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IN ACCOMMODATION MATTERS, THE EMPLOYER MUST TAKE INTO CONSIDERATION BOTH THE RIGHTS OF THE EMPLOYEE AND THOSE OF THE CLIENTELE

PIERRE L. BARIBEAU, CIRC

OVER THE LAST TEN YEARS, QUEBEC SOCIETY HAS FREQUENTLY BEEN CALLED ON TO ESTABLISH MEANS FOR INTEGRATING HUMAN RIGHTS IN THE WORKPLACE, PARTICULARLY WITH RESPECT TO ACCOMMODATION MATTERS. IN THIS RESPECT, WE SHOULD KEEP IN MIND THAT THE SUPREME COURT OF CANADA [1] CLARIFIED THE APPLICATION OF THIS CONCEPT IN THE WORKPLACE IN RESPECT OF PERSONS WHOSE STATE OF HEALTH TEMPORARILY CONSTITUTES AN IMPEDIMENT TO THE FULL RECOGNITION OF THE EXERCISE OF THEIR RIGHTS ON AN EQUAL FOOTING WITH THEIR WORK COLLEAGUES.

LAST AUGUST, AN ARBITRATOR, WHO ALSO IS AN AUTHOR ON LABOUR LAW AS WELL AS HUMAN RIGHTS MATTERS, RULED [2] ON A DISPUTE IN THE CONTEXT OF WHICH ACCOMMODATION MEASURES WERE SOUGHT FOR THE BENEFIT OF A PERSON WHO HAD IN EXCESS OF TEN YEARS OF SENIORITY AND NO LONGER HELD HER POSITION, HAVING BEEN ABSENT FOR NEARLY THREE (3) YEARS FOR PHYSIOLOGICAL REASONS. THE ARBITRATION TRIBUNAL HAD TO RULE ON SEVERAL ISSUES PERTAINING TO THE DAY-TO-DAY MANAGEMENT OF ABSENCES AND TO THE RETURN TO WORK SOUGHT BY A FEMALE EMPLOYEE BASED SIMPLY ON THE SUBMISSION OF A MEDICAL CERTIFICATE.

BETWEEN, ON THE ONE HAND, AN EMPLOYEE AND THE UNION AND, ON THE OTHER HAND, THE EMPLOYER, WHO BEARS THE BURDEN OF PROOF AS TO THE CAPACITY OF THE EMPLOYEE AFTER AN ABSENCE DUE TO HER MEDICAL CONDITION?

When a medical dispute must be resolved through arbitration, which party is first responsible for establishing the state of health of the employee before the arbitrator? The tribunal ruled on the dispute between the parties by declaring itself in agreement with the case law, according to which:

> [Translation]
>
> "In the case of an extended absence [...] submitting a medical certificate does not seem sufficient to prove the capacity of the plaintiff to work. The content of the certificate must be proved. In short, the union must demonstrate that the plaintiff was able to meet the burden of proof as to the reasons justifying the return to work." [3]

[1] *McGill University Health Centre (Montreal General Hospital)* v. *Syndicat des employés de l'Hôpital général de Montréal*, [2007] 1 S.C.R. 161.

[2] *Syndicat des employé(e)s de l'Hôpital du Sacré-Cœur* et *Hôpital du Sacré-Cœur de Montréal*, arbitration award of Mtre Jean-Denis Gagnon, August 21, 2009, AZ-50573214.

[3] *Union Internationale des travailleurs unis de l'alimentation, section locale 405-p et Aliments Lesters Ltée*, arbitration award of Mtre Diane Veilleux, A.A.S. 98A-215.

Indeed, although the order of the submission of evidence may be modified for reasons of convenience, it is up to the union and the employee to convincingly prove the state of health alleged at the time when the medical certificate relied upon by the employee seeking to return to work in her regular position is obtained.

