*, *supra* note 98.

^[103] *Insurance Corp. of British Columbia and O.P.E.I.U. Loc.378 (Baus) (Re)* (2003), 123 L.A.C. (4th) 422 (Germaine); *British Columbia Public School Employers' Assn. and B.C.T.F. (Coutts) (Re)* (1998), 78 L.A.C. (4th) 289 (Jackson); *Peel Board of Education and O.S.S.T.F. (Lambert) (Re)* (1998), 73 L.A.C. (4th) 183 (Albertyn).

^[104] *City of Toronto v. C.U.P.E., Local 79 (Berg)* (2006), 149 L.A.C. (4th) 353 (Nairn).

Legal Citation

Ingenthron v. Overwaitea Food Group, a Division of Great Pacific Industries Inc., [2006] B.C.H.R.T.D. No. 556 (B.C.H.R.T.); British Columbia Human Rights Tribunal, November 20, 2006.

Facts

The Complainant had worked as a bakery clerk for Overwaitea Food Group since 1987. He had suffered from a back injury from playing sports which was aggravated by an auto accident in 1996.

In 2000, the Complainant was diagnosed with a “lumbo-pelvic pathology of ill defined-origin.” His orthopedic specialist determined that it was a permanent injury and would likely worsen over time. The Complainant was restricted from prolonged bending and rotating.

The company had provided accommodation to the Complainant since 1990 by modifying duties based on his physical restrictions. Over this lengthy period of time, the company requested and received medical information about the Complainant’s disability and restrictions.

In 2004, the Complainant applied for two job postings in two different stores and was denied on each occasion. He filed a grievance alleging discrimination and an arbitrator ultimately concluded that it would cause undue hardship to transfer the Complainant to a different store. It was central to the arbitrator’s decision to dismiss the grievance that the Complainant wanted to transfer for reasons of “convenience” and “change.”

Following the arbitration award, the Complainant applied for another posting and was again denied. The company took the position that the previous arbitration award allowed it to deny other job postings to him even if he satisfied the criterion of skill, ability and seniority.

The Complainant filed a complaint with the B.C. Human Rights Commission alleging discrimination based on a disability. The B.C. Human Rights Tribunal dismissed the complaint regarding the two job postings since it had been dealt with by an arbitrator. However, the Tribunal allowed the portion of the complaint dealing with the company’s repeated refusal to transfer the Complainant from his position to another store.

Analysis

The B.C. Human Rights Tribunal easily determined that there had been a *prima facie* case of discrimination. The Complainant was disabled, had been accommodated in his current position and was denied an opportunity to transfer to another position because it was believed that it would cause undue hardship.

Once the Complainant established that there was discrimination, the onus shifted to the Company to prove that “it would be impossible to accommodate individual employees sharing the characteristics of [the Complainant] without imposing undue hardship upon it as the employer.”

After reviewing the evidence, the Tribunal determined that the company had not made any enquiries about whether it could accommodate the Complainant at the new store. Making enquiries about accommodation is an obligation that continues through the life of the employment relationship. In the Tribunal’s view, the company treated the arbitrator’s award on the two job postings as being the final word on the issue. This was not appropriate as the company had an obligation to make enquiries every time the Complainant applied for a new job posting.

The Tribunal identified the steps that should have been taken by the company. Upon receipt of the application to transfer, the company should have reviewed the Complainant’s abilities and limitations with the Complainant and the union. It should have then reviewed the duties at the new store to determine if it was possible to accommodate the Complainant. The Tribunal recognized that it was open to the company to obtain an updated medical assessment or an occupational assessment of the new store. The failure to take these steps was fatal to the company’s case.

The Tribunal ordered the company to retain an occupational therapist to conduct a review of the new store that the Complainant had sought a transfer for. In addition, the Tribunal ordered the company to transfer the Complainant to the new store based on the occupational therapist’s recommendations. A request for monetary damages was denied.

Implications for Employers

In this case, the Tribunal discussed the approach that arbitrators and human rights tribunals must apply to accommodation issues. It was not appropriate, according to the Tribunal, to weigh the hardship of the employer against the consequences suffered by the employee. The Tribunal stated:

While both the hardship to be suffered by the employer and the consequences of a lack of accommodation to the employee are clearly relevant to the hardship analysis, they are not to be weighed against one another.

In the Tribunal’s view, such an approach would have the effect of watering down the employer’s legal obligation to accommodate the employee to the point of undue hardship.

From these comments, employers can draw further clarity of their obligations in the accommodation process. The appropriate question to ask is whether it can be shown that it would be impossible to accommodate the employee without causing undue hardship.

Implications for Unions

The request of a remedy is always a difficult issue for unions, especially where there has been no injury or loss to the employee. If the union is successful in seeking an order to transfer the employee to the requested position, the potential loss is remedied. In order to justify a request for damages, a union would have to show actual injury or financial loss. In this case, the Tribunal stated that the most important and meaningful remedy was one that would make the Complainant whole. An order to accommodate and transfer the employee was a more appropriate remedy than awarding damages.

Accommodated employee entitled to further accommodation

An Ontario arbitrator held that an accommodated employee was entitled to a new job even though she required further accommodation. In the arbitrator's view, the duty to accommodate was an ongoing process that balanced the interests of the disabled employee with that of the Company.

Legal Citation

National Automobile, Aerospace, Transportation and General Workers Union of Canada, (C.A.W.), Local 1941 v. Siemens VDO Automotive Inc. (Young Grievance), [2006] O.L.A.A. No. 492 (M.V. Watters); Ontario Labour Arbitration, August 10, 2006.

Facts

In late 2005, Siemens VDO Automotive (“The Company”) implemented a new “Relief Person” classification. The job posting stated that individuals in this classification were expected to work a rotating shift, which included nights.

The grievor, who had Type I Diabetes, applied for the Relief Person classification. She had been working in an accommodated position as a result of the side-effects of diabetes. The accommodation called for a work schedule of straight days. There was no issue that the grievor had the skills, abilities, qualifications and seniority for the Relief Person job posting. However, the Company did not award the position to the grievor because she was unable to work a rotating shift.

After she was denied the posting, the grievor filed a grievance alleging discrimination based on a disability.

Analysis

The Union argued that the decision not to award the position to the grievor was based on the grievor’s medical restrictions. If she had been able to work a rotating shift, she would have been awarded the position. The Union proposed several different options for rearranging the shifts to accommodate the grievor. It argued that allowing the grievor to work a straight day shift in the Relief Person classification would not have caused undue hardship.

The Company argued that it was justified in denying the grievor the position since she was unable to comply with the shift requirements, which was described as an essential part of the job. It took the position that it had already accommodated the grievor by keeping her on the day shift and it was not required to provide further accommodation. Finally, it stated that the impact of the grievor’s accommodation would seriously disrupt and displace other employees. This, it argued, would cause undue hardship.

The Arbitrator recognized that the issue required a balancing effort between the interests of the grievor and the Company. He cited from *Re Cape Breton Healthcare Complex and Canadian Auto Workers, Local 4600* (2000), 90 L.A.C. (4th) 403 (Ashley):

Such cases as this one involve a balancing of the right of a disabled employee to protection of his fundamental human rights, against the legitimate right of the Employer to organize and manage the workplace and to determine how the work will be done. However, the legal requirements imposed by the duty of accommodation mandate that the

Employer must make efforts to the point of undue hardship to accommodate the needs of disabled employees, imposing a significant limitation on the Employer's right to manage.

