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The employer's duty of accommodation of an employee with a disability

by Monique Lagacé

Until quite recently, in cases of chronic absenteeism related to a single medical cause, according to the classic position of the arbitration case law in matters of so-called "administrative" dismissal, the employer had to satisfy two conditions before it could terminate the employment contract of an employee:

- it had to prove that the employee's absenteeism rate during the preceding years had considerably exceeded the absenteeism rate of other workers in the firm;
- it also had to show, by means of medical evidence, that in all probability, there would be no foreseeable improvement in the future.

However, for some time now, under the influence of the *Charter of Human Rights and Freedoms* and recent judgments of the Supreme Court of Canada, some arbitrators have begun to introduce the principle of the duty of reasonable accommodation without undue hardship. This new direction is particularly well illustrated by two arbitration awards rendered recently by the arbitrator, Denis Nadeau.

The Case of La Caisse populaire Deux-Rivières

In the first case,[1] a cashier, who had worked for the Caisse populaire Deux-Rivières for 16 years, presented a medical problem diagnosed as "major bipolar affective disorder". During the multiple relapses inherent to this illness, Ms. Bellerose had to be hospitalized, which resulted in absences of three to five months per year. Between the periods of crisis, the employee performed her work normally and satisfactorily.

During her last relapse in 1996, the employee was absent for nearly eight months.

On this occasion, the employer conducted a review and discovered that over the preceding ten years, her average absenteeism rate exceeded 30% of her working hours, and was always due to her medical problem. It goes without saying that this rate greatly surpassed that of the other workers.

In addition, the psychiatrist who met the employee on three occasions during 1996 at the employer's request, gave a reserved prognosis. In his last report of August 29, 1996, while recommending a return to work without restriction, he nevertheless noted that, in the future, the employee would likely "still have extended periods of absences due to relapses of her bipolar illness and would not be able to put in a regular performance in terms of her work."

Faced with this prognosis, the employer decided to terminate Ms. Bellerose's employment. She then filed a grievance which was submitted to the arbitrator, Denis Nadeau.

During the hearings, the employer acknowledged that Ms. Bellerose suffered from a handicap within the meaning of section 10 of the *Charter of Human Rights and Freedoms* of Quebec.[2] Based both on her past file as well as her future medical prognosis, it also acknowledged that she lost her job due to this handicap, which prevented her from providing regular and steady work.

However, it invoked the defence set out in section 20 of the Charter which states that a "distinction, exclusion or preference based on the aptitudes or qualifications required for an employment … is deemed non-discriminatory." In this regard, it maintained that the requirement to provide regular and steady work is a qualification required for the employment, and therefore a "bona fide occupational qualification". It claimed in addition that it was acting in good faith, since it waited to see whether the illness, or the resulting absences, were temporary.

The arbitrator Nadeau did not accept this argument. Relying on the recent decisions

[1] *Syndicat des employées et employés professionnels-les et de bureau, section locale 57 et Caisse populaire Deux-Rivières*, 1999 R.J.D.T. 397.

[2] R.S.Q., c. C-12

of the Supreme Court of Canada, he concluded that in matters of impairment or handicap, the employer cannot use this defence alone. It must essentially show that it tried to reasonably accommodate the employee. For the arbitrator Nadeau, the Supreme Court has laid down the path: the duty to accommodate is inherent in any measure taken to counter discrimination in matters relating to an impairment or handicap, and "is integral to the right to equality in the workplace."[3]

This duty is not an unlimited one however: the employer must accommodate the employee but without suffering undue hardship. It is up to the employer to show how it will suffer undue hardship if it is requested to take more steps to accommodate the employee than it has taken until then. This evidence must demonstrate the efforts made and be supported by specific facts; it must not be limited to mere allegations of difficulties which could arise. More is required than some negligible effort to fulfill the duty of accommodation.

This undue hardship may in some cases consist of an excessively high financial cost or an another undue hindrance to the operations of the business. The size of the employer's operation may then affect the assessment of what constitutes an excessive cost, or the ease with which the personnel, equipment or facilities can adapt to the circumstances. The opportunities for accommodation may be more limited in a small or medium-sized business than a large operation. For example, where a limited number of employees are assigned to a specialized production, this may mean that an employer cannot replace an employee who is regularly absent.