WHETHER THE ATTENDING PHYSICIAN IS AWARE OF ALL THE DUTIES PERFORMED BY THE EMPLOYEE IS HIGHLY RELEVANT

In this case, the tribunal had to review the opinions of four medical experts to conclude that the evidence was *clearly contradictory*, while stating that the testimony of one of the plaintiff's physicians revealed that [translation] *"... according to his testimony, it would seem that the physician had not been really informed about all the duties of the plaintiff as an orderly"*.

This lack of knowledge, when added to the statements of two physicians according to whom [translation] *"there was a real risk that the condition of the plaintiff would deteriorate if she resumed her duties as an orderly"* was determinative for the tribunal, which then clearly declared itself in favour of the decision of the employer not to rely on the medical certificate, but instead rely on the corroborated evidence, according to which *"the main duty of orderlies is to mobilize or move patients"*.

IN ORDER TO FULFIL ITS DUTY TO ACCOMMODATE BY PROPOSING SOLUTIONS, IS THE EMPLOYER REQUIRED TO MODIFY THE POSITION SO THAT THE EMPLOYEE DOES NOT HAVE TO PERFORM THE DUTIES THAT APPEAR TO BE INCOMPATIBLE WITH HER STATE OF HEALTH?

The union made representations to the effect that the testimony of the expert rheumatologist had to be given precedence over that of an orthopaedist who had met with the employee only once.
The rheumatologist was of the opinion that there was no risk in reinstating the employee in her regular position. Moreover, the union submitted to the tribunal that [translation] *"even if he ruled that the plaintiff could not perform all the duties of her position as an orderly at the time of her termination, the arbitrator nevertheless had to take note that management failed in its duty to accommodate."*

The employer invoked its duty to protect the health and safety of its employees [4] while the union stressed the necessity for the employer to act in such a way as to maintain the employee's employment, notwithstanding the constraints. In view of the union's positions and representations, the tribunal asked itself one of the main questions, that is, [translation] *"has management fulfilled its obligation to accommodate the plaintiff?"*

The tribunal took into consideration the solution that the employer had proposed to the employee and the union, which was to offer the employee a position that was consistent with her state of health and took into account the risks to both her and the patients. In the circumstances proved before the tribunal, the management decision of the employer was well founded and the arbitrator was of the view that [translation] *"... management cannot be blamed for having tried to steer [the employee] towards another position, namely, an intermediate clerk position."*

Health professionals testified about the difficulty in identifying the orderly duties that could be removed, all the more so since one of the main duties is physical and repetitive, namely, [translation] *"assisting patients when they have to move, when they get into bed or helping them to get up"*. Accordingly, the tribunal agreed with the qualification of the position as involving moderately heavy work and accentuated the concepts of quality and safety of the services.

Under the *Act respecting health services and social services* [5], patients are entitled to services of quality and the employer must take the necessary measures to ensure their safety when services are provided to them.

> "5. Every person is entitled to receive, with continuity and in a personalized and safe manner, health services and social services which are scientifically, humanly and socially appropriate." *(Emphasis added)*

[4] CSN Collective Agreement / sections 3.02 and 43, *Act respecting Occupational health and safety* / sections 4 and 51, *Civil Code of Québec* /section 2087 and *Charter of human rights and freedoms* /section 46.

[5] *Act respecting health services and social services*, sections 2, 3 and 5.

The legislation pertaining to the obligations and duties of the employer toward its employees was also relied upon to support the position of the employer, as discussed below.

WHEN AN EMPLOYER PROPOSES A SOLUTION TO ACCOMMODATE, THE EMPLOYEE CAN ONLY REFUSE THE PROPOSAL FOR ACCEPTABLE REASONS

In its dealings with the union and the employee, the employer offered the employee the opportunity to qualify for a clerical position. This solution had been put forward after the medical experts' reports indicated to the employer that reinstating the employee in her position involved risks to her health.

