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Absenteeism and the obligation to accommodate: When the employer is required to consider the measures recommended by the medical experts

By Véronique Morin

In a judgment rendered on February 7, 2006, the Quebec Court of Appeal reiterated the obligations of the employer and the employee to play a role in seeking a reasonable accommodation. In cases where a collective agreement exists, the union has the same obligation.

More specifically, the Court of Appeal required that all the measures envisioned by the different medical experts consulted in the months preceding the administrative dismissal be considered by the employer, and that evidence of such analysis be presented when it is being judicially determined whether the termination of employment for excessive absenteeism should be maintained, regardless of the employer's undeniable patience and tolerance in previous years[1].

Context of the Dispute

In July 2001, the employer proceeded with the administrative dismissal of an employee due to her particularly high absenteeism rate since 1994, and the demonstration of her present and future inability to perform her work on a regular and reasonable basis, based on the conclusions of the two psychiatric experts retained by the employer.

From 1992 to 1994, the employee, who worked as a sales clerk in the employer's Granby establishment, was absent due to various surgical operations and certain physical problems.

When she returned to work in 1994, the employee alleged harassment by her immediate supervisor and her co-workers: relations with her superior were difficult due to her absences and claims to the CSST, which she explained were due to poor ergonomics of her work station and the refusal to improve it, etc. On December 21, 1994, she left work again due to depression and suicidal intentions.

After experiencing difficult family relations and legal disputes with the CSST, the employee returned to work at the end of 1995 but, during the following months, again proved to be depressive and attempted suicide.

In 1996, the employee was assigned to a position as a meter reader, with a new immediate supervisor. This lasted only for a short time because of the medication prescribed for the employee which prevented her from driving, an essential function of a meter reader. The employee was assigned to office work under the authority of a new supervisor.

At the end of 1997, the employee returned to her position as a clerk. However, in the spring of 1998, an administrative reorganization led to the abolition of her position. Despite the provisions of the applicable collective agreement, the employee was not declared redundant but rather was transferred in December 1998 to a position identical to her own, but in her employer's establishment in Drummondville under a new supervisor.

Due to the same characteristics of her workstation, which the employee considered to be non-ergonomic, she claimed to be harassed and again suffered from depression at the end of 1999.

Following a diagnosis of major depression in remission at the beginning of 2000 and different attempts to return to work, the employee progressively started working full time as of the end of 2000, but was absent frequently, sometimes without prior notice or after requesting leave the same day.

In January 2001, the employee's supervisor met with her and explained that her presence at work was important, that she could not be absent without prior notice except for serious reasons and that she should be aware of the consequences of her absences on both the planning of work and the workloads of her two sales clerk colleagues.

[1] *Syndicat des employées et employés de techniques professionnelles et de bureau d'Hydro-Québec, section local 2000 (SCFP-FTQ) v. Hydro-Québec* 2006 QCCA 150.

The employee continued to be absent regularly and, in some cases, requested leave the same day, with the result that the employer required a medical certificate for each new absence following a meeting on February 8, 2001.

At that meeting, the employer informed the employee that she should think about whether it was appropriate for her to attend the sales group's annual conference, in view of her repeated absences in the past few months, but did not prohibit such attendance. After this meeting, the employee no longer came to work for various reasons (her daughter's illness, moving, an injury during her move). Despite repeated attempts, it was difficult for her employer to obtain information about her health.

After having received a medical certificate from the employee's attending physician on May 11, 2001, she was summoned to a meeting by her employer who, noting her health status and relying on the report of one of the experts it had retained, proceeded with her administrative dismissal on July 19, 2001.

The Experts' Evidence

In its judgment, the Court of Appeal summarized the experts' evidence in the employer's file for the period from September 2000 to June 2001.

In September 2000, a first psychiatrist consulted by the employer diagnosed a major depression in remission and a mixed personality disorder with borderline traits and dependency traits. However, this expert did not observe any functional limitation that would justify a total disability. He concluded that the future will be in the image of the past and that the employee will always be more fragile than average when faced with the vagaries of life. He recommended a progressive return to work spread over three weeks, at the rate of two days a week, to be increased by one day a week until completion, with prescription of a medication, and reserved prognosis regarding the employee's capacity to function in the long term.

