IN FACT AND IN LAW

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Disability and the duty to accommodate:

Loss of seniority and loss of employment clauses are still relevant!

By Isabelle Gosselin

The Supreme Court of Canada recently handed down a highly anticipated judgment in *McGill University Health Centre (Montreal General Hospital)* (the "MUHC") vs. *Syndicat des employés de l'Hôpital Général de Montréal* (2007 SCC 4). This case sets out the scope of an employer's obligations with regards to the application of the provisions of a collective agreement regarding loss of seniority and employment in the event of an absence for disability of an employee, with respect to its duty of reasonable accommodation stemming from the protection against discrimination based on a handicap under the *Charter of Human Rights and Freedoms*[1].

The Supreme Court of Canada unanimously allowed the appeal by the MUHC and quashed the decision rendered by the Quebec Court of Appeal on March 18, 2005.

The facts. The employee, a medical secretary with the MUHC, took a leave of absence from work on account of a nervous breakdown. After attempting a gradual return to work several times, she had an automobile accident which prevented her from returning to work full time, thereby extending her leave of absence. The employee was therefore not able to return to work within the 36-month period provided for in the loss of seniority and termination of employment clause in the collective agreement. Relying on this clause, the MUHC terminated her employment.

[1] R.S.Q., Chapter C-12, hereinafter the "*Charter*".

Both at the time of the termination of the employee's employment and that of the arbitration, no return to work was foreseeable and the employee was still receiving full disability benefits from the SAAQ.

Prior judgments

The grievance arbitrator confirmed the termination of the employment relationship, noting that the employee, for medical reasons, was totally incapable of performing the usual duties of her position or of any other comparable position. He concluded that the MUHC had accommodated the employee by granting her rehabilitation periods more generous than were provided for in the collective agreement. The arbitrator therefore held that the loss of seniority and termination of employment clause found in the collective agreement was not discriminatory within the meaning of the *Charter* and that it was applied by the employer without discrimination.

The Superior Court refused to intervene following the motion for judicial review brought by the union on the grounds that there was no illegal discrimination towards the employee because she was still unable to return to work in the foreseeable future, at the expiry of the period provided for in the collective agreement .

The Court of Appeal quashed this judgment and the arbitration award. It held that the automatic application of a loss of seniority and termination of employment clause infringes the right to protection against discrimination based on a handicap guaranteed by the *Charter* in that it does not take into account the employee's actual situation, needs and abilities. The Court concluded that the arbitrator had not assessed the reasonable accommodation issue on an individualized basis but had instead merely applied the provision of the collective agreement mechanically.

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This Court of Appeal judgment raised concern among employers, who wondered if there was any point in negotiating and agreeing with the union on whether such a loss of seniority and termination of employment clause should be included or kept in a collective agreement in the case of a prolonged absence.

The Supreme Court of Canada judgment

The Supreme Court analysed the scope of the duty to accommodate and set out certain guidelines to help parties determine their respective obligations in the context of a disability, given the individualized nature of an accommodation process.

Reasons of the majority

The majority judges were of the opinion that a collective agreement plays an important role in determining the scope of the employer's duty to accommodate and that, in the specific case of the MUHC, the three-year period provided for in the collective agreement constitutes reasonable accommodation.

At the outset, the Honourable Deschamps J., writing for the majority, confirmed the right of the employer to establish measures, in good faith, to ensure the attendance of employees and to ensure that they do their work. It was thus recognized that the parties to a collective agreement have the right to negotiate clauses which ensure the return to work of disabled employees within a reasonable time. If this valid objective is recognized, the establishment of a maximum period of time for absences is thus a form of negotiated accommodation. In this regard, Deschamps, J. issued the following reasoning:

> **"The fact that such a period of time has been negotiated and included in the collective agreement indicates that the employer and the union considered the characteristics of the enterprise and agreed that, beyond this period, the employer would be entitled to terminate the sick person's employment. The consensus that has been reached is significant, because it was reached by the people who are most familiar with the particular circumstances of the enterprise, and also because these people were representing different interests. It can therefore be assumed that the clause has been negotiated in the mutual interest of the employer and the employees. [...] Considered from the perspective of the duty to accommodate, this clause, like the right to return to work part time, is among the measures implemented in the enterprise to enable a sick employee to be accommodated."** [2]

Deschamps J. recalled the principle that the parties may not limit a person's fundamental rights in a collective agreement. In this sense, the collective agreement cannot provide for a level of protection that is lower than the one to which employees are entitled under the *Charter*, as the *Charter* prevails and forms an integral part of the collective agreement. Accordingly, the period provided for in the collective agreement for the loss of seniority or termination of employment cannot be less than what is required according to the principles inherent in the duty to accommodate depending on the circumstances. "*Reasonable accommodation is thus incompatible with the mechanical application of a general standard*."[3] Accordingly, a grievance arbitrator must review the standard provided for in the collective agreement to ensure that applying it would be consistent with the employer's duty to accommodate. The majority thus reiterated the individualized nature of the process for assessing the duty of reasonable accommodation, which varies depending on the characteristics specific to each business and each employee, as well as according to the particular circumstances surrounding the decision.