After reviewing the evidence, the Arbitrator determined that the requirement to work a rotating shift was not an essential component of the job or a *bona fide* occupational requirement. According to Arbitrator Watters, it was preferred by the Company to avoid complicating the schedule.

The Arbitrator also determined that the primary reason for not awarding the position to the grievor was directly related to her disability and the schedule restrictions imposed by her physician. This was discriminatory and violated the Ontario *Human Rights Code*.

The Arbitrator upheld the grievance and ordered the Company to place the grievor in the Relief Person classification.

Implications for Employers

In this case, the Company also argued that it was not required to provide the “perfect” accommodation arrangement to the grievor. Its only obligation was to provide reasonable accommodation, which it had been doing in the grievor’s existing position.

While the Arbitrator did not reject this position, he advised that the duty to accommodate was an ongoing process which was subject to change if the grievor applied for job postings. He stated:

If the accommodated employee, as in this case, applies for a different position, I think it incumbent on the Employer to consider whether some further and reasonable accommodation can be achieved in respect of that position short of undue hardship.

Accommodation requires fluidity. Employers must be willing to allow change in accommodation arrangements, especially where it is long-term.

Implications for Unions

It is a good strategy to put forward alternative accommodation solutions at the grievance and arbitration stages. It serves two purposes. First, if the solutions are reasonable, it is a compelling argument that the employer has not fully satisfied its accommodation obligations. Second, it provides the arbitrator with a specific remedy that can be awarded. If a specific option is not put forward by the union, an arbitrator is more likely to order the employer to accommodate the grievor, without any details.

New work location was reasonable

An Ontario arbitration board held that an employer's offer to provide a new work location was reasonable and that there was no medical evidence to justify a refusal to attend work despite the grievor's fear. The Board held that disabled employees may have to incur some discomfort in the accommodation process.

Legal Citation

Ontario Secondary School Teachers' Federation, District 25 (Plant Support Staff Unit) v. Ottawa Carleton District School Board (Sauvé Grievance), [2007] O.L.A.A. No. 104; Ontario Labour Arbitration, February 28, 2007.

Facts

The grievor had worked as a part-time custodian for the Ottawa Carleton District School Board since 2000. In September 2002, she went off work for surgery for carpal tunnel syndrome. As a result of this injury, she had a permanent disability as recognized by the Workplace Safety Insurance Board.

In March 2003, she returned to modified duties provided by the School Board. This continued until an incident occurred in October 2004. According to the Federation's evidence, the grievor was assaulted at the loading dock while at work. She applied for benefits under the WSIB for psychological/emotional injury, but was denied. The WSIB advised the School Board that the grievor could return to work performing modified duties. In June 2005, the School Board was advised by the grievor's psychiatrist that the grievor was experiencing flashbacks of the past assault. The psychiatrist recommended that the grievor be transferred to a different school to avoid exposures to any further triggers.

The Board created a new position for the grievor at a different school. It took into account the new work environment and ensured that the grievor would be working with female staff so that she would be more comfortable. The Board also arranged to have special equipment at the new school to accommodate the grievor's physical disabilities and retained a consultant to train the grievor to properly use the equipment. In preparing the accommodation for the grievor, the Board took into consideration that the Chief Custodian at the school had experience in assisting accommodated workers. This new position was approved by the WSIB.

While the first day of work was scheduled in September 2005, the grievor contacted the School Board to advise that she was "...feeling overwhelmed and frightened to go to work at the end of town." The grievor's family physician advised the Board that her anxiety had increased and that it would be important to change the location of her work to accommodate her wishes.

The Board declined to offer a new location of work. It met with the grievor and the Federation to discuss the position. At this meeting, the grievor agreed to attend work on September 28, 2007.

On her first day of work, the grievor called the Federation and advised that she was in the parking lot of the school and too scared to go inside. After discussions with representatives at the School Board, the grievor entered the building, but left shortly afterwards and did not return.

The grievor was paid until October 8, 2005. When she did not produce any further medical information, she was not returned to work. The Federation filed a grievance seeking full compensation from October 8, 2005 until an incident when the grievor broke her arm in an unrelated incident.

Analysis

The School Board took the position that it had provided accommodation in accordance with the psychiatrist's restrictions and that, since its offer of employment was approved by the WSIB, it was suitable. The note from the family physician did not provide any rationale for why the position that had been created was no longer appropriate. Furthermore, the offer of accommodation had been originally accepted by both the grievor and the Federation.

The Federation submitted that the School Board failed to accommodate the grievor's psychological disability because it did not provide her with an environment in which she felt comfortable. The Federation argued that, if further information was needed to support the recommendation of the family physician, then the onus was on the School Board to make this request.

The Arbitration Board, chaired by L. Trachuk, found that the newly created position at a different school met the restrictions identified by the grievor's psychologist. The School Board took extraordinary precautions to attempt a successful return-to-work including providing special equipment, considering the leadership of the Chief Custodian, a new location and working with female staff. In the view of the majority of the Arbitration Board, the School Board satisfied its duty to accommodate.

The Arbitration Board also rejected the argument that the School Board had an obligation to provide a different accommodation based on the grievor's preferences. On this point, Arbitrator Trachuk wrote:

Given what was required to accommodate her, the Board cannot be expected to keep assigning her to schools whether or not they needed her until she found one where she felt comfortable. At least, the Board could not be expected to do so without any medical support that another location is either necessary or, if her anxiety disorder is that severe, that it would likely work.

In conclusion, the grievance was dismissed.

Implications for Employers

An employer's duty to accommodate is satisfied once it has made an offer of accommodation that provides meaningful work and is suitable to the functional abilities of the employee. The Arbitration Board explained how the onus shifts to the employee to justify why the proposed accommodation is not acceptable:

When an employer offers reasonable accommodation, as the Board did in this case, it discharges its obligation to accommodate an employee. An employee then has an obligation to accept the accommodation or provide a bona fide reason why she cannot. (See Central Okanagan District School Board (supra)). If an employee refuses reasonable accommodation, her complaint or her grievance will be dismissed.

Implications for Unions

Generally, arbitrators expect employees to tolerate some hardship in the accommodation process. It has often been said that an employee is not entitled to the most preferred solution. The Arbitration Board explained its expectation in this case:

It would not be reasonable for the Board to abandon all of its plans to create the accommodation position at the [the new school] just because an employee has expressed some anxiety and the desire for a location closer to home. An employee with a disability may have to work with a certain amount of discomfort if the work provided is within her restrictions whether or not her disability is mental or physical. The Board provided a position which met [the grievor's] restrictions and could therefore expect her to attend at work.

If an employee refuses a proposed accommodation, unions should consider whether there is any evidence to support the employee's decision. This may include a medical opinion or a lack of clarity on the proposed accommodation. The onus will be on the Union to justify how and why the accommodation was deficient.

Driver's license requirement discriminatory

An Ontario labour arbitrator ruled that legislation requiring a paramedic to hold a driver's license was discriminatory. According to the Arbitrator, it would not cause undue hardship to allow him to work as an "attend only" paramedic without driving privileges.

