The accommodation of disabled employees - a guide to the legal landscape

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Most employers are aware that workplace law has been complicated in recent years by a new factor: the impact of human rights legislation. Employers now must consider whether rules or practices which in the past had been considered unproblematic may in fact be discriminatory and, if so, whether they can be modified to accommodate the needs of protected groups. In the employment context, the questions of discrimination and accommodation most frequently arise in connection with disabled employees.

In this and the next two issues of *FOCUS*, we will examine the duty to accommodate disabled employees. (For more recent articles, see "The duty to accomodate in action" and "Accommodating disability short of undue hardship" on our Publications page and "The duty to accommodate after Meiorin and Grismer" on our What's New page; on a related issue, see "Managing innocent absenteeism in the unionized workplace", "Discharging the duty to accommodate: Hospital case provides some pointers", "Bill S-5 to amend the *Canadian Human Rights Act*", "A question of comparison: Appeal Court rules on restrictions to benefits, seniority and service accumulation of disabled employees" and "Arbitrator rules against "perfect" accommodation for phobic technician" on our Publications page, and "Two federal labour bills now in force" on our What's New page.) In this issue, we will describe the principles derived from the decisions of the Supreme Court of Canada, discuss the meaning of 'disability', and provide an overview of recent arbitration and tribunal decisions on several types of contract provisions which have come under fire for being discriminatory.

THE VIEW FROM THE SUPREME COURT OF CANADA

a) Forms of discrimination and the duty to accommodate

Over the course of the past decade, the Supreme Court of Canada has elaborated the principles governing discrimination and the duty to accommodate. These principles, along with the applicable legislation, have defined the parameters for the deliberations of lower tribunals.

The Court has held that there are two forms of discrimination: direct and adverse effect discrimination. Direct discrimination in employment occurs where an employer adopts a practice or rule which clearly discriminates on a prohibited ground. A rule barring the hiring of persons in wheelchairs would be an example of direct discrimination.

By contrast, adverse effect discrimination arises where an employer for genuine business reasons adopts a rule or standard which, on the surface, is neutral and applies equally to all employees, but has the unintended effect of penalizing one or more employees based on a prohibited ground of

discrimination. An example of this type of discrimination would be a requirement that all employees be available for work on Saturdays, whether or not this conflicts with their day of worship.

In the context of adverse effect discrimination, the Supreme Court has held that, where the challenged employment rule is rationally related to the performance of the job but has a discriminatory effect upon a prohibited ground, it will not be struck down. However, the employer has a duty to take reasonable steps short of undue hardship to accommodate the employee or group affected. The duty to accommodate the aggrieved employee may be triggered even in cases where the adverse effect resulting from the challenged rule is relatively minor.

Once an employee or group demonstrates that a neutral employment rule has a discriminatory effect, the onus shifts to the employer to show that the rule is rationally connected to the performance of the job, and either that it took reasonable steps to accommodate short of undue hardship, or that accommodation is not possible without undue hardship.

In many Canadian jurisdictions, including the federal sector, the characterization of discrimination as direct or adverse effect is of some importance. This is because the Court has held that, in the absence of legislation to the contrary, the duty to accommodate applies only in cases of adverse effect discrimination. By contrast, to defend against a claim of direct discrimination, an employer need only prove the existence of a *bona fide* occupational requirement, without accommodation, to allow the rule or practice to stand. Readers should be cautioned that distinguishing between direct and adverse effect discrimination is not always a simple matter. However, for provincially-regulated employers in Ontario, the distinction between the two forms of discrimination is of less importance because certain provisions of the *Human Rights Code*, such as s. 17 which applies to disability, make the duty to accommodate applicable to both direct and adverse effect discrimination.

b) The parties' relative obligations in accommodating disability

The Court has held that the employer is in the best position to determine how to accommodate employees without undue hardship and therefore bears the responsibility for doing so.

However, an employee or group adversely affected by a rule has a responsibility to bring the facts relating to the discrimination to the employer's attention, and to facilitate and accept a reasonable solution proposed by the employer which would fulfil its duty to accommodate.

Unions may also be liable for discriminatory rules, and have a duty to accommodate employees adversely affected by those rules. A union's liability may arise in two ways:

1. it may cause or contribute to the discrimination by participating in the formulation of the work rule that has a discriminatory effect. Where the rule is contained in a collective agreement, the union and the employer, as parties to the negotiations, bear equal responsibility for its effect.

2. even if the union did not participate in the formulation of the rule, it may impede an employer's reasonable efforts to accommodate affected employees.

In the first type of situation, because the union shares a joint responsibility with the employer to accommodate affected employees, if nothing is done, both are equally liable. However, because the employer, which has charge of the workplace, is in a better position to formulate accommodations, it is expected to initiate the process. If the employer's proposed accommodation is disruptive of the collective agreement, or prejudices other employees, the union generally will be permitted to withhold its consent unless no other measures for accommodation can be taken. Where other measures do exist, the union may be under a duty to suggest alternatives that are less disruptive of the collective agreement or prejudicial to the rights of other employees.