In May 2001, the second psychiatrist retained by the employer felt that the employee would continue to have difficulties in adapting, which difficulties were inherent in her borderline personality disorder. Like the first psychiatrist, he did not detect any psychiatrically disabling pathology or symptomatology, and believed that the employee's incapacity to return to work was more related to workplace conflicts with her superior and colleagues, to which an administrative solution should be applied. He reserved his prognosis regarding the employee's capacity to provide regular work, but suggested that the employee could benefit from psychotherapy.

In June 2001, at the request of the employee's attending physician, a third psychiatrist identified an adjustment disorder and borderline personality traits, the consequences of which could be regulated by taking medication. This psychiatrist recommended that the employee not work until the workplace conflicts were settled through the intervention of a mediator.

A fourth and last psychiatrist, retained by the union, and whose conclusions were unknown to the employer at the time of the administrative dismissal, diagnosed a severe adaptive disorder with mixed and depressive mood, as well as a personality disorder. Although complex, the employee's case involved a "psychiatric" aspect and a "workplace conflicts" aspect. Even though the psychiatric disorders may have been inflamed by the workplace conflicts, the latter should be addressed by an administrative solution. This psychiatrist concluded that the employee was incapable of returning to work effectively in the current state of affairs because the principal stressor was the workplace conflicts. Any return to work envisioned should be progressive and involve a complete change of work environment with psychotherapeutic support.

The Court of Appeal's Judgment

The Court of Appeal overturned the conclusions of the grievance arbitrator and the Superior Court. Both had upheld the administrative dismissal of the employee in the absence of a reasonable accommodation without undue hardship: the employee's state of health (including significant deficiencies in her adaptation mechanisms) would have required the recurrent creation of a new work environment with new superiors and colleagues for the employee in a context where different stressors, such as family relations, would have been added and would have been beyond the employer's control.

Before the Court of Appeal, the employer and the union presented opposing arguments regarding the existence of evidence concerning the impossibility to accommodate the employee without undue hardship for the employer.[2]

In its judgment, the Court of Appeal reiterated the criteria established by the Supreme Court of Canada in the *Meorin* case[3].

The rationality of the objective of a standard of attendance and regular work performance

The Court of Appeal clearly recognized that the employer had proved that the standard of attendance and regular work performance that was invoked had a rational purpose in accordance with the first stage of the test established in the *Meorin* case; this obligation to perform work being recognized in Article 2085 of the Civil Code of Québec:

> **"[TRANSLATION] [68] It seems obvious to me that a standard requiring an employee's regular attendance and regular work fulfills an objective rationally related to the performance of the work. It is patently obvious that there cannot be adequate and efficient performance of the work without regular work performance. (...)**
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> [...]

[2] Before the Court, however, the parties agreed on the applicable control standard, namely that of correctness regarding an arbitration decision interpreting and applying a law of public order such as the *Charter of Human Rights and Freedoms* when an employee's handicap and the reasonable occupational requirement defence according to Section 20 of that *Charter* were raised.

[3] *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3.

[70] There is no need to address this question at greater length. It is unnecessary to devote much time to this stage when the general purpose of the standard is to allow the sure and efficient performance of the work, which is the case, in my opinion, of a standard intended to ensure regular work. To ensure that the work is performed efficiently, an employer is entitled to expect that the tasks it assigns to its employee, and for which it pays the employee, are performed on a regular basis."

The adoption of this standard and the sincere belief in its necessity

According to the second stage of the test specified in the *Meorin* case, the Court of Appeal required the employer to prove that it has adopted the standard of attendance and regular work performance in the sincere belief that it was necessary to the achievement of the objective sought. The Court quickly settled this issue:

"[TRANSLATION] [72] (...) Hydro-Québec, like any employer, has adopted a standard of attendance and regular work performance, in good faith and in the sincere belief in its necessity. This general standard, as I mentioned previously, is consistent with the usual rules of Labour law."

The reasonably necessary nature of the standard adopted, without undue hardship for the employer

In its analysis of this third stage of the test established in the *Meorin* case, the Court of Appeal stated that the employer should have proved that the possibilities of accommodation identified by the different medical experts had been analyzed to establish that their application would have involved an undue hardship for the employer.

