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The *Hydro-Québec* Case: The Supreme Court Confirms That There are Definitive Limits to an Employer's Duty to Accomodate

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On July 17, 2008, in the case of ***Hydro-Québec*** *v.* ***Syndicat des employé-e-s de techniques professionnelles et de bureau d'Hydro-Québec, section locale 2000 (SCFP-FTQ)***[1]*, the Supreme Court of Canada rendered a unanimous judgment setting aside the ruling by the Quebec Court of Appeal and affirming that the employer had fulfilled its duty to accommodate.*

In this judgment, the Court essentially dealt with two aspects. It analyzed the concept of "undue hardship" in order to clarify the employer's burden of proof, and to limit this burden based on the circumstances specific to each dispute. In addition, the Court reiterated that an employer's duty to accommodate must be assessed globally commencing from the start of the employee's disability period.

In a nutshell, the principles set out in this judgment are of interest to employers, unions and employees, as well as to courts called upon to determine the practical details of a duty to accommodate on a day-to-day basis. However, the conclusions reached with regard to the facts of the dispute demonstrate that there are definite limits to the reasonable duty to accommodate.

Principles recognized in matters of reasonable accommodation: the *McGill University Health Centre* case

On January 26, 2007, the Supreme Court of Canada rendered a judgment much awaited by the labour community.

In *McGill University Health Centre (Montreal General Hospital) v. Syndicat des employés de l'Hôpital général de Montréal*[2], the Supreme Court identified steps that were essential in determining the respective obligations of the parties in a context of disability, given the individualized nature of the accommodation process.

In that case, the Court ruled on the interpretation and application of a collective agreement clause establishing the maximum period of time for absences, with payment of salary insurance benefits, without termination of the employment relationship.

The employee was absent from work because of depression and had benefited from a period of rehabilitation in accordance with the terms and conditions of the collective agreement, as well as an extension of the period. Still unable to return to full-time work on successive scheduled dates, she had a car accident that further delayed the possibility and the timing of her return to full-time work. The employer then notified her of the termination of her employment relationship as a result of the expiry of the three-year period during which the employment relationship was maintained, as provided for in the collective agreement. At the time of the arbitration, the employee was receiving full disability benefits from the S.A.A.Q. and the date of her return to work remained undetermined.

[1] 2008 SCC 43.

[2] [2007] 1 S.C.R. 161.

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In its judgment, the Supreme Court of Canada upheld the dismissal of the grievance and the main reasons given by the majority (6 of the 9 judges) are instructive:

- the parties to a collective agreement can negotiate clauses to provide for the return to work of sick employees 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 have agreed that the employer is entitled to terminate the employment beyond this period;
- a clause concerning the maximum period of time for absences without termination of the employment relationship does not apply automatically but rather in accordance with the specific circumstances of a given case;
- in determining the individualized accommodation required in a particular case, the parties should analyze the relevant clauses of the collective agreement (for instance, those concerning the maximum period of time for absences and part-time return to work);
- depending on the circumstances and the clauses negotiated by the parties, a court may take the negotiated maximum period of time for absences into consideration in its review of the evidence of undue hardship for the employer;
- undue hardship resulting from an employee's absences must be assessed globally starting from the beginning of the absences and not from the expiry of the maximum three-year disability period;
- the reasonable duty to accommodate is neither absolute nor unlimited: the employee must do his/her part in the search for a reasonable compromise and must demonstrate his/her ability to return to work within a reasonable time period, if he/she feels that the accommodations provided for in the collective agreement are insufficient in view of the circumstances.

In this January 2007 judgment, the three other Supreme Court judges thought it necessary to reaffirm the definition of what actually constitutes illegal discrimination.

In their view, not every distinction constitutes a situation of illegal discrimination and a complainant must show that the difference in the alleged treatment results from her membership in a group protected by the relevant provisions of the *Charter of human rights and freedoms.* These three judges recalled that the purpose of the prohibition of discrimination is to preclude arbitrariness and preconceived conclusions regarding the abilities of individuals. Thus, an employer demonstrating that it assessed a person individually adopts a management approach which favours non discrimination.

