

Accommodation: The Supreme Court of Canada Once Again Rules in Favour of An Employer

Employers in the province are rejoicing. The Supreme Court of Canada, in a judgment written by the Honourable Madam Justice Deschamps, has just confirmed the dismissal by Hydro-Québec of one of its employees after a long period of absenteeism and unsuccessful attempts to accommodate her.

In matters of accommodation, most are familiar with the well-known case involving Hydro-Québec (*Syndicat des employé(e)s de techniques professionnelles et de bureau d'Hydro-Québec, section locale 2000 v. Hydro-Québec*, 2006-02-07, Montreal C.A., J.E. 2006-403), in which our Court of Appeal ruled that Hydro-Québec had not done enough—after 10 years of accommodation—for an employee who suffered from mental health problems, and therefore quashed the arbitration award which had confirmed the employee's dismissal. According to the Court of Appeal, Hydro-Québec could have created a part-time position for the employee in accordance with the suggestion of the physician who was treating the employee at the time of her dismissal.

Employers in the province nearly sank into a state of depression! If an employer such as Hydro-Québec could not successfully dismiss an employee whose absenteeism had been chronic, how could a smaller employer even think of overcoming such a situation? Did this mean that an employer had to accommodate such an employee until the employee's resignation or death? In short, would an employer be required to keep an employee on staff, somehow or other, even if the employee were unable to perform his or her work adequately?

Fortunately, employers were given some hope in January 2007, following the decision of the Supreme Court in another case of accommodation, that of the "McGill

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University Health Centre" (*McGill University Health Centre v. Syndicat des employés de l'Hôpital général de Montréal*, 2007 SCC 4). In a judgment once again written by the Honourable Madam Justice Deschamps, the Supreme Court of Canada confirmed the dismissal—that, once again, had been quashed by our Court of Appeal—of an employee following the application of a termination of employment clause contained in her collective agreement. In that decision, the Honourable Madam Justice Deschamps explained that this kind of clause still serves a purpose, despite the existence of an employer's duty to accommodate, provided the clause is not applied automatically, as had occurred in the past.

On July 17, 2008, the Supreme Court of Canada reiterated the terms of the landmark ruling it rendered in 1999 in *Meiorin* (*British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3) and stated in greater detail **the standard an employer must satisfy in order to prove undue hardship**, because it was on this point that the Court of Appeal had erred.

In essence, the principle established in the *Meiorin* ruling as regards accommodation is that an employer has the obligation to accommodate an employee to the point of undue hardship, which our Court of Appeal interpreted as

being a total impossibility to provide any means of accommodation whatsoever—a burden of proof that is excessive, even for an employer such as Hydro-Québec.

According to the Supreme Court, evidence of undue hardship can be **completely different** from one employer to another and from one situation to another.

It is important to remember that the purpose of the duty to accommodate is to help an employee to work when he or she is able to do so or, in other words, to refrain from “unfairly” excluding persons who are otherwise fit to work “where working conditions can be adjusted without undue hardship.” (par. 14 of the Supreme Court judgment)

Thus, the purpose of the duty to accommodate has never been to “**completely alter the essence** of the contract of employment, that is, the employee’s duty to perform work in exchange for remuneration.” (par.15)

The Supreme Court felt it necessary to avoid all doubt by underscoring what does not constitute undue hardship:

[16] The test is not whether it was impossible for the employer to accommodate the employee’s characteristics. The employer does not have a duty to change working conditions in a fundamental way, but does have a duty, if it can do so without undue hardship, to arrange the employee’s workplace or duties to enable the employee to do his or her work.

[...]

[18] Thus, the test for undue hardship is not total unfitness for work in the foreseeable future. (Emphasis added)

In other words, the fact that the employee was able to work part-time did not mean that Hydro-Québec absolutely had to arrange her workplace accordingly.

Finally, the Supreme Court concluded that “the employer’s **duty to accommodate** ends where the employee is no longer able to fulfill the basic obligations associated with the employment relationship for the foreseeable future.” (par.19)

In short, **an employee must first be fit to work**, in any capacity whatsoever, before an employer is required to assess whether there are possible means of accommodation within its workplace. The employment contract remains the basis for the employment relationship, whether or not the duty to accommodate supplements it.

In closing, the Supreme Court reiterated what it had said in the McGill University Health Centre case: In situations of chronic absenteeism, the decision to dismiss must be evaluated based on the entire situation, namely, the employee’s performance at work, the prognosis of the doctors and past accommodation measures. Thus, in contrast to the teachings of the Court of Appeal, **the past cannot be disregarded when assessing whether an employer will suffer undue hardship** (cf. par. 21).

By rendering this judgment on behalf of the Supreme Court of Canada, the Honourable Madam Justice Deschamps has provided employers and employees with clear guidelines for determining whether or not accommodation measures must be applied in a given case, without forcing them to deal with inflexible rules that do not take reality into account.