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BULLETIN

Duty to accommodate in the workplace

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What is duty to accommodate? I have been injured and do not expect to be able to return to my job in my former full capacity. What are my options?

You have probably been hearing a great deal over the past year about the duty to accommodate. Labour relations practitioners have been working hard to keep up with the huge developments in this area of the law as a result of several Supreme Court of Canada decisions.

What is the duty to accommodate? It arises in the workplace as a result of section 13 of the BC Human Rights Code which states that no one should be discriminated against at their place of employment on various grounds

Section 13: Discrimination in employment

1. A person must not

a. refuse to employ or refuse to continue to employ a person, or

b. discriminate against a person regarding employment or any term or condition of employment because of the race, colour, ancestry, place of origin, political belief, religion, marital status, family status, physical or mental disability, sex, sexual orientation or age of that person or because that person has been convicted of a criminal or summary conviction offence that is unrelated to the employment or to the intended employment of that person.

2. An employment agency must not refuse to refer a person for employment for any reason mentioned in subsection 1.

3. Subsection 1 does not apply

a. as it relates to age, to a bona fide scheme based on seniority, or

b. as it relates to marital status, physical or mental disability, sex or age, to the operation of a bona fide retirement, superannuation or pension plan or to a bona fide group or employee insurance plan.

4. Subsections (1) and (2) do not apply with respect to a refusal, limitation, specification or preference based on a bona fide occupational requirement.

Although many of the areas set out above may apply in a duty to accommodate case, where we most commonly encounter the issue is when someone with a mental or physical disability wishes to return to work.

The founding case from the Supreme Court of Canada is Renaud v. Central Okanagan School District, a 1992 decision. That case set out the duties of both employers and unions to make accommodations and adjustments sufficient to allow a person with particular needs to return work in a way which will allow them to operate within their limitations.

A typical accommodation for a physically disabled person might be to allow the worker to do lighter work, or, where she can no longer do her own job, to move to another job in the workplace which she is capable of doing. For purposes of religious accommodation it might mean that a Seventh Day Adventist is not required to work on Saturdays.

In all cases, it is incumbent upon both the union and the employer to try and make this accommodation to the point of undue hardship. What that may mean will be a matter of the circumstances of each case. A large urban hospital will be better able to find another job for a worker with chronic tendonitis than a small social services agency with only five employees.

Big issues currently facing labour relations practitioners include whether employees must be accommodated across bargaining units where an employer has more than one union in the workplace. Does the "receiving union" have to accept a disabled employee from another union? If so, do they have to allow him to bring his seniority along?

While there is no hard and fast rule, the law generally accepts that seniority is a cornerstone of the collective agreement and it will not be interfered with lightly. It has been held that a unions duty to accommodate is not restricted solely to its own members, but that does not alter the primary obligations of a union not to interfere with the rights of its existing members.

Similarly, the duty imposed on the employer to find a solution to the employees problem is quite stringent. While the employer will not necessarily be required to "create" a new job, they may be required to "cobble together" a bunch of duties which make a viable job for one person. It should also be remembered that the employer is required to work closely with the union in looking for alternatives. Its not good enough for an employer to simply say, "Ive looked for an alternative position but theres nothing there." The employer must satisfy the union that every effort has been made.

In late 1999 two momentous decisions were issued by the Supreme Court of Canada. The Meiorin case and the Grismer case have fundamentally affected human rights in the workplace. More on these developments in our next issue.

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