These three judges therefore concluded that the text of a clause stipulating the maximum period of time for absences before the termination of the employment relationship does not automatically constitute proof of discrimination obliging the employer to show that it discharged its duty to accommodate. In each case, the time period provided for by the agreement must be assessed in accordance with the nature of the job and other relevant factors such as the protections afforded by public order labour law legislation.

In the case at bar, the protection of the employment relationship for a maximum three-year disability period was not discriminatory at first glance and, therefore, the employer was not obliged to justify its decision.

Context of the dispute in the *Hydro-Québec* case

In July 2001, the employer dismissed an employee for administrative reasons because of her high rate of absenteeism since 1994 and the demonstration of her current and future inability to perform work on a regular and reasonable basis. The employer's decision was based on the conclusions of the two expert psychiatrists it had retained to examine the particular case of this employee who was absent because of numerous physical and mental problems and, in particular, a mixed personality disorder accompanied by borderline and dependent character traits.

In its judgment, the Supreme Court explained that the employee's personality disorder resulted in deficient coping mechanisms that affected her relationships with her supervisors and co-workers. This situation continued despite adjustments made by the employer, even including reassignment following the abolition of her position, thus providing her with a benefit beyond the applicable provisions of the collective agreement, during the period starting approximately in 1994 and ending in 2001.

The employee once again failed to report to work as from February 2001 and, in light of the psychiatric assessments on file indicating an unfavourable prognosis regarding the improvement in the employee's attendance at work, she was dismissed for administrative reasons in July 2001.

As appears from the court record, the Supreme Court reiterated the comments made by the arbitrator who dismissed the grievance basing himself, in particular, on the fact that, given the characteristics of the complainant's illness, *"the employer would have to periodically, on a recurring basis, provide the complainant with a new work environment, a new supervisor and new co-workers to keep pace with the evolution of the 'love-hate' cycle of her*

relationships with supervisors and co-workers" in spite of the fact that the complainant's condition was also influenced by factors beyond the employer's control (stress related to the employee's family environment) [3].

The arbitrator's opinion on the existence of undue hardship and his dismissal of the grievance were upheld by the Quebec Superior Court but, as you may recall, the Court of Appeal caused some turmoil by allowing the union's appeal and finding that the employer had not fulfilled its duty to accommodate.

According to the Court of Appeal, the employer had to show that the accommodation possibilities stated by the different medical experts had been examined and that their implementation would have constituted undue hardship under the circumstances, and that this assessment was to be made on the date of the decision to terminate.

While recognizing the existence of a standard of attendance and regular and reasonable performance of work in the case at hand, as well as the particular circumstances of the dispute, the Quebec Court of Appeal urged the employer to be proactive and innovative and also to demonstrate that it had analyzed its duties to accommodate and had fulfilled them from the moment it became aware of the employee's real handicap and, by that very fact, had become aware of the measures to take to allow her to perform her work [4].

Demonstration of undue hardship

The *Hydro-Québec* case gave the Supreme Court of Canada an opportunity to review certain principles regarding the demonstration of undue hardship to be made by an employer.

The Court thus reiterated the three elements of evidence required from an employer in matters of accommodation without undue hardship, as developed in 1999 in the *Meiorin* case [5]:

- the adoption of a standard for a purpose rationally connected to the performance of the job;
- the adoption of this particular standard in an honest and good faith belief that it was necessary to the fulfillment of that legitimate work-related purpose;
- the reasonable necessity of this standard to fulfill the legitimate work-related purpose, by demonstrating that it would be impossible for the employer to accommodate employees who have the same characteristics as the complainant without imposing undue hardship upon the employer.

It was generally understood that this was a heavy burden of proof imposed on the employer, especially with regard to the third element; the union based itself on this third element to contend that the employer had to demonstrate "impossibility".

On the contrary, the Supreme Court stated that "*What is really required is not proof that it is impossible to integrate an employee who does not meet a standard, but proof of undue hardship, which can take as many forms as there are circumstances*" [6].

The purposes of the duty to accommodate are therefore to enable an employee who is able to work to do so and to ensure that persons who are otherwise fit to work are not unfairly excluded where working conditions can be adjusted without creating undue hardship. It follows that an employer must be flexible in applying a standard if flexibility enables the employee in question to perform his or her work without causing undue hardship for the employer [7].

