Duty to Accommodate Supreme Court of Canada Rehabilitates the Undue Hardship Threshold

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An employer's duty to accommodate the legitimate needs of employees from a human rights standpoint whether based on religious belief, illness, disability or some other factor has long been established. What's been difficult to establish is the extent to which employers must go to accommodate these needs. In recent years, employers have often had to demonstrate that it was virtually impossible to accommodate the employee in order to establish that accommodation would result in undue hardship for the employer, thereby relieving the employer of the accommodation requirement.

Well, "the times, they are a-changing"! The recent Supreme Court of Canada decision in Hydro-Québec reflects a reconsideration of the prevailing orthodoxy on the undue hardship test and has infused it with a renewed reasonableness standard. The case (this one out of Québec) is the latest in a string of Court of Appeal and Supreme Court of Canada decisions Mulvihill v. Ottawa, Honda v. Keays, and Evans v. Teamsters that reflect an unmistakable shift in judicial attitude towards a more practical and reasonable approach to the interpretation and application of the rules of engagement in the historic bargain between master and servant.

Duty to accommodate based on illness

In the Hydro-Québec case, the complainant employee had an employment history marked with many physical and mental health problems, from tendonitis and hypertension on the physical side, to a significant personality disorder on the mental health side that affected her relationship with supervisors and co-workers. These problems resulted in extensive absences from work. In the final seven and one-half years of her employment, she had missed 960 days of work.

Hydro-Québec had adjusted the employee's working conditions on several occasions in an attempt to accommodate her limitations. These included actions ranging from assigning lighter duties to providing a gradual return to work following a depressive episode. None of the actions improved the complainant's ability to report to work regularly and she was eventually dismissed.
At the time of her dismissal, the complainant had been absent from work for over five months, the employer had obtained a psychiatric assessment that confirmed that the employee would not be able to work regularly without extended absences, and the complainant's own doctor had recommended that she stop working for an indefinite period.

The employee grieved the dismissal, and her grievance was dismissed by both the arbitrator and by the Québec Superior Court on appeal. The union appealed again to the Québec Court of Appeal and won its case, with the Court of Appeal stating that the employer had to prove that it was impossible to accommodate the complainant's characteristics.

More moderate standard emerges

The Supreme Court of Canada disagreed with the Court of Appeal's approach. In a unanimous decision, Justice Deschamps stated that:

"What is really required is not proof that it is impossible to integrate an employee who does not meet a standard, but proof of undue hardship, which can take as many forms as there are circumstances."

Justice Deschamps went on to state that:

" the goal of accommodation is to ensure that an employee who is able to work can do so. In practice, this means that the employer must accommodate the employee in a way that, while not causing the employer undue hardship, will ensure that the employee can work.

The purpose of the duty to accommodate is to ensure that persons who are otherwise fit for work are not unfairly excluded where working conditions can be adjusted without undue hardship."

"However, the purpose of the duty to accommodate is not to completely alter the essence of the contract of employment, that is, the employee's duty to perform work in exchange for remuneration."

The Supreme Court of Canada allowed Hydro-Québec's appeal. The Court found that if an employee's condition hampers business operations or prevents an employee from working in the foreseeable future even though the employer has tried to accommodate them the employer will have satisfied the undue hardship test and the dismissal will be non-discriminatory.

Assess the facts on a case-by-case basis

The Supreme Court of Canada's acknowledgement that proof of undue hardship can take as many forms as there are circumstances reaffirms the fact that each case must be judged on its own merits with the standard for proving undue hardship now far short of proving that accommodation is impossible.

For these reasons, consultations between your organization's human resources professionals and internal or external counsel can be invaluable in helping you assess the limits of any accommodation requirements, if and when such a situation arises.

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