Legal Citation

County of Simcoe Ambulance Service and O.P.S.E.U., Loc. 911 (Rogers) (2007), 162 L.A.C. (4th) 289 (Gorsky); Ontario Labour Arbitration, July 9, 2007.

Facts

The grievor worked for the County of Simcoe Ambulance Service as an ambulance paramedic. The ambulance service was provided through a mixture of employed paramedics and volunteers.

In 2002, the grievor was diagnosed with Choroidal Melanoma, a condition that adversely affected his vision.

Surgery in 2002 helped relieve some issues, but he was left with 20/200 vision in his left eye. Under the Ontario *Highway Traffic Act*, he could no longer hold an “F” classification on his driver’s license, which was necessary to drive an ambulance. The grievor asked his employer if he could continue working as a paramedic without any driving privileges. The County denied his request, citing the Ontario *Ambulance Act*.

The Ontario *Ambulance Act* requires all paramedics who are employed to hold and maintain a driver’s licence to operate an ambulance. There is no exception to this rule, as it applies to all paramedics that are in an employment relationship. Volunteers, on the other hand, are permitted under the *Act* to work without a driver’s license and can perform their duties in an “attend only” capacity. This means that they are permitted to ride along in the ambulance, without driving duties, and perform their functions as an attendant. This same option is not provided to paramedics who are employed.

The grievor asked the Ministry of Health and Long Term Care for accommodation of his visual impairment so that he could continue as a paramedic without driving privileges. His request was denied. The County was prepared to waive the driver’s license requirement for the grievor and allow him to work as an “attend only” paramedic, but was precluded from doing so under the *Act*.

Since there was no other forum to pursue its case, the union filed a grievance against the County alleging a failure to provide accommodation as required by the *Human Rights Code*. The Ontario Government intervened in the case in order to defend its position on the driver’s license requirements.

Analysis

The Union argued that the *Ambulance Act* discriminated against the grievor based on a physical disability because it prevented him from being employed as a paramedic. There was no provision for accommodation under the *Act* and this was contrary to the requirement for accommodation under the *Human Rights Code*. The supremacy of the *Code* meant that specific provisions of the *Ambulance Act* should be struck down.

The Crown argued that the *Ambulance Act* only required a driver’s license – it did not preclude him from being employed or accessing a service. Thus, it was not discriminatory.

The County was always prepared to provide relief to the grievor, but felt that it was not permitted by the terms of the *Ambulance Act*. It was not prepared to risk losing its license for failing to comply with the *Act*.

Arbitrator Morley Gorksy extensively reviewed the caselaw on discrimination and accommodation and began his analysis on the appropriate comparator group. He determined that employed paramedics and volunteer paramedics essentially performed the same duties but were

treated differently under the *Ambulance Act*. In this case, the different treatment had an adverse impact on the grievor because of his disability since he was required to hold a driver's license. If he were a volunteer paramedic, there would be no issue.

According to Gorsky, this constituted *prima facie* discrimination and triggered the accommodation analysis. He explained that it was not discriminatory to refuse the grievor a driver's license or allow him to take the test. In his words:

Rather, the discrimination lies in the absence of the possibility of accommodation...that would "permit him to attempt to demonstrate that his situation could be accommodated [as an 'attend only' paramedic] without jeopardizing" the goal of reasonable safety to patients and others impact by the operation of ambulances.

The more complex issue for Arbitrator Gorsky was to determine whether the legislative standards as they were applied to the grievor could be justified under the three-part test articulated by the Supreme Court of Canada in the *Meiorin* decision.

Arbitrator Gorsky had no difficulty concluding that the standards were adopted for a purpose rationally connected to the performance of the job. The safety of the patients and the public were related to the staffing of ambulances.

He went on to conclude that the standards were also adopted in good faith since they were clearly designed to maintain a level of health and safety.

Finally, in terms of whether it was reasonably possible to accommodate the grievor without causing undue hardship, Gorsky stated that he could not ignore the evidence that volunteer paramedics had served in an attend-only capacity for approximately 18 years. There was no actual evidence of health and safety concerns regarding these volunteer paramedics. Gorsky rejected the argument that it would cause undue hardship to provide accommodation since the health and safety concerns were speculative. He stated:

...considerable weight must be given to the absence of evidence that the functioning of attend only volunteer paramedics has led to any actual detrimental health and safety effects.

Since volunteer paramedics could do the job as an attend-only paramedic, there was no reason why employed paramedics could not act in this capacity.

The Arbitrator ordered the County to accommodate the grievor in an attend-only capacity, and ruled that the specific portion of the *Ambulance Act* that was in question was invalid for this particular dispute. His order did not go any further on the overall application of the legislation for other ambulance services. Compensation for lost wages was also ordered.

Implications for Employers

This case has significant implications for ambulance services across the province, since Gorsky's reasoning is likely to be upheld in other cases. For other employers, this case is instructive on how to handle similar issues. Generally, human rights legislation will prevail when there is a conflict with other provincial or federal legislation. Employers can be placed in the middle by trying to comply with competing legislative and accommodation requirements. Resolving the conflict through the arbitration process can often be the best solution since it alleviates any non-compliance issues for the employer. The Arbitrator's award and remedial order is a legally binding decision which can relieve the employer of statutory obligations. It may be the safest way to resolve a dispute with the union.

Implications for Unions

This case raises other interesting issues aside from the statutory conflict between two pieces of legislation. It also touches upon the issue of a *bona fide* occupational requirement of a driver's license. Unions are occasionally faced with an employer decision to terminate (or place on suspension) an employee who has lost his/her license. If the employee's conduct is related or caused by her disability, unions should be demanding accommodation in a non-driving capacity. This may be a different position or classification, but still within the bargaining unit. In other words, a loss of a driver's license does not automatically result in dismissal. As illustrated in this case, unions can demand and reasonably expect demonstrable evidence with regards to undue hardship factors before a loss of driver's license is considered a reason for termination. Arbitrator Gorsky's ruling should be helpful for the type of evidence that is required.

8. Medical Information

Employer access to medical information regarding an employee's disability is a commonly litigated issue in disability accommodation cases. When an employer requests an employee's medical information, it is invariably for one of four accepted reasons: (i) to verify the existence of a disability; (ii) to understand an employee's capabilities and limitations in order to devise a suitable accommodation; (iii) to be assured that an employee can return to work without posing a safety risk to himself, herself or others; or (iv) to determine whether an employee's disability still requires him or her to remain away from active employment. The prevailing test employed by arbitrators and tribunals is to protect the employee's right to keep personal medical information confidential, and to permit access by the employer only when it can demonstrate that the information is reasonably necessary to fulfill one of these four legitimate workplace objectives.

