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DISABILITY AND DUTY TO ACCOMMODATE: THE SUPREME COURT OF CANADA ALLOWS THE EMPLOYER'S APPEAL.

An employer cannot automatically apply the clauses of the collective agreement providing for the termination of the employment relationship at the expiry of the maximum period of absence for disability stipulated, but the employee has the burden of demonstrating his or her capacity to return to work in a foreseeable future.

By: Mtre. Véronique Morin

On January 26, 2007, the Supreme Court of Canada issued a judgment that was much anticipated by the labour law community.

The case of *McGill University Health Centre (Montreal General Hospital)* v. *Syndicat des employés de l'Hôpital général de Montréal* (2007 CSC 4) provides employers, unions, employees and courts with essential pointers for determining the respective duties of the parties in the context of disability, taking into account the individualized nature of the accommodation process.

THE FACTS

An employee took a leave of absence from work on account of depression. She availed herself of the rehabilitation period provided for under the collective agreement and an extension of that period but was unable to resume full-time work at the dates successively fixed and, in the meantime, had a car accident. The employer notified the employee of the termination of her employment relationship following the expiry of the three-year period of disability provided for in the collective agreement.

At the time of the arbitration, the employee was receiving total disability benefits from the SAAQ and the date of her return to work was still undetermined.

THE JUDGMENT: The Supreme Court of Canada confirmed the arbitration award dismissing the grievance.

The main reasons given by the majority (six of the nine judges) were as follows:

- the parties to a collective agreement may negotiate clauses to ensure that sick employees return to work within a reasonable period of time;
- the establishment of a maximum period of time for absences is a form of negotiated accommodation, indicating that the parties agreed that the employer is entitled to terminate the employment after such period;
- a clause respecting the maximum period of absence without termination of employment cannot apply automatically; each case must be dealt with based on its particular circumstances;
- in assessing the individual accommodation required in a specific case, the parties should analyze the relevant clauses of the collective agreement (for example, the clauses addressing the maximum absence period and returning to work part-time);
- depending on the circumstances and the clauses negotiated by the parties, a court may take into account the maximum absence period that has been agreed upon when assessing the employer's evidence of undue hardship;

- undue hardship resulting from the employee's absence must be assessed globally starting from the beginning of the absence, not at the expiry of the three-year period of disability; and
- the duty to accommodate is neither absolute nor unlimited: the employee must do his share in the attempt to arrive at a reasonable compromise and show his capacity to return to work within a reasonable period of time if, in his opinion, the accommodation provided for in the collective agreement is insufficient in view of the circumstances.

The other three judges of the Court were of the opinion that a clause specifying the maximum period of absence for disability before the employment relationship is terminated does not automatically constitute evidence of discrimination requiring the employer to show that it complied with its duty to accommodate. In each case, the period thus provided for in the agreement must be assessed depending on the nature of the employment and other relevant factors, such as the protections granted under provisions of labour laws that are of public order.

These three judges concluded that protection of the employment relationship for a maximum disability period of three years was not presumptively discriminatory and that the employer was not required to justify his decision.

THE PRACTICAL IMPACTS

In the next few days, our firm will issue a more detailed information bulletin on the reasoning in this judgment.

In the meantime, the members of our firm's labour and employment group will be pleased to help you analyze the implications of the guidelines reiterated by the Court respecting discrimination and the duty to accommodate, whether for your organization in general or with respect to a specific matter.