It must be noted that, despite the failure of the employee to qualify during the tests, the employer continued its approach by lowering its requirements in order to allow the employee to qualify by practicing her typing technique before assuming her duties.

Finally, the employee refused the solution proposed by her employer, stating that [translation] *"she preferred staying home with her children to enjoy the Christmas period"* and she invoked the difficulties related to the change of schedule, which would not allow her to travel with her spouse. The tribunal considered these reasons unacceptable and relied on the above-mentioned decision of the Supreme Court in the *McGill* case:

> "...when the employee receives a reasonable proposition from the employer, which would allow him or her to remain employed, he or she cannot reject it without demonstrating the existence of serious reasons for not accepting."

RECOMMENDATION OF THE ARBITRATOR DESPITE HIS DECISION TO DISMISS THE UNION'S CONTESTATION

The tribunal thus ruled that the employee's grievances were *unfounded*. However, the tribunal invoked the plaintiff's seniority to take an exceptional initiative, that is, to recommend [translation] *"to the parties that they voluntarily begin discussions which may eventually allow this employee to be assigned to a clerical position which would be better suited to her state of health"* [!]

PIERRE L. BARIBEAU, CIRC

514 877-2965
pbaribeau@lavery.ca

YOU CAN CONTACT THE FOLLOWING MEMBERS OF THE LABOUR AND EMPLOYMENT GROUP WITH ANY QUESTIONS CONCERNING THIS NEWSLETTER

PIERRE-L. BARIBEAU, CIRC 514 877-2965 pbaribeau@lavery.ca

PIERRE BEAUDOIN 418 266-3068 pbeaudoin@lavery.ca

JEAN BEAUREGARD 514 877-2976 jbeauregard@lavery.ca

VALÉRIE BELLE-ISLE 418 266-3059 vbelleisle@lavery.ca

MONIQUE BRASSARD 514 877-2942 mbrassard@lavery.ca

PIERRE DAVIAULT 450 978-8107 pdaviault@lavery.ca

MICHEL DESROSIERS 514 877-2939 mdesrosiers@lavery.ca

JOSÉE DUMOULIN 514 877-3088 jdumoulin@lavery.ca

PHILIPPE FRÈRE 514 877-2978 pfrere@lavery.ca

MICHEL GÉLINAS 514 877-2984 mgelinas@lavery.ca

JEAN-FRANÇOIS HOTTE 514 877-2916 jfhotte@lavery.ca

NICOLAS JOUBERT 514 877-2918 njoubert@lavery.ca

VALÉRIE KOROZS 514 877-3028 vkorozs@lavery.ca

JOSIANE L'HEUREUX 514 877-2954 jlheureux@lavery.ca

NADINE LANDRY 514 878-5668 nlandry@lavery.ca

CLAUDE LAROSE, CIRC 418 266-3062 clarose@lavery.ca

GUY LAVOIE 514 877-3030 guy.lavoie@lavery.ca

FRANCE LEGAULT 514 877-2923 flegault@lavery.ca

GUY LEMAY, CIRC 514 877-2929 glemay@lavery.ca

VICKY LEMELIN 514 877-3002 vlemelin@lavery.ca

CARL LESSARD 514 877-2963 clessard@lavery.ca

CATHERINE MAHEU 514 877-2912 cmaheu@lavery.ca

ISABELLE MARCOUX 514 877-3085 imarcoux@lavery.ca

VINCENT METSÄ 514 877-2945 vmetsa@lavery.ca

VÉRONIQUE MORIN, CIRC 514 877-3082 vmorin@lavery.ca

FRANÇOIS PARENT 514 877-3089 fparent@lavery.ca

MARIE-CLAUDE PERREAULT, CIRC 514 877-2958 mcperreault@lavery.ca

MARIE-HÉLÈNE RIVERIN 418 266-3082 mhriverin@lavery.ca

MADELEINE ROY 418 266-3074 mroy@lavery.ca

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