The legal emphasis is on privacy,^[105] and the employer's requirement for medical information must be narrowly tailored to the specific need to accomplish the accommodation and/or the return to work.^[106]

Arbitrators and tribunals have protected employee privacy in a variety of accommodation circumstances. They have ruled that confidential medical information can only be made available to an employer and a union when the employee has either consented to such disclosure, or by an order of a legal decision-maker.^[107] Requests that are too invasive, or that go beyond a need-to-know basis, will be denied.^[108] In particular, employers do not have a free standing right to an employee's confidential medical information, or to have uncontrolled direct contact with the employee's physician.^[109] Psychiatric examinations of employees are deemed to be especially intrusive, and are only available to employers when the workplace necessity has been firmly established.^[110] Employer requests for medical information should be done in private in order to avoid employee humiliation,^[111] and health care workers have been scolded when they disclosed an employee's immunization status to an employer without the employee's consent.^[112]

Employers also have obligations regarding their investigation of medical information on a disability. They are required to ask a sufficient range of questions on the nature of an employee's disability and the expected length of time for recovery to put them in a position to accommodate.^[113] As well, employers must clearly and directly state their specific request for medical information to an employee;^[114] a passive expectation by the employer that the

^[105] *Hobart Brothers of Canada and ITW Canada Co. v. Glass, Molders, Pottery, Plastics and Allied Workers International Union Loc. 446 (Return to Work)*, [2006] O.L.A.A. No. 149 (Levinson); *St. James-Assiniboia School Division No. 2 and St. James-Assiniboia Teachers' Assn. No. 2 (Re)* (2004), 131 L.A.C. (4th) 313 (Peltz).

^[106] *Ontario (Ministry of Children and Youth Services) and O.P.S.E.U. (Hyland) (Re)* (2006), 150 L.A.C. (4th) 149 (Petryshen); *O.N.A. v. St. Joseph's Health Centre* (2005), 76 O.R. (3d) 22 (Div. Ct.).

^[107] *Sunnybrook Health Sciences Centre v. O.N.A. (Devine)*, [2006] O.L.A.A. No. 600 (Davie). Older caselaw which suggested that the employee's physician had the responsibility to decide whether to answer the employer's inquiries appears to have been eclipsed: *Bowater Mersey Paper Co. and C.E.P., Loc. 141 (Leslie) (Re)* (1998), 76 L.A.C. (4th) 411 (Outhouse).

^[108] *Ontario (Ministry of Children and Youth Services)*.

^[109] *Hobart Brothers of Canada*.

^[110] *St. Joseph's Health Centre*.

^[111] *Wiens v. West Telemarketing Canada*, 2006 BCHRT 432.

^[112] *North Bay General Hospital v. O.P.S.E.U. (Anger)*, [2006] O.L.A.A. No. 533 (Randall).

^[113] *McLellan v. MacTara Ltd.*, [2004] N.S.H.R.B.I.D. No. 6.

^[114] *Alberta (Human Rights and Citizenship Commission) v. Federated Co-operatives Ltd.* (2005), 383 A.R. 341 (Q.B.); *Davis v. 1041433 Ontario Ltd. (c.o.b. Trust Flooring Group)*, 2005 HRTO 37.

employee should provide this information is insufficient.^[115] Additionally, while the reliance by employers on an external institutional conclusion (such as by a workers' compensation board) that an employee is fit to return to work may be generally acceptable, the failure to evaluate contrary medical information provided by the employee can be fatal to an employer's case.^[116]

However, once an employer has demonstrated that its request for medical information is reasonable necessary, the onus shifts to the employee to either provide the information or to challenge the basis for the request. In these circumstances, a failure by the employee to furnish the reasonably necessary medical documents will usually end the employer's accommodation duty.^[117] Arbitrators have recognized that the provision of medical information necessary to establish one legitimate disclosure purpose (i.e., the existence of a disability) may not be sufficient for another purpose (i.e., the crafting of a suitable accommodation, or addressing safety concerns).^[118] If the employer can demonstrate legitimate concerns about the quality, applicability or thoroughness of the medical diagnosis provided by the employee, it may demand further and better documentation.^[119] In the course of acquiring appropriate medical information, employers are entitled to expect that employees will co-operate in the process when the request is reasonable,^[120] and that they will accurately and truthfully report their medical symptoms to their physicians.^[121] And while employers are required to handle employees' medical information with the strictest of sensitivity and confidentiality, they do not need to utilize a physician or a health official to receive the information on its behalf.^[122]

^[115] *Ottawa (City) v. Civic Institute of Professional Personnel (Lasalle)*, [2006] O.L.A.A. No. 226 (Weatherill).

^[116] *Gentak Building Products Ltd. and U.S.W.A., Loc. 1105 (Batko) (Re)* (2003), 119 L.A.C. (4th) 193 (Surdykowski).

^[117] *Christie v. Canada (Attorney General)*, 2004 FC 1383; *Kelfor Industries Ltd. v. I.W.A., Loc. I-3567 (Anderson)*, [2003] B.C.C.A.A.A. No. 214 (Hope); *Grant v. Newfoundland (Human Rights Commission)* (2003), 227 D.L.R. (4th) 508 (Nfld. & Lab. C.A.); *L.B. (Committee of) v. Newfoundland (Human Rights Commission)* (2002), 214 Nfld. & P.E.I.R. 183 (Nfld. & Lab. C.A.); *Hudson Bay Mining and Smelting Co. (Zochem Division) and C.E.P., Loc. 819 (Folo) (Re)* (2001), 93 L.A.C. (4th) 289 (Springate); *Brimacombe v. Northland Road Services Ltd.* (1998), 33 C.H.R.R. D/53 (B.C.C.H.R.).

^[118] *Capital Health Authority (Royal Alexandra) v. U.N.A., Loc. 33 (Schram)*, [2006] A.G.A.A. No. 60 (Ponak); *Code Electric Products Ltd. v. I.B.E.W., Loc. 258 (Kinder)*, [2005] B.C.C.A.A.A. No. 14 (Burke).

^[119] *Kautex Corp. and C.A.W., Local 195* (9 April, 1996, unreported) (Brent).

^[120] *Babcock & Wilcox v. U.S.W.A. (Handorf)*, [2007] O.L.A.A. No. 152 (Kaplan); *Christie, supra* note 234.

^[121] *Petro-Canada and C.E.P., Loc. 593 (Bulleid) (Re)* (2006), 146 L.A.C. (4th) 275 (Starkman).

^[122] *St. James-Assiniboia School Division No. 2.*

Lack of medical information leads to dismissal

An Ontario arbitrator upheld the discharge of an employee who refused to confirm that he was participating in a prescribed treatment program. According to the arbitrator, the grievor failed to cooperate in the accommodation process.

Legal Citation

Babcock & Wilcox v. United Steelworkers of America (Handorf Grievance), [2007] O.L.A.A. No. 152 (Kaplan); Ontario Labour Arbitration, April 3, 2007.

Facts

The grievor had worked for Babcock & Wilcox since 1994. In 2003, he alleged that he was being harassed by his supervisor and other employees. The allegations became the subject of a seven-day mediation/investigation by an impartial mediator, Mr. Frank Reilly. Ultimately, the parties sought a binding decision from Reilly.

After a two-day hearing, Reilly concluded that there had been no violation of the collective agreement or the Ontario *Human Rights Code*. He denied the grievor's claim that he had been harassed and stated:

"...perceptions have emerged that are at best described as illusionary and not violations of the Human Rights Code... What causes [the grievor] to believe he has been treated contrary to the Code is I find an unhealthy obsession driven by an admitted medical ailment that requires a more professional diagnosis, care and treatment."

Reilly went on to suggest that the employer should direct the grievor to attend an independent health professional qualified in psychiatry if the grievor's behaviour did not change.

