Accommodating disability short of undue hardship

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The duty to accommodate is a key element in the right of the disabled to be free from discrimination. But what are the limits on what employers must do to make the workplace accessible, given that they are obliged to offer only *reasonable* accommodation *short of undue hardship*?

The Supreme Court of Canada 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, safety, interference in the operation of the employer's business, and the overall economic climate. The Ontario *Human Rights Code* also lists cost, outside sources of funding, and health and safety requirements as considerations relevant to undue hardship.

Yet, even when such factors are identified, at the centre of many disputes over accommodation is the question of *when* the threshold of undue hardship has been reached. In this concluding part of our series on the duty to accommodate disabled employees, we will look at how the cases have assessed undue hardship. (For previous articles on the subject, see "The accommodation of disabled employees - a guide to the legal landscape" and "The duty to accommodate in action" on our Publications page; on a related issue, see "Managing innocent absenteeism in the unionized workplace", "Emerging issues in attendance management", "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.)

DISRUPTION OF THE COLLECTIVE AGREEMENT

Where accommodation entails a substantial departure from the terms of a collective agreement, this may allow an employer to argue that its normal business operation has been unduly impaired. One arbitrator has held that, where the employee was accommodated by being transferred to an excluded position, a requirement that the employee retain full bargaining unit status would impose numerous administrative difficulties and costs on the employer, and would amount to undue hardship. However, in a case where a disabled employee was transferred out of the bargaining unit to part-time status, and the collective agreement prohibited such involuntary transfers, the arbitrator ruled that allowing the employee to retain her status in the full-time unit would not create undue hardship for the employer.

Where accommodation impedes the operation of seniority, it is likely that one of the parties will claim that the point of undue hardship has been reached. In one case, an employer recalled a disabled employee over one with more seniority, because the recall position was one within the disabled employee's restrictions. The union challenged this decision on the grounds that the employer had not considered other forms of accommodation that did not involve a breach of the collective agreement. The arbitrator agreed with the union, holding that the employer could not breach the terms of the collective agreement without first attempting to accommodate the employee in some other manner. The arbitrator invoked a decision of the Supreme Court of Canada in ruling that the employer bore the initial obligation to accommodate the disabled employee, and that the union's joint responsibility would arise only if the terms of the collective agreement were used to justify discrimination.

Where the application of the collective agreement itself is held to have a discriminatory effect, it will be difficult to claim that breaching its terms will result in undue hardship. This was the case where a collective agreement provided for layoffs in reverse order of seniority beginning with the lowest job category. The arbitrator held that the laid off grievor had, in effect, been trapped in the lowest job category due to the restrictions imposed by his disability. To remedy the discriminatory effect of the collective agreement, the union requested he be reinstated and that an employee with less seniority from a higher-rated group be displaced. The employer countered that this remedy would expose it to a grievance, thereby causing it undue hardship. The arbitrator rejected this argument and held that it was unreasonable to prevent the employee who had suffered discrimination under the collective agreement from exercising his seniority against the junior employee.

EFFECT ON MORALE OF OTHER EMPLOYEES

A substantial departure from key terms of the collective agreement, such as seniority, may have a disruptive effect on the morale of other employees. The Supreme Court of Canada has stated that, when factoring in the impact of accommodation on employee morale, only employee objections based on well-grounded concerns about their rights should be considered. Objections based on "attitudes inconsistent with human rights" are irrelevant to the determination of undue hardship.

In one case where employee concerns were held to be well-grounded, the union had cooperated in allowing a disabled employee to transfer into the bargaining unit. However, following a consultation with its members, it objected to crediting her with full seniority accumulated in her former unit. The members were concerned that, with layoffs looming, their job security would be affected by permitting the employee to retain her competitive seniority. The arbitrator agreed that the concerns of the unit members were legitimate, and ruled that transferring the employee's full seniority would constitute undue hardship for the union.

The effect of accommodation on employee morale has also been found to create undue hardship in cases where employees were consistently short-staffed due to the disabled employee's unreliable attendance, and where they experienced a reduction in their weekend time off, or removal of

favoured work assignments normally governed by seniority.