In the second type of situation, the Court has said that the employer must first "canvass other methods of accommodation before the union can be expected to assist in finding or implementing a solution. The union's duty arises only when its involvement is required to make accommodation possible and no other reasonable alternative resolution of the matter has been found or could reasonably have been found".

c) What is 'undue hardship'?

What constitutes reasonable accommodation short of undue hardship is a question of fact and will vary with the circumstances of the case. However, it is clear that the Court applies a much stricter test than the *de minimis* standard used in the U.S. to determine what constitutes undue hardship: some hardship is acceptable; it is only 'undue' hardship which satisfies this test.

The Court has mentioned several factors relevant to an assessment of whether hardship is undue, including financial cost, disruption of a collective agreement, the morale of other employees, interchangeability of the work force and facilities, the size of the employer's operation (as this relates to the employer's ability to bear the cost and adapt the workplace), safety, interference in the operation of the employer's business, and the overall economic climate.

THE MEANING OF 'DISABILITY'

The purpose of human rights legislation, as it relates to disability, or handicap, is to protect those who "are actually or perceived to be materially impaired through illness". A handicap has been said to mean something that affects, or is perceived to affect, an individual in carrying out "life's important functions".

Therefore, the words 'disability' and 'handicap' have been held to encompass congenital deformities, physical conditions caused by accident or injury, asthma, epilepsy, speech impediments, hypertension and high blood pressure, depression, alcoholism and drug dependency,

AIDS, AIDS Related Complex, or the condition of being HIV-positive and, in some cases, obesity. However, a transitory illness that affects everyone, such as the flu, would not be included.

AUTOMATIC TERMINATION CLAUSES

A significant line of arbitration awards and three judgments of the Ontario Divisional Court support the proposition that an employer cannot rely on an automatic termination clause to terminate employees who have been absent due to accident or illness for a specified period of time. To do so would deny the disabled employee the benefit of the 'just cause' standard for termination available to other employees, contrary to the *Human Rights Code*. The fact that other employees, not disabled within the meaning of the *Code*, may also be subject to an automatic termination clause after being off work for the same period of time does not mean these provisions may be relied upon to terminate a disabled employee.

The prudent course for employers, therefore, would be to not rely on an automatic termination clause, but rather to cite innocent absenteeism as the grounds for dismissal. Should the matter proceed to arbitration, the employer would have to show just cause for dismissal, which presumably would entail demonstrating that the grievor could not have been accommodated short of undue hardship.

SENIORITY ACCUMULATION PROVISIONS

Other provisions which have been successfully attacked are those which impact upon the accumulation of seniority by employees absent due to illness. These include clauses which suspend seniority accumulation after a specified period of absence, as well as provisions which link it to attendance at work. Again, the fact that these provisions also apply to non-disabled persons does not mean they are not discriminatory. In most cases, they have been held to be neutral provisions whose application to disabled employees constitutes adverse effect discrimination.

By contrast, it appears that provisions linking various forms of compensation to attendance at work may be less vulnerable to attack. The prevailing trend in the cases is that, in matters such as employer benefit contributions, vacation entitlement, and service accumulation as it relates to compensation, legitimate distinctions may be drawn based on the employee's actual attendance at work. One arbitrator has reasoned that the *Code* treats compensation differently from access to employment: where the issue is one of participation in the work force, equality means implementing special measures to accommodate the disabled; but in matters of compensation, disabled employees may be treated the same as those who are able-bodied.

LAST CHANCE AGREEMENTS

In one recent award, an Ontario arbitrator has ruled that an automatic termination provision in a last chance agreement reinstating a grievor suffering from alcoholism was, though troubling, not invalid merely because it was linked to the grievor's alcoholism. The provision had no adverse effect until it was applied, the arbitrator reasoned, and the employer could rely on it if, at the time of the termination, it was shown that the grievor could not be accommodated short of undue hardship.

This view appears to differ from the one most often expressed in automatic termination clause cases, where the predominant approach has been to invalidate the discharge without reference to whether the grievor could have been accommodated. This difference may be explained by the arbitrator's belief that the automatic termination clause was included in the last chance agreement because the employer felt that any further drinking by the grievor would irremediably undermine the employment relationship. This may simply be another way of saying that, in a last chance agreement, the employer presumably has already provided some accommodation to the grievor, and has determined that any further accommodation would entail undue hardship.

IN FUTURE ISSUES

In the next two issues of *FOCUS*, we will examine the duty to accommodate in more detail. Topics covered will include the level of performance to be expected from accommodated employees, the scope and nature of reasonable accommodation required of employers, and factors which may be relevant to an assessment of undue hardship.

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