When Reilly's decision was issued, the grievor was off work due to an unrelated illness. Notwithstanding his absence from work, the employer sent the grievor a letter directing him to attend a psychiatrist and follow any prescribed treatment.

While the Union agreed that the grievor had a medical condition, it objected to the employer's direction. To resolve the issues, the parties agreed to mediation on December 19, 2003. The grievor did not attend. At the mediation, the parties entered into an agreement that had three main components:

- i) the grievor was required to show initiative by obtaining a referral to a psychiatrist from his family doctor;
- ii) the grievor was required to make and attend an appointment with the psychiatrist;
- iii) the grievor was to follow the directions of the psychiatrist.

The grievor was evaluated by a psychiatrist and was encouraged to seek regular counseling. In June 2004, he was told that he could not return to work for 6 to 8 weeks.

Despite the timeframe, the grievor did not return to work and in February 2005, the employer sought confirmation that the grievor was still receiving treatment. The grievor was advised that if he did not respond or provided suitable confirmation from his psychiatrist, he would be terminated. No information was provided.

The grievor was terminated on March 22, 2005. During subsequent grievance meetings, the employer offered to reinstate the grievor if suitable medical information was provided that confirmed the grievor's continued treatment. The grievor provided a medical note from his psychiatrist stating that he had been totally disabled from November 2003 to January 31, 2006 and was now fit to return to work. It made no reference to his treatment.

The termination grievance proceeded to arbitration.

Analysis

The employer argued that the grievor was required to comply with the treatment prescribed by his psychiatrist as a result of the mediated settlement between the parties. It also argued that the grievor had an obligation to cooperate in the accommodation process and had failed to participate in the process set out by the parties. Furthermore, it was unreasonable to allege a violation of the *Code* after the extensive efforts by the employer to secure the treatment for the grievor's full recovery.

The union took the position that the mediated settlement and the requirement to attend to a psychiatrist violated the *Code*. It also argued that the medical note provided in January was sufficient information for the employer to return the grievor to work. Anything further went beyond the employer's entitlement to medical information.

Arbitrator William Kaplan found that the mediated settlement between the parties was both lawful and binding on the parties. He held that settlements in labour relations, absent extraordinary circumstances, must be given effect.

The arbitrator noted that this was not a case where the grievor communicated to the employer that he disagreed with the treatment. Rather, the grievor had chosen not to follow the treatment.

In the arbitrator's view, the employer was seeking to accommodate the grievor and was entitled to know that the grievor was following the prescribed course of treatment. The medical note provided by the grievor in January 2004 was cursory and did not satisfy the grievor's legal obligation to cooperate in the process. According to Kaplan, the grievor did not take his accommodation obligations seriously.

In conclusion, the discharge was upheld.

Implications for Employers

In some circumstances, employers are entitled to confirmation that an employee is receiving appropriate treatment. This often includes addiction-related illnesses or illnesses of a psychiatric nature. There is no need for employers to know what treatment has been prescribed since they usually has no expertise in the subject matter. When seeking information about treatment, employers should only request confirmation that the employee is participating in the prescribed treatment on a continual basis. Such updates can be requested by employers on a regular basis where there are reasonable grounds.

Implications for Unions

Human rights law clearly states that employees who are seeking an accommodation must reasonably co-operate with the employer and the union to search for a suitable accommodation. An employee who otherwise may have a medically required accommodation can nevertheless lose his or her claim because of a lack of co-operation.

In this case, the union entered into a settlement with the participation of the grievor. While not always a best practice, it is necessary in some circumstances. As stated by Arbitrator Kaplan, these agreements are legally binding and enforceable at arbitration. In circumstances where the grievor is absent or uncooperative, unions may be faced with a difficult decision to enter into an agreement with the employer that still protects the interests and rights of the grievor.

Employer request for medical information too invasive

An arbitrator with the Ontario Crown Employees Grievance Settlement Board denied a request for detailed medical information because it did not pertain to the specific issues in dispute. The Arbitrator preferred the Union's solution of providing a medical report that answered specific questions from the Employer.

Legal Citation

Ontario (Ministry of Children and Youth Services) and O.P.S.E.U. (Hyland) (Re) (2006), 150 L.A.C. (4th) 149 (Petryshen); Ontario Crown Employees Grievance Settlement Board, April 20, 2006.

Facts

The grievor worked as a Youth Service Officer at the Brookside Youth Centre. He began working at the Brookside Facility after a previous ruling of the Ontario Crown Employees Grievance Settlement Board concluded that the provincial government failed to accommodate the grievor's sensitivity to cigarette smoke (See *Ontario (Ministry of Correctional Services) and O.P.S.E.U. (Hyland) (Re)* 115 L.A.C. (4th) 289 (Petryshen).

The grievor suffers from asthma and is particularly sensitive to cigarette smoke. While working at the Brookside Facility, the grievor filed two grievances against the Ministry of Children and Youth Services. The first grievance alleged that the smoking policy did not provide adequate protection for his disability. The second grievance alleged that the smoking policy was not being enforced and that this was having a negative impact on his disability, including causing him stress.

Prior to filing the grievances, the grievor had been absent from work as a result of the cigarette smoke in the workplace. He was also absent due to the stress caused by the regular exposure to cigarette smoke and management's failure to enforce the policy.

On the first day of arbitration, the Ministry sought detailed medical information from the grievor. Specifically, it sought an order to produce a decoded OHIP summary covering the

period from June 1, 2004 to the present. The Ministry also requested the clinical notes and records of any medical practitioner, specialist and therapist that Mr. Hyland had seen for the same period.

The request for medical information was resisted by the union and the issue was presented before Arbitrator Petryshen.

Analysis

The Ministry argued that the request for medical information was reasonable since the grievor's health condition was a critical feature of the dispute. It took the position that the medical information is arguably relevant for the time period since it pertained to the specific issue of accommodation.

The Union agreed that the grievor's health was an issue in the case, but it argued that the Ministry's request was overly broad. It was the Union's position that the grievor suffered from other medical conditions which were unrelated to the issue in dispute. If the Ministry's request was granted, it would capture information about the grievor's other medical conditions.

The Union was prepared to ask the grievor's physician for a medical report which detailed the grievor's treatment for asthma, for exposures to cigarette smoke, for exposures to cats and dogs and any treatment relating to stress.

The Arbitrator reviewed the caselaw and identified the appropriate legal test as being a balance between the grievor's interests in not disclosing personal medical information with the employer's interest in obtaining arguably relevant medical information that was necessary to defend the grievances.

The Arbitrator found that the primary issue in dispute was the grievor's allegations that he was exposed to cigarette smoke in the workplace and that this caused adverse reactions as a result of his disability. According to the Arbitrator, the grievor was not making a claim which placed his entire medical history in issue. Therefore, the Ministry's request for medical information was too invasive and could not be justified.

The Arbitrator preferred the Union's offer of providing a medical report that answered specific questions about the grievor's asthmatic condition, his absences from work and any stress related problems that he has reported and the cause of such problems.

The Ministry's request was denied.

Implications for Employers

Employers do not have to wait for the arbitration hearing to request medical information from a grievor. Such requests can be made during the grievance process. However, employers are only entitled to such medical information that is directly relevant to the particular issue in dispute: i.e. – only a “need-to-know” basis.