In other cases, the measure which is apt to accommodate the employee may be contrary to certain provisions of the collective agreement. In such a case, however, the arbitrator was of the opinion that the employer cannot rely on the collective agreement alone; the union must be called on to contribute and accept certain impingements to the agreement, if this is feasible. For example, it might allow an employee not to work at night, even if the employee, based on his or her seniority, should be assigned to the night shift.

Other factors may also constitute undue hardship. The morale of the other employees may be severely tested by the measure to accommodate, as we shall see below. An issue of safety may also come into play: an employee subject to epileptic seizures cannot stay in an environment where dangerous machinery is used.

In the case of the Caisse populaire Deux-Rivières, the arbitrator Nadeau concluded that the employer failed to satisfy its duty of accommodation in dismissing Ms. Bellerose, and did not prove that it would suffer undue hardship by keeping her in its employ.

On the issue of excessive costs, the employer adduced into evidence the details of disability benefits paid to Ms. Bellerose from 1986 to the date of her dismissal. The arbitrator did not accept this submission, since, according to him, the employer did not indicate in what way these costs were excessive!

As for the argument of undue hindrance to the operation of the business, the evidence showed that during Ms. Bellerose's absences, the employer had to call on part-time cashiers or employees from an agency to replace her, and they were not as familiar with the clients and the operations of the Caisse as Ms. Bellerose. Again, the arbitrator did not accept this submission because the employer did not show that this situation gave rise to organizational difficulties or problems with the other cashiers. In any event, the Caisse regularly made use of agency employees when there was a surplus of work.

Finally, the most crucial question remained: if the employer retained Ms. Bellerose in her position despite the prospect of her future absenteeism, would this not in itself constitute undue hardship? To answer this question, the arbitrator conducted a meticulous review of all the medical reports, the testimony of physicians, and the scientific documentation in the file, to come to the following findings:

- Ms. Bellerose's condition was stable, although this stability was relative; the possibility of relapses with hospitalization was always present but, according to his understanding of the testimony and the medical reports, the evidence did not enable him to conclude that Ms. Bellerose's medical condition had deteriorated or that it would deteriorate further in the future; he therefore assumed that her absenteeism rate would remain the same at about 30%;
- although an absenteeism rate of 30% was objectively high, the arbitrator took into account the fact that, each time, these absences were for extended periods, which made it easier to manage Ms. Bellerose's replacement; circumstances would have been different, according to him, if the absences had been sporadic, short in duration (one or two days), and had occurred every week or month;
- the arbitrator also took into account the nature of the employee's work; she held a basic position as a cashier, the position with the largest number of employees for this employer; her replacement did not therefore pose a major difficulty;
- finally, the arbitrator found that the nature of Ms. Bellerose's handicap was such that between her periods of disability, she was able to perform her normal and regular work without the need for any accommodation in particular.

[3] 1999 R.J.D.T. p. 417

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In light of these factors, the arbitrator Nadeau came to the conclusion that there was no undue hardship for the employer to maintain Ms. Bellerose in her position. It is interesting to note that the arbitrator makes a clear distinction here between absences of long duration, all caused by the same medical problem, and short, sporadic and unforeseeable absences, caused by different medical problems. In the latter case, the arbitrator intimated that the duty of accommodation would not apply.

The Case of Centre hospitalier des Vallées de l'Outaouais

In this second case,[4] an X-ray technician, Ms. Duclos, had worked for the hospital centre for nearly 15 years. During these years, Ms. Duclos had been in two work accidents which had caused a herniated lumbar disk. The second accident aggravated her condition, leaving her with significant functional limitations. She had to avoid bending forward, twisting her torso repeatedly, lifting, pushing or pulling weights heavier than 15 kilos, and doing these activities in a crouched or unstable position.

However, the very nature of the duties of X-ray technicians involve pushing stretchers, transferring patients from the stretcher to the examination table, moving patients to position them correctly for X-rays, and sometimes handling heavy equipment.

