IN FACT AND IN LAW

Labour

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Hiring, Handicap (Illness) and Accommodation: Be Careful!

By Gilles Paquette

The refusal to hire an employee who is not available to perform his or her duties as of the date of signing of his contract would seem to be a normal reflex on the part of any employer. However, this should not be so according to the case of *Commission scolaire Seigneurie* and *Syndicat des professionnelles et professionnels de la CS de l'Outaouais (C.E.Q.)*.

The Facts

From September 1993 to June 1994, the employee, an orthopedagogist, had a contract as a part-time supernumerary employee which entitled her to have her name registered on the recall list that had been prepared pursuant to the collective agreement.

During the summer of 1994, the employee was a victim of the so-called "flesh-eating" bacteria. Her leg was amputated and she left the hospital in July 1994. In August 1994, she received home care services as well as hydrotherapy treatments. The following month, she once again had surgery, after which she began rehabilitation.

In August 1994, the human resources manager contacted the employee to see if she would be available to fill a position which needed to be filled by the end of the month. The employee informed him that due to her condition, she would not be available before January 1995. Although the position in question was to be assigned for the entire year, the human resources manager offered to divide the position in two so that she could fill it in January. In effect, the employee held the position as of January 1995.

Nonetheless, the union filed a grievance claiming that the employee should have been hired for the entire initial period of the annual contract, given that she had priority on the basis of the recall list and, consequently, it claimed that she should be paid her salary for that period.

The Arbitration Award

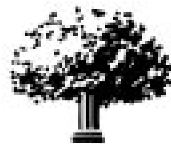
The arbitrator, Denis Tremblay, allowed the grievance. His award included two separate legal components. Firstly, he considered the issue based upon the provisions of the collective agreement and, secondly, on the basis of the *Charter of Human Rights and Freedoms*.

The arbitrator declared that, following his analysis of the collective agreement, he had no choice but to conclude that the complainant was entitled to claim the right to be hired in preference by the school commission, but this did not confer upon her an absolute right to be hired nor did it create any contractual relationship. As it happened, given that the employee was not able to occupy the position at the start of the school year, she could not validly have exercised her preferential right to be hired.

Furthermore, without regard to the complainant's handicap or the *Charter of Human Rights and Freedoms*, he recognized that, as a whole, the rules that the parties had established regarding recalls and priority of hiring had been respected and the school commission had acted in good faith and in compliance with the collective agreement by mitigating the negative effects of the complainant's disability. However, in light of the *Charter of Human Rights and Freedoms*, the employee should henceforth have been considered as "handicapped", because in the autumn of 1994 she had been affected by a grave physical ailment which significantly limited her ability to function normally.

Given this situation, the employer should not have considered that the employee was not available in August 1994, because in so doing, it had unwittingly engaged in a discriminatory practice.

The employer had acted in good faith and had, of its own volition, proposed a means of accommodation which allowed the complainant to retain her position and occupy it as of January 1995. But within the context of discrimination with a prejudicial effect, the arbitrator was of the opinion that the employer should have gone further: it should have offered the contract to the complainant for the full year so that she could have been eligible for employment insurance for the duration of her rehabilitation. Given that this measure was provided for in the collective agreement, it could not be considered excessive.



LAVERY, DE BILLY

BARRISTERS AND SOLICITORS

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Consequently, the arbitrator ordered the school commission to award the complainant the position in question for the entire 1994-95 school year.

Motion for Judicial Review

The employer filed a motion for judicial review before the Superior Court with respect to the arbitration award. According to the school commission, in ruling as he did, the arbitrator had committed errors which made him overstep his jurisdiction.

The school commission alleged that there had not been any discrimination, that the employer's refusal was based upon the non-availability of the employee and that, in any event, the employer had proposed a reasonable means of accommodation.

The Superior Court Judgment

The Superior Court dismissed the motion for judicial review, thereby confirming the arbitration award.

The Superior Court ruled that the arbitrator had acted within his jurisdiction. Although the Superior Court might have rendered a different decision than that rendered by the arbitrator, it found that the arbitrator's conclusions were not unreasonable and there was no reason for the Court to intervene. The Superior Court held that the employee was handicapped and that she would have been able to avail herself of employment insurance under the circumstances.

Appeal Lodged Before the Court of Appeal

The judgment of the Superior Court was appealed by the union. It argued that there was a similarity between the complainant's situation and that of pregnant instructors whose temporary and justified unavailability is one of the characteristics of maternity. Indeed, the caselaw on this subject states that the employer must award the contract to the employee and grant her a remunerated maternity leave if applicable. The judgment of the Court of Appeal in the case at bar merely stated that [TRANSLATION] "without adopting all of the pronouncements of the trial judge, the Court is of the opinion that he was right to conclude that the award of the mis en cause did not contain any error giving rise to judicial review."

Leave to appeal to the Supreme Court of Canada was sought but refused on September 6, 2001.

Conclusion

Henceforth, if an employee is handicapped or ill, it will no longer be possible to assume that the unavailability of the employee to perform his or her work, at the time of hiring, is an automatic obstacle to the hiring of that employee. It will be necessary to analyze the type of handicap or illness and, consequently, the appropriate means of accommodation, which accommodation should not impose an undue hardship on the employer, the whole in accordance with the pronouncements of the Supreme Court of Canada on these issues.

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