When requesting medical information, employers have an obligation to maintain confidentiality of the information, including after the grievance is finally concluded. Employers should have properly trained individuals who can act as a custodian of the medical information in the workplace.

Implications for Unions

Requests for medical information should be reviewed by senior union stewards who have experience in accommodation cases. It is important that employees are not pressured into providing more medical information than necessary. Occasionally, requests for medical information come from joint union-management accommodation committees. These types of requests should be restricted to the medical restrictions placed on the grievor and not pertain to the specific medical condition of the grievor.

Standard medical form too broad

An Ontario arbitrator ruled that a hospital's standard medical form requested too much information, including "current treatment" and "nature of illness". While the request for medical information can increase with the complexity of the accommodation case, the collective agreement language usually dictates the employer's entitlement, according to the arbitrator.

Legal Citation

Brant Community Healthcare System v. Ontario Nurses' Assn. (Medical Form Grievance), [2008] O.L.A.A. No. 116 (Harris); Ontario Labour Arbitration, February 21, 2008.

Facts

The Brant Community Hospital developed a standard form to be used when any nurse in its bargaining claimed sick leave benefits in excess of three days. While the hospital participated in the provincial collective bargaining process, the monitoring and accountability of the Short Term Disability Plan ("STD") was a responsibility of the hospital. The STD Plan, which was incorporated into the collective agreement, stated:

Proof of your total disability satisfactory to your employer such as a doctor's certificate is required

The first draft of the standard form, prepared by the Hospital, required the nurse's physician to provide a "Primary Diagnosis" and "Secondary Diagnosis", if available. It also asked the physician for a description of the "Current Treatment". After the Ontario Nurses' Association (ONA) challenged the form through the grievance process, the hospital modified the form to request the "Nature of Illness/Injury". However, the request for the "Current Treatment" remained on the standard form.

The Association filed a policy grievance alleging that the form violated the privacy rights of its members. The grievance proceeded to a hearing before Arbitrator Daniel Harris.

Analysis

It was ONA's position that the request for information was too invasive and unnecessarily required the disclosure of a diagnosis for sick leave absences. It acknowledged that there may be occasions where such information was relevant, but argued that it must be dealt with on an individual basis. There was no basis, argued the Association, for demanding this information every time a nurse was absent for more than three days.

The Hospital justified its request by pointing to similar information requests for the Long Term Disability Benefits or the requirements of the Workplace Safety Insurance Board. It argued that it was trying to verify that the claim was for sick leave, and also to identify any communicable diseases. By requesting the nature of the illness, the Hospital was able to use its medical information to determine an approximate duration of sick leave and also to determine whether it was a recurrence of a previous claim. It also took the position that, as the need for accommodation increased, there was a greater right to more detailed information.

Arbitrator Daniel Harris agreed with the Hospital's argument that the level of required medical information increased with the complexity of accommodation. He stated:

...there is a continuum along which an employee's obligation to provide detailed medical information increases with the length of absence and/or complexity of accommodation required upon return to work.

However, the standard form was used at the beginning of the process when the nurse was absent for more than three days. At this stage, there was no need for the hospital to know the nature of the illness or the type of treatment.

Arbitrator Harris also reviewed the caselaw and found that arbitrators generally looked to the collective agreement language to determine whether the parties had contemplated exchanging more detailed information. He disagreed, however, with the jurisprudence that examined whether the employer's right to medical information had been curtailed by the collective agreement. Rather, he stated that the employer had no inherent right to medical information, such a right could only be conferred during the collective bargaining process. He explained:

The employer has no right to medical information unless the collective agreement grants a right and the employee consents to the release of the information. The language of the collective agreement defines the amount of information required for granting entitlement to benefits. The employee must still consent to the release of the information if s/he wants to receive the bargained for benefits. The question is better put as what right to medical information does the language of the collective agreement grant to the employer.

Arbitrator Harris determined that the parties' collective agreement language did not provide a right to the medical information being request. He ruled that requesting the "Nature of Illness/Injury" was a reasonable request, but ordered the employer to include the following sentence:

Nature of Illness or Injury is a general statement of a person's illness or injury in plain language without any technical medical details, including diagnosis or symptoms.

However, the request for details about “Current Treatment” was not justified or warranted under the collective agreement. It was not necessary, according to the Arbitrator, for the Hospital to know the type of treatment being received in order to verify the entitlement to sick leave benefits.

In conclusion, the grievance was partially upheld.

Implications for Employers

In this case, the collective agreement stipulated that the proof of the disability had to be “satisfactory to the employer”. This language was not sufficient to warrant a request for a diagnosis or confirmation of the current treatment for the employee’s condition. If the employer is seeking this information when faced with a request for paid sick leave, it should attempt to negotiate an appropriate collective agreement provision. Such a provision could be very helpful to employers when attempting to provide accommodation for an employee. It may also be advantageous for an employer to negotiate collective agreement language allowing a request for the duration of the illness, a confirmation that the treatment is being followed, and whether a second opinion has been sought. A broad collective agreement provision on the disclosure of the medical information will usually help the employer make appropriate accommodation choices.

Implications for Unions

This decision could be helpful for unions since Arbitrator Harris seems to have accepted that a right to privacy exists in Ontario. While he cited from cases decided in British Columbia, which has privacy legislation, he expected the employer in this case to justify its infringement on an employee’s privacy rights. Unions can also rely on this case for the principle that employers do not have a right to medical information unless provided for in the collective agreement.

9. Accommodation – Religious Beliefs and Family Status

“Family status” revisited

The Federal Court of Justice reviewed the law on “family status” and rejected the “substantial interference” test. It determined that an adverse impact on an individual was sufficient to establish a prima facie case of discrimination based on family status.

Legal Citation

Johnstone v. Canada (Attorney General), [2007] F.C.J. No. 43 (Fed. Ct. Jus.); Federal Court of Justice, January 16, 2007.

Facts

The Applicant worked as a Customers Inspector with the Canada Board Services Agency (CBSA) since 1998. Her husband also worked with the CBSA, as a Customs Superintendent. Both individuals worked 37.5 hours per week on a rotating shift covering a 24-hour period.

In 2004, the Applicant returned to work from a maternity leave. The rotating shift for the Applicant and her husband made it very difficult to find appropriate childcare. The CBSA had a policy on accommodating employees who could not work the rotating shifts. For employees requiring accommodation for non-medical reasons, the CBSA’s policy offered employees fixed shifts of up to 4 days per week to a maximum of 34 hours per week. Employees requiring accommodation for medical purposes were treated differently and could be placed on a fixed shift with full-time hours.

Ultimately, the Applicant accepted a 3-shift schedule for a total of 30 hours per week. She also filed a human rights complaint against the CBSA alleging discrimination based on family status.

The Canadian Human Rights Commission appointed an investigator to review the circumstances of the complaint. Despite the investigator’s recommendation that the complaint proceed to a full hearing, the Commission decided not to proceed to a hearing.

The Applicant sought judicial review of the Commission’s decision.

Analysis

The Federal Court of Canada determined that the appropriate standard of review was “correctness”. This meant that the Commission’s decision needed to be legally correct in order to be upheld.