When Ms. Duclos returned to work in September 1991 following her second accident, the hospital centre succeeded in finding her adapted work that suited her functional limitations. In particular, it had to rearrange Ms. Duclos' work schedule to allow her to work only days and never on weekends, or during meal periods, so that she would never be left alone and could always count on the presence of another technician or assistant to help her when needed. She was only assigned to certain X-ray rooms so that she did not have to work with machinery requiring too much physical effort, notably the mobile X-ray machine.

It goes without saying that this rearrangement of Ms. Duclos' work had repercussions on the work of the other technologists. Since the technologists were required, in turn, to work in each of the X-ray rooms, the hospital centre had, among other things, to modify the rotation which had existed until that time among the technologists. It also had to hire a technologist on a casual basis to work on weekends as a replacement for Ms. Duclos.

In September 1995, Ms. Duclos was once again disabled, this time due to an episode of multiple sclerosis and major depression. When, in August 1997, her physician recommended a gradual return to work, the hospital centre refused. Even if her health problem related to the sclerosis and depression had been resolved, Ms. Duclos still had her functional limitations, i.e., she could only resume the adapted work she had had before she stopped work in 1995. However, in the meantime, the situation had considerably changed and the hospital centre could no longer continue to assign her work tailored to her condition.

The employer invoked two grounds to cease offering accommodation to Ms. Duclos.

First, budget cuts had forced it to reorganize its radiology department. No one is unaware of the move toward ambulatory care or the budget cuts imposed by the government on the hospital network. For the Hôpital des Vallées de l'Outaouais, this meant the "floating" technologist's position had to be eliminated and 6 technologist positions had to be cut out of the 15 positions the department once had. The remaining technologists were therefore called on to put in a more intense and sustained performance at work - to give 150% of themselves - as one witness said. They often found themselves working alone, with very little opportunity to obtain help from another technologist or assistant. They had to be more versatile since they were expected to work in several different rooms in the course of the same day.

However, due to her limitations, Ms. Duclos could not do the rotation of the rooms like the others, nor could she work alone, or with certain machinery that was too heavy. To reinstate her, it would have been necessary to take her back in addition to the personnel in place, which would have required an additional budget of about $33,000 per year. The radiology coordinator tried to obtain this budget, but the hospital management refused.

The other ground relied on by the hospital to refuse to accommodate Ms. Duclos raised the issue of the infringement of the other technologists' rights, and the maintenance of team morale. The reduction of staff resulted in a work overload for those who remained.

Furthermore, due to the move toward ambulatory care, hospitalized patients were more onerous cases than previously, which made the technologists' work more difficult. Changes in technology also contributed, in some cases, to making the technologist's work more demanding.

To ease these difficulties, the work was planned in rotation in order to vary the technologists' duties and, especially, to allow them to work in the pulmonary lab, where the work was less sustained. But this was precisely the only room where Ms. Duclos could have worked due to her limitations. By assigning Ms. Duclos only to this room, this would have reduced the opportunities for the other members of the team to work there, particularly since this was the room reserved for pregnant employees.

In this context, the coordinator judged that she could not allow this room to be reserved for Ms. Duclos, since she would thereby have increased the burden of the other technologists' duties. These workers had clearly made it known to the coordinator that they needed this room to give them a bit of occasional relief, and the coordinator felt she could not ask for more sacrifices from her team.

[4] *Syndicat des technologues en radiologie du Québec et Centre hospitalier des Vallées de l'Outaouais (Pavillon de Hull)*, August 12, 1999

This time, the arbitrator Nadeau found for the employer. The only way it could have accommodated Ms. Duclos would have been to hire additional personnel. However, the budget cuts imposed by the government no longer gave it this margin for maneuver.

Conclusion

These are the first cases in which an arbitrator has gone so far, not only in his inquiry into the scope of an employer's duty of accommodation, but also in the practical application of this duty. It will be interesting to see whether other arbitrators, or even higher courts, will follow this path and impose so heavy a burden on the employer to apply its duty of reasonable accommodation without undue hardship.

In the meantime, an employer who wishes to dismiss an employee suffering from a handicap or impairment due to the inconveniences caused to the employer by the employee's state of health, must keep in mind this notion of reasonable accommodation and ensure that it can show, where necessary, why it was unable to accommodate its employee.

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