COST AND PRODUCTIVITY

As noted in the last issue of *FOCUS*, employers will not be required to create a superfluous position, or to tolerate substandard performance or extreme unpredictability in the employee's attendance at work. This has been equated with undue hardship, even where the employer has the resources to endure it. The general view is that an employer is entitled to expect the accommodated employee to contribute to its production requirements.

Nor is an employer necessarily expected to pay a disabled employee more than the new position's pay rate. In a case where an injured employee was returned to work in a lower-rated position that was within her restrictions, the arbitrator ruled that there was no requirement to maintain her previous rate of pay, as she was unable to perform the core duties of her old job.

Cost, while obviously a factor in the assessment of undue hardship, is also one whose significance will vary in several ways. One arbitrator has suggested that one must compare the cost of the accommodation with the benefit that results. It may be easier to argue that cost is an undue hardship when the disadvantage removed by accommodating the employee is relatively small in relation to the cost involved. The size of the business will also influence the determination of whether cost is undue, as will the prevailing economic climate. The factors of cost and productivity will also be affected by whether the accommodation is a temporary measure or a permanent initiative.

SAFETY OF THE EMPLOYEE, CO-WORKERS AND THE PUBLIC

Where the accommodation poses a risk to the safety of co-workers or the public, undue hardship will be established. However, tribunals have been divided in their approach to assessing the risk. Some have refused to countenance any risk to safety in accommodation, while others have opted for a more individualized assessment of the nature of the risk.

In one case in which the latter approach was adopted, the employer had terminated a nurse who suffered from hypoglycemic episodes on the grounds that her illness made her unfit to carry out her duties, particularly the dispensing of medications to patients. The arbitrator ordered that she be reinstated to work on the midnight shift, during which significantly fewer medications were administered. The arbitrator reasoned that because medication administration was limited to 15 minutes a night, with the assistance of other nurses on duty, any risk presented by the grievor could be kept below acceptable levels.

What if the employer refuses to accommodate the employee on the grounds that the suggested accommodation would pose a health risk to the employee? One human rights tribunal has expressed the view that, where there is substantial risk of injury if the employee returns to work, the

employer is not only entitled to take the position that the employee is incapable of performing the essential duties of the job, but may be obliged under health and safety legislation to ensure that he or she is medically fit. Another board of inquiry has ruled that a refusal to accommodate an employee on the basis of a risk to the employee's health must be supported by objective evidence. As well, other arbitrators have ruled that the employee's willingness to assume some risk must be taken into account by the employer. In such circumstances, the physical risk to the employee must be balanced against his or her right to equality of opportunity at work.

MEASURES TAKEN PREVIOUSLY, OR BEFORE THE EMPLOYER KNEW OF THE HANDICAP

Where an employer has unknowingly accommodated a disabled employee by tolerating erratic attendance or substandard performance over a long period of time, will these past efforts be counted towards the assessment of undue hardship? Several decisions suggest they will. These decisions, usually dealing with disability due to substance abuse, stand for the proposition that an employer need not have realized that it was accommodating disability to have its past efforts added to the anticipated burden of future measures in the determination of undue hardship. One arbitrator has pointed out that, if knowledge that one is discriminating is not an essential ingredient of a human rights violation, it makes no sense to discount accommodative measures taken before the employer recognizes the employee's disability.

However, merely having accommodated an employee in the past will not necessarily excuse an employer from offering different forms of accommodation in the future. In one case, an employee who was on permanent modified duties was denied a position on another shift despite the fact that he was entitled to it by virtue of his seniority. At arbitration, the employer took the position that it did not have to re-accommodate the grievor. The arbitrator disagreed, holding that the fact that an employer had already accommodated a permanently disabled employee did not excuse it from ever considering the employee for other positions. While the employer could take into account the workplace disruption caused by the earlier accommodation when considering the request for a transfer, it still had to turn its mind to whether the employee could be re-accommodated without undue hardship. The arbitrator listed a number of factors which might be relevant to this assessment, including the length of time the employee had been in the modified position, the cost and extent of the modifications in the current and new positions, the impact on other employees seeking accommodation, and the events which gave rise to the request for re-accommodation.

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