The Commission had decided not to proceed to a hearing because it was satisfied that the CBSA accommodated the Applicant’s request for a static shift schedule. In addition to accepting the reduced hours, the Applicant never requested full-time hours as part of the accommodation.

Finally, the Commission concluded that the CBSA's policy did not constitute a serious interference with the Applicant's duty as a parent.

The Federal Court had significant difficulty with the Commission's reasoning. The Court held that the policy of placing employees who required accommodation for non-medical reasons on a fixed shift with less than full-time hours may have been *prima facie* discriminatory. It explained that the Commission should have provided closer examination on the different treatment between medical and non-medical accommodation needs.

Furthermore, and perhaps most importantly, the Court rejected the definition of discrimination based on family status that was applied by the Commission. The Commission had applied the "serious interference" test from *H.S.A.B.C. v. Campbell River & North Island Transition Society*, [2004] B.C.J. 922, where it was stated:

In the usual case where there is no bad faith on the part of the employer and no governing provision in the applicable collective agreement or employment contract, it seems to me that a *prima facie* case of discrimination is made out *when a change in a term or condition of employment imposed by an employer results in a serious interference with a substantial parental or other family duty or obligation of the employee.*

[Emphasis added]

The Federal Court of Canada rejected this test and explained that there was "...no obvious justification for relegating this type of discrimination to a secondary or less compelling status." The Court also rejected the notion that such discrimination could only occur when the employer changed or implemented a policy. According to the Court, such discrimination could arise when there was a change in the status or circumstances of an employee, such as child-birth.

The Court agreed with the Applicant's Memorandum of Fact and Law:

To that end, pursuant to the [Canadian Human Rights] Act, any and all discrimination is contrary to the Act. There is no discretion, and no degree or level of discrimination which must be suffered by a complainant to obtain the protection of the [Act]. Thus, the fact that the Applicant was adversely affected by the Respondent's policy is sufficient to establish a prima facie case of discrimination, and, by applying a higher standard to the ground of family status in its decision, the Commission erred in law.

In conclusion, the matter was remitted back to the Commission to be considered by a new decision-maker.

Implications for Employers

Employer accommodation policies should not distinguish between medical and non-medical needs for accommodation. Human rights legislation generally treats all prohibited grounds equally. Thus, "religion" or "creed" is treated in the same manner as "disability" or "gender

(pregnancy)”. Accommodation policies should not distinguish between the prohibited grounds and each request or need for accommodation must be treated equally.

Implications for Unions

The Court’s reasoning is certainly an expansion of previous decisions on the issue of “family status”. While the nature of this decision is a judicial review and therefore not binding on other parties, the reasoning of the Federal Court may be influential on arbitrators and human rights tribunals in various jurisdictions. In British Columbia, the law remains to be the “substantial interference” test, but this could change. See *Stuart v. Navigata Communications Ltd.* [2007] B.C.J. No. 662 where the B.C. Supreme Court examined this case and stated:

However, the decision in Campbell River is the law that applies in British Columbia. I must follow the definition of "family status" used by the Court of Appeal in that case.

Johnstone is unlikely to be the last word on this issue. “Family status” cases have been a latecomer to the application of the 1999 *Meiorin* test created by the Supreme Court of Canada, and the two current schools of thought (*Campbell River* and *Johnstone*) will likely contend among human rights tribunals, labour arbitrators and the courts for the foreseeable future.

Biometric scanning system discriminates against ‘creed’

An Ontario arbitrator reinstated three grievors after they were discharged for refusing to use a biometric scanning system due to their religious beliefs. Ruling that the Company could have gone further in accommodating the grievors, the Arbitrator held that there was no requirement for the grievors’ religious beliefs to be mandatory precepts of the church in order to trigger the duty to accommodate.

Legal Citation

407 ETR Concession Co. v. National Automobile, Aerospace, Transportation and General Workers Union of Canada, CAW-Canada, Local 414 (Black Grievance), [2007] O.L.A.A. No. 34 (Albertyn); Ontario Labour Arbitration, January 29, 2007.

Facts

The three grievors involved in this case all worked for the 407 ETR Concession Co. (“The Company”) as Customer Service Representatives (“CSRs”). The Company operates the 407 highway network in Ontario. It has one office location where 560 employees work of which 220 are bargaining unit members. The grievors are among 150 other CSRs who work at the front entrance of the building and at the call centre.

As a result of security concerns, the Company acquired 10 biometric scanning units and nine boxes, which store the scanned information. It planned to have a total of 25 scanners at the entrances and exits of the building, as well as at specific access points throughout the building, in order to control access. Initially, the Company introduced a pilot program with the front-counter CSRs where the grievors worked. The grievors immediately raised concerns about the scanners as they felt it infringed upon their religious beliefs.

The biometric scanner takes an image of an individual’s hand from two different angles and produces a three-dimensional picture. The scanner takes 91 measurements of the hand’s length, width, thickness and surface area and is converted to a 9-digit number. The number is stored in the enrolment database and is used to identify employees each time they enter a secured doorway along with a password.

The grievors objected to the biometric scanning system due to religious reasons citing passages from the Book of Revelation of St. John the Divine of the New Testament of the Bible. The text urges believers not to take the “Mark of the Beast” on their foreheads or on their right hands. The grievors were members of the Pentecostal church and objected to using measurements of portions of their bodies for the purpose of identification where (a) it is associated with a number; (b) the number becomes part of a system of numbers; (c) the number and system of numbers is used to create unique identifiers for the people enrolled; and (d) the system is used or implicated in their ability to “buy and sell” i.e. earn a living. While each grievor had separate interpretations of the Scripture in the Book of Revelation, it was generally acknowledged that the religious precepts were not mandated by the Church. Rather, it was a subjective interpretation and belief held individually by the grievors based on their reading of the Scripture.

As a result of the grievors’ refusal to use the biometric scanning system, the Company disciplined the grievors, beginning with a series of warnings and leading ultimately to a termination of the employment relationship. The Union filed a grievance alleging discrimination based on creed.

Analysis

The Union took the position that the biometric scanning system did not take into consideration the grievor's creed. It argued that the Company had failed to properly accommodate the grievors or consider any of the alternatives to the scanning system that were available. Specifically, the Union argued that the Company could have provided the grievors with swipe cards and a password which would have avoided using the scanning system.

The Company's position was that it could not make an exception for the grievors without undermining the very reason for the biometric scanning system. It argued that, if it made an exception for the three grievors, it would likely lead to further exceptions since it was aware of 25 other employees who objected to the new system. Finally, it argued that it had offered to allow the employees to use their left hand, rather than their right hand, which would have alleviated some of the concerns identified in the Scripture.

Arbitrator Albertyn extensively reviewed the Supreme Court of Canada's decision in *Syndicat Northcrest v. Amselem*, [2004] 2 S.C.R. 551 (SCC), where it was determined that in order to attract the protection of human rights legislation, the grievors must establish that their religious beliefs were sincerely held. The majority of the Supreme Court gave a broad definition to religion:

Defined broadly, religion typically involves a particular and comprehensive system of faith and worship. Religion also tends to involve the belief in a divine, superhuman or controlling power. In essence, religion is about freely and deeply held personal convictions or beliefs connected to an individual's spiritual faith and integrally linked to one's self-definition and spiritual fulfilment, the practices of which allow individuals to foster a connection with the divine or with the subject or object of that spiritual faith.