The Court of Appeal was of the view that the employer did not prove that it had, as of the date of its decision to proceed with the administrative dismissal, considered all the reasonably possible accommodation measures previously expounded.

Although the Court of Appeal expressly recognized that the employer cannot be accused of having applied the standard of attendance and regular work performance blindly or arbitrarily, and despite the patience and tolerance of the employer, and its various reassignments of the employee, the Court of Appeal was of the view that the employer had not proved that it had followed up on the reasonable accommodation measures proposed.

Indeed, even though the employer acted in good faith, it based itself exclusively on the past circumstances and on the unfavourable prognoses contained in the various experts' reports, without sufficiently considering the suggestions contained in these same reports and then discussing them with the parties involved, namely the employee and the union, particularly with regard to an administrative solution to the workplace conflicts with psychotherapeutic support.

In its reasons, the Court of Appeal emphasized that the search for a reasonable accommodation is not exclusively the employer's responsibility and that the employee and the union must cooperate.

Similarly, the judgment noted the eminently special nature of the facts in dispute: in this case, the experts' reports in the court record could not establish a total incapacity of the employee to provide any work in the foreseeable future:

"[TRANSLATION] [98] (...) The experts agree that there is no psychiatric pathology justifying a total incapacity to work. Although they reserve their prognoses regarding the future capacity of Ms. L... to provide sustained work, these prognoses largely depend on the fact that the workplace conflicts persisted and that the parties have not attempted to agree in order to resolve them. The experts also agree that the settlement of the workplace conflicts would greatly improve Ms. L...'s chances of being able to provide regular and sustained work. I believe that it would be inappropriate to set aside their conclusions, that is to say that an administrative solution should be applied to the workplace conflicts."

The Court thus concluded that the contents of the experts' reports should have been considered in their entirety in order to evaluate the validity of the administrative dismissal and that the accommodation measures suggested by the experts retained by the employer should have been analyzed (for example: a progressive return to work or a part-time work schedule, even if the employer had no part-time employees in its work force at that time). These measures should have been envisioned, in the absence of evidence of undue hardship.

In conclusion, the Court of Appeal's judgment repeated the different factors relevant to the determination of an employer's obligation to accommodate: financial cost, disruption of a collective agreement, employee morale, interchangeability of members of the work force and facilities, safety, possible risks, etc.[4]

Conclusions

Even though the Court of Appeal recognized the employer's good faith and its "*almost irreproachable*" conduct, the Court's final comments are food for thought.

The Court affirmed that the patience or tolerance shown by an employer in the past cannot constitute an accommodation measure.

Such an employer must establish that it has fulfilled its obligation from the time it became aware of the employee's handicap and of the measures that might enable the employee to provide work:

"[TRANSLATION] [102] (...) The obligation to accommodate requires the employer to be proactive and innovative, meaning that it must take concrete actions to accommodate, or else prove that its attempts are in vain and that any other solution, <u>which must be identified</u>, would impose undue hardship on it. It is not enough to affirm that there are no other solutions - this must be proved." (our underlining)

[4] *Alberta Human Rights Commission v. Central Alberta Dairy Pool* [1990] 2 S.C.R. 489, page 521.

It is clear that an employer's obligation to accommodate, as defined by our courts, may seem almost unlimited. The hardship is acceptable except if it is undue.

The good news: the Court of Appeal invites not only the employer to be proactive and innovative, but the employee and the union as well. The obligation to accommodate is not a one-way street and presupposes real cooperation between the parties.

The Court of Appeal explicitly emphasized that the dispute submitted involved special circumstances. However, in view of the judgment, a prudent employer should ensure that it has analyzed, with the players concerned, the feasibility of the measures enunciated by the experts consulted, the employee and the union (as the case may be) at the time the decision is made, considering all of the factors in the file. Every avenue must be explored before it is rejected, and decisions must be documented.

The concrete analysis of the potential accommodation measures performed at the time of the decision to terminate the employment relationship and the content of such analysis should generally serve as satisfactory evidence of the efforts of the employer, that the employer can offer, as the case may be, to the adjudicators, if no solution could have been found between the parties.

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