Deschamps J. also noted that accommodation is not necessarily a one-way street, which implies that when an employer makes a proposal that is reasonable, it is incumbent on the employee to facilitate its implementation: "*If the accommodation process fails because the employee does not co-operate, his or her complaint may be dismissed*."[4]

Although a clause providing for the loss of seniority and termination of employment cannot be applied without taking into account the principles involved in reasonable accommodation, the usefulness of such a clause for the parties is described in the following extract of the Supreme Court judgment:

> **"Thus, although a clause providing for termination of the employment relationship after a specified period is not determinative, it does give a clear indication of the parties' intention with respect to reasonable accommodation. It is accordingly a significant factor that an arbitrator must take into account in considering a grievance. In these circumstances, and depending on the duration of the authorized period of absence, such a clause can serve as evidence of the maximum period beyond which the employer will face undue hardship. This evidence may prove very useful, especially in the case of a large organization, where proving undue hardship resulting from an employee's absence could be complex."** [5]

In this case, the majority of the Supreme Court held that the loss of seniority and termination of employment clause found in the collective agreement with the MUHC was not applied by the arbitrator in a factual void. Contrary to the Court of Appeal, it was of the opinion that the arbitrator did not limit himself to automatically applying the clause of the collective agreement :

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2 Paragraph 19 of the judgment.

3 Paragraph 22 of the judgment.

4 Paragraph 22 of the judgment.

5 Paragraph 27 of the judgment.

"The arbitrator took into account not only the accommodation measures granted by the Hospital, which had agreed to rehabilitation periods longer than those provided for in the collective agreement, but also the dynamics leading to the failure of the attempt to return to work before the expiry of the three-year period and, finally, the state of Ms. Brady's health after the employer's decision." [6]

In this regard, the undue hardship resulting from an employee's extended absence must be assessed globally, as of the time the employee begins his or her leave of absence, not at the end of the period provided for in the collective agreement for the loss of seniority and employment. This reduces the heavy burden which could result from a new assessment of the accommodation measures and undue hardship at the end of the period indicated in the collective agreement: all steps taken by the employer during the employee's entire leave of absence must be taken into consideration in assessing the duty to accommodate and undue hardship.

Deschamps, J. concluded her analysis with this eloquent and telling description of the scope of the duty to accommodate:

"The duty to accommodate is neither absolute nor unlimited. The employee has a role to play in the attempt to arrive at a reasonable compromise. If in Ms. Brady's view the accommodation provided for in the collective agreement in the instant case was insufficient, and if she felt that she would be able to return to work within a reasonable period of time, she had to provide the arbitrator with evidence on the basis of which he could find in her favour." [7]

Reasons of the other three Supreme Court justices

The Honourable Abella, J., writing for the other three judges, also allowed the appeal by the MUHC, but for different reasons.

They essentially entrenched the decision of the arbitrator, holding that the employer did not discriminate in refusing to maintain the employment relationship with an employee who, in the opinion of her doctor, was still unable to return to work after three years of absence due to disability. These judges recalled that not every distinction is discriminatory and that it is the employee who bears the burden of proving a *prima facie* case of discrimination [8].

These judges held that clauses setting a maximum period of absence without loss of employment and seniority do not automatically represent *prima facie* discrimination [9]. Designating such clauses as presumptively discriminatory, and thus creating a duty of reasonable accommodation, may remove the incentive to negotiate mutually acceptable absences [10].

Regardless of the reasonableness of the duration of the protection, the judges opposed the idea that by filing a grievance, an employee could still render the clause's term meaningless, shifting the burden to the employer to explain why it was reasonable to terminate a particular employee [11].

They also found that it would have an unwanted effect, in that it would leave disabled employees without the lengthy guarantee of job and seniority protection such clauses offer. The resulting protection is significantly longer than the applicable employment standards legislation. They do not unfairly disadvantage disabled employees. Instead, these clauses acknowledge that employees should not be at unpredictable risk of losing their jobs when they are absent from work due to disability [12].