In separate reasons, the minority of the Court in this decision would have applied a narrower definition of "religious beliefs". It stated that the individuals should have the onus of showing that there was a reasonable basis for believing that the religious precept on which they rely on was mandatory.

While Arbitrator Albertyn expressed his preference for the narrower definition as defined by the minority of the Court, he felt compelled to apply the broader test laid out by the majority of the Court. Using this test, he ruled, and the Company conceded, that the grievor's beliefs were religious and were sincerely held. Furthermore, they were protected against discrimination under the Ontario *Human Rights Code* and entitled to be accommodated. Interestingly, Arbitrator Albertyn felt that the Union would not have been able to meet the test of *Syndicat Northcrest v. Amselem* if the minority decision was applied since the religious precepts of the grievors were not mandatory.

The only remaining issue was whether the biometric scanning system was a *bona fide* occupational requirement and to make this determination, Arbitrator Albertyn applied the three-part test from the Supreme Court of Canada in *Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3 ("*Meiorin*").

There was no issue that the scanning system was adopted for a purpose rationally connected to the performance of the job and that it was implemented in good faith. The central issue was whether the Company satisfied its duty to accommodate.

The arbitrator acknowledged that the Company's proposal to have the grievors use their left hand to be scanned, rather than their right hand, was not an insignificant proposal. This alternative had been used in the United States to accommodate members of the Pentecostal Church and satisfied some of the Company's objectors. However, when it was not sufficient to satisfy the grievor's concerns, the Company went no further to explore alternatives. It did not engage in any serious discussion with the Union on how to provide accommodation. It failed to consider whether the grievors could be relocated or whether their work could be performed with less movement in the building. It also did not consider using the swipe cards for the grievors.

Instead, the Company treated the grievors as being insubordinate and applied the progressive discipline model.

Arbitrator Albertyn concluded that the Company's position on the mandatory use of the biometric scanning system was discriminatory based on creed and contrary to the *Code*. The grievors were reinstated without loss of pay.

Implications for Employers

At the conclusion of the decision, the Arbitrator provided guidance to the Company on how to handle similar situations in the future. In essence, a two step process should be followed:

- 1) The Company and the Union should first establish whether the religious objections are founded in sincere religious beliefs.
- 2) If so, the parties should explore with the employees concerned whether they will participate in the biometric scanner system on a modified basis.

According to the Arbitrator, possible accommodation solutions include:

- allowing the employee to use the left hand, or a latex glove over the hand, or something else on the hand (such as a ring) to distinguish their own hand from that enrolled in the system;
- the employee might accept enrolment as long as the 9-digit template does not contain the numbers 666 (if this is technically possible); or
- the employee concerned might accept use of a smart card containing his or her biometric information.

Implications for Unions

It is clear from this case that Arbitrator Albertyn expected the Union to have a role in finding an accommodation solution. Unions should expect and even demand an opportunity to make proposals on possible accommodations that will be suitable for the employee's restrictions. In this case, the Union's arguments on accommodation were clearly influential on Albertyn's undue hardship analysis, since the Company had not attempted any of the Union's proposals. If the Union is able to demonstrate that it was not adequately consulted on the accommodation process

despite having reasonable proposals for the Company to consider, its case will be much stronger at arbitration.

Reasonable offer of religious accommodation

An Ontario arbitrator held that there was no obligation to pay an employee who takes time off for religious observance if other reasonable offers of accommodation have been made. This includes an offer to rearrange the work schedule, use vacation time or work a compressed work week.

Legal Citation

Turning Point Youth Services v. Canadian Union of Public Employees, Local 3501 (Kartash Grievance), [2008] O.L.A.A. No. 83 (Herman); Ontario Labour Arbitration, February 6, 2008.

Facts

The grievor worked as a Child and Youth Worker II for Turning Point Youth Services. She was among six other full-time employees who worked at the 24-hour, 7-day a week group home.

In September 2005, the grievor requested two days off with pay to observe the religious holidays of Rosh Hashanah and Yom Kippur. The employer allowed her to take the time off work without pay. Alternatively, the grievor was offered the option of changing her work schedule so that she did not lose any pay for the week's work. She also could use her vacation time, float days, banked overtime, or utilize a compressed work week so that her weekly pay would remain the same.

All of the options identified by the employer were rejected by the grievor. She insisted that she was entitled to the time off work with full pay since two Christian holidays (Christmas and Good Friday) were provided to employees with pay.

The union filed a grievance alleging discrimination based on creed.

Analysis

The union argued that working a compressed work week or changing the schedule was either too stressful or not practical for the grievor since her schedule had already been posted in the workplace. The options of using vacation time, float days or banked overtime were a greater burden on the grievor than other employees who enjoyed Christmas Day and Good Friday off work with pay. According to the union, the employer had failed to fulfill its duty to accommodate.

The employer argued that it had no obligation to pay an employee for time off work under the *Human Rights Code*. Rather, it had satisfied its accommodation obligations by offering a range of options for the grievor so that she did not experience any financial burden for her religious observance.

Arbitrator Robert Herman extensively reviewed the caselaw on religious accommodation and cited the decision of the Ontario Court of Appeal in *Ontario (Ministry of Community and Social Services) v. OPSEU* (2000), 50 O.R. (3d) 560:

A review of the relevant authorities leads me to conclude that employers can satisfy their duty to accommodate the religious requirements of employees by providing appropriate scheduling changes, without first having to show that a leave of absence with pay would result in undue economic or other hardship.

He then applied the principles of this decision to the case at hand. Arbitrator Herman stated that the grievor was not entitled to refuse any reasonable offer of accommodation. According to the arbitrator, the law does not require an employer to demonstrate that it would cause undue hardship to pay the employee for the days' off work. Rather, in the words of the arbitrator:

An employer is entitled to offer other means of accommodation, and if they provide reasonable accommodation, an employee is expected to facilitate or accept one of the reasonable offers.

The most reasonable offer made by the employer was to rearrange the schedule so that the grievor could have time off work for religious observance. According to the arbitrator, the grievor should have accepted this offer of accommodation.

As a result, the employer did not violate the collective agreement or the *Code*. The grievance was denied.

Implications for Employers

When faced with a request for time off work for religious observance, employers should consider whether it is possible to rearrange the work schedule so that the employee can be accommodated. In most cases, this will be considered a reasonable accommodation and the employee will be expected to accept it. However, it may not be reasonable if (a) the employee is required to secure volunteers to cover the shift; (b) there is too little time for the employee to make necessary personal arrangements as a result of the time off; (c) the rearranged schedule causes personal difficulties for the employee that were properly brought to the employer's attention. These types of issues may influence the reasonableness of the accommodation.

Implications for Unions

In this case, the grievor and the union relied heavily on the Ontario Human Rights Commission's "Policy on Creed and the Accommodation of Religious Observance" to support its argument for payment of the two religious holidays. While the policies of each provincial human rights commission may influence an arbitrator's decision, they are not binding in law. Arbitrators tend to review the policies against the current state of the law to determine whether it is advocating for a principle that has been upheld by the courts or is generally accepted by arbitrators and human rights tribunals. Unions may rely on the policies as part of their advocacy strategy, but should caution grievors that an arbitration decision may not always agree with the Commission's policies.