However, the Supreme Court stated that the duty to accommodate may not alter the essence of a contract of employment, *i.e.*, the employee's obligation to perform work in exchange for remuneration [8].

Reiterating the individualized nature of the duty to accommodate as set out in *McGill University Health Centre*, the Supreme Court clearly urged the parties to be flexible in applying the concept of undue hardship by taking all the circumstances into account and, from then on, the characteristics of an illness can be taken into consideration.

It remains that an employer will have to show, having regard to the circumstances, that an employee is unable to perform his or her work in a reasonably foreseeable future despite the accommodations made until then [9].

The time to assess reasonable accommodation

In *Hydro-Québec*, the Supreme Court adhered to the principles it had already established in the case of *McGill University Health Centre (supra)* to thus set aside the conclusion of the Court of Appeal to the effect that the duty to accommodate must be assessed when the decision to dismiss is made.

On the contrary, a global assessment of the duty to accommodate is mandatory and thus must take into account the entire period of time during which the employee is absent [10]:

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3 Paragraphs 5 and 6 of the Supreme Court of Canada's judgment.

4 2006 QCCA 150, paragraph 102 of the Court of Appeal's judgment.

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

6 Paragraph 12 of the Supreme Court's judgment.

7 Paragraphs 13, 14 and 16 of the Supreme Court's judgment.

8 Paragraph 15 of the Supreme Court's judgment.

9 Paragraphs 17 to 19 of the Supreme Court's judgment.

10 Paragraphs 20 to 22 of the Supreme Court's judgment.

"(...) A decision to dismiss an employee because the employee will be unable to work in the reasonably foreseeable future must necessarily be based on an assessment of the entire situation. Where, as here, the employee has been absent in the past due to illness, the employer has accommodated the employee for several years and the doctors are not optimistic regarding the possibility of improved attendance, neither the employer nor the employee may disregard the past in assessing undue hardship." [11]

Moreover, the Supreme Court refused to consider the argument that the employer did not know the nature of the employee's mental problems from the outset of her disability and that, consequently, the measures to accommodate her that were previously implemented could not be taken into consideration in assessing the employer's compliance with its duty to accommodate. In the Supreme Court's view, the Court of Appeal erred in intervening in the determination of the significance of the evidence. The Supreme Court made it clear that:

"Even if the employer had not known the reasons for the complainant's absenteeism at the time it agreed to accommodate her, her personal life, including the record of her past absences, was nonetheless entirely relevant for the purpose of putting the experts' prognosis for the period after February 8 into context." [12]

Thus, in this second aspect of its ruling, the Supreme Court once again emphasized that each case is different and that the preparation of the file, the recording of the factual elements and the analyses made by the employer are exceedingly relevant when assessing its compliance with its duty to accommodate and the possible existence of undue hardship if the employee's and his or her union's claims were accepted.

Conclusion

The Supreme Court of Canada recognized that for several years Hydro-Québec had tried to adjust the complainant's working conditions to her situation (the physical layout of her workstation, a part-time schedule, assignment to a new position, etc.).

Moreover, the employer demonstrated that despite these accommodations, given the employee's chronic absenteeism, she could not return to work in a reasonably foreseeable future and, in this context, it had met its burden of proof and established the existence of undue hardship [13] if other accommodations were to be imposed.

From the time of the judgment rendered in *McGill University Health Centre*, it was established that a reasonable duty to accommodate was neither absolute nor unlimited and that the accommodation should be individualized and, therefore, assessed according to the circumstances specific to each dispute.

Since that judgment, we also know that undue hardship must be assessed globally and, consequently, on the basis of all the events that occurred from the start of the employee's periods of absence.

The Court's judgment in the *Hydro-Québec* case however constitutes a concrete illustration of these principles in light of the specific circumstances of a particular dispute, the outcome of which was awaited by all those involved in the labour community.

However, it is certain that these clarifications made by the Supreme Court by no means exempt an employer from analyzing, on the merits, each situation brought to its attention and that they underscore the importance of building a file recording the relevant facts and analyses conducted to justify the decisions that are made.

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[11] Paragraph 21 of the Supreme Court's judgment.

[12] Paragraph 22 of the Supreme Court's judgment.

[13] Paragraph 17 of the Supreme Court's judgment.

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