Thus, the loss of seniority and termination of employment clauses represent a trade-off between an employer's legitimate expectation that its employees will perform reasonable work and employees' expectations that they will not suffer an arbitrary disadvantage due to their state of health [13].

It was up to the employee to show that she was the victim of discrimination due to her disability, which would have forced the employer to justify its decision to terminate her employment. In other words, even before deciding the issue of the duty to accommodate, the arbitrator had to determine whether the collective agreement was *prima facie* discriminatory. To do so, he had to assess the length of time provided by the clause negotiated by the parties, the context of the nature of the employment and other relevant factors [14].

In this regard, the judges concluded that the maximum three-year leave period provided by the collective agreement gave extensive protection from job loss caused by disability, as an employee can only lose his or her job if, after three years, he or she continues to be "totally incapable of the usual duties of his or her job or of any other comparable, similarly compensated job." [15]

Conclusions

The reasons expressed by the Supreme Court in this recent judgement set out the following guidelines:

- It is still advisable to negotiate loss of seniority and termination of employment clauses of reasonable duration in a collective agreement.

6 Paragraph 35 of the judgment.

7 Paragraph 38 of the judgment.

8 Paragraphs 49 and 50 of the judgment.

9 Paragraph 54 of the judgment.

10 Paragraph 55 of the judgment.

11 Paragraph 55 of the judgment.

12 Paragraph 56 of the judgment.

13 Paragraph 57 of the judgment.

14 Paragraph 59 of the judgment.

15 Paragraphs 60 and 61 of the judgment.

- The negotiation of such clauses must take into account the particular context of the business.
- Loss of seniority and termination of employment clauses should include the possibility of a progressive return to work, of rehabilitation and of other measures which could be put into place in the business in the case of extended disability.
- The usefulness and relevance of such clauses will come to light when a court has to determine whether the employer has fulfilled its duty to accommodate before giving effect to a loss of seniority and termination of employment clause.
- However, the period provided for in such clauses may not necessarily constitute the accommodation measure to which an employee is entitled, as the determination of that measure is based on variables and should be appreciated in the specific context applicable to each case.
- Several steps are important before applying loss of seniority and employment clauses, including a serious assessment of the employee's medical condition and his or her ability to return to work in the foreseeable future.

It will be very interesting to see what scope and interpretation will be given to this Supreme Court judgment by administrative tribunals and the courts in the various situations to which it could apply, including last chance or return to work agreements and non-unionized environment.

Isabelle Gosselin
514 877-2960
igosselin@lavery.qc.ca

You may contact any of the following members of the Labour and Employment Group regarding this bulletin.

At our Montreal office

Pierre L. Baribeau	514 877-2965
Jean Beauregard	514 877-2976
Monique Brassard	514 877-2942
Denis Charest	514 877-2962
Michel Desrosiers	514 877-2939
Jocelyne Forget	514 877-2956
Philippe Frère	514 877-2978
Alain Gascon	514 877-2953
Michel Gélinas	514 877-2984
Isabelle Gosselin	514 877-2960
Jean-François Hotte	514 877-2916
Nicolas Joubert	514 877-2918
France Legault	514 877-2923
Guy Lemay	514 877-2966
Vicky Lemelin	514 877-3002
Carl Lessard	514 877-2963
Josiane L'Heureux	514 877-2954
Catherine Maheu	514 877-2912
Isabelle Marcoux	514 877-3085
Véronique Morin	514 877-3082
Marie-Claude Perreault	514 877-2958

At our Quebec City office

Eve Beaudet	418 266-3066
Valérie Belle-Isle	418 266-3059
Pierre Beaudoin	418 266-3068
Claude Larose	418 266-3062
Marie-Hélène Riverin	418 266-3082
Madeleine Roy	418 266-3074

At our Laval office

Pierre Daviault	450 978-8107

Montreal
Suite 4000
1 Place Ville Marie
Montreal Quebec
H3B 4M4

Telephone:
514 871-1522
Fax:
514 871-8977

Quebec City
Suite 500
925 Grande Allée Ouest
Quebec Quebec
G1S 1C1

Telephone:
418 688-5000
Fax:
418 688-3458

Laval
Suite 500
3080 boul. Le Carrefour
Laval Quebec
H7T 2R5

Telephone:
514 978-8100
Fax:
514 978-8111

Ottawa
Suite 1810
360 Albert Street
Ottawa Ontario
K1R 7X7

Telephone:
613 594-4936
Fax:
613 594-8783

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