Arbitrator rules against "perfect" accommodation for phobic technician

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What is the result when an employee whose disability has been accommodated for years requests further, more extensive accommodation, in order to transfer to another location? The answer, of course, will depend on the specific facts of the case, but some indication of the issues to be considered emerges from a recent decision rendered by a British Columbia arbitrator.

The grievor in *NAV Canada v. I.B.E.W.* (October 30, 2001) was a 59 year old technician with over 30 years of service. His job duties required that he visit various remote sites to service navigational systems and equipment. Some of these sites were, at certain times of the year, accessible only by helicopter.

FLYING PHOBIA ACCOMMODATED AT PRINCE GEORGE …

In 1985, the grievor informed the employer that he had a phobic fear of flying. The employer responded by waiving the requirement that he fly. The employer was able to offer this accommodation because, at the Prince George Airport, where the grievor was posted, there were five other technicians in the grievor's classification as well as a working supervisor. Therefore, even though it was required that there be two technicians on each helicopter flight, the employer had sufficient staff to accommodate the grievor without undue hardship. Further, the employer had accommodated the grievor by allowing him to take the train from B.C. to Cornwall, Ontario, rather than flying, in order to attend employee training sessions.

… BUT NOT AT CRANBROOK

However, when, in February 2000, the grievor requested a lateral transfer to a posting at the Cranbrook Airport, the employer turned him down. It asserted that accommodating the grievor's phobia at Cranbrook would constitute undue hardship. In support of its decision, the employer noted that, to service the three remote sites that were at times accessible only by helicopter, it had only two technicians and a supervisor. Moreover, the supervisor himself was being accommodated, as he had refused to fly after having been in a helicopter accident in 1998.

At the hearing into his grievance, the grievor indicated that he had requested the transfer to Cranbrook because the air quality in Prince George had affected his wife's health, and because he planned to retire at Cranbrook. It also emerged that he was eligible to retire on a full pension within less than a year from the time of the hearing.

Witnesses for the employer testified that the only technician at Cranbrook who was willing to fly was a senior person who took most of his annual leave in the winter. It was conceded that the flying requirement did not appear on the job description for the grievor's classification and that, at one of the sites serviced out of Cranbrook, no helicopter flights had been undertaken in 2001.

The union, citing the Supreme Court of Canada decision in *British Columbia (Public Service Employee Relations Commission) v. BCGSEU* (see "Not reasonably necessary": aerobic fitness test held discriminatory in B.C. woman firefighter victory" on our Publications page), argued that the flying requirement was not reasonably necessary for the grievor to work out of Cranbrook. Pointing to the fact that, in over two years, there had been only nine flights to the serviced sites, the union asserted that the added costs the employer would incur by accommodating the grievor did not amount to undue hardship.

The employer countered that it had already accommodated the grievor at Prince George, and that the grievor wanted a further modification for what amounted to personal reasons. After living in Prince George with his wife for 33 years, and being eligible for a full pension in a matter of months, the grievor now wanted "perfect" accommodation for his disability. Granting the grievor's request would amount to an undue hardship for the employer.

GRIEVANCE DENIED

The arbitrator found in favour of the employer, ruling that being able to fly was reasonably necessary to qualify for the position at Cranbrook and that the grievor could not be accommodated without undue hardship. In support of his decision, the arbitrator stressed the differences in circumstances between Cranbrook and Prince George, where the grievor had already been accommodated. Cranbrook had both fewer personnel and a greater requirement for helicopter flights than Prince George.

Given that one employee at Cranbrook was already unable to fly, and another frequently on vacation during the winter, the extra expense and added delays in securing personnel from other facilities when flying was necessary constituted an undue hardship for the employer, particularly in view of the employer's responsibilities:

> "The employer is charged with the high responsibility of providing and servicing navigational aids for safe air travel in Canada. In my view, it is necessary that it do all it can to ensure that when problems arise at any facility, it has the necessary qualified personnel on site with the ability to fly. Here, we have a situation where "the relative interchangeability of the work force and facilities", as noted in [*British Columbia (Public Service Employee Relations Commission) v. BCGSEU*], is so minimal that it amounts to, in my judgment, undue hardship to the employer."

In Our View

In dismissing the grievance, the arbitrator referred to the grievor's desired outcome as the "perfect solution" which must give way to the employer's legitimate work-related needs. This appears to be a reference both to the fact that the employee had been significantly accommodated in the past, and to his relatively personal motivation for requesting the transfer. While the arbitrator stressed in his decision the factors of cost and disruption to the employer's ability to provide a safe navigational system, it is likely that he was also influenced by the circumstances underlying the grievor's reasons for wanting the transfer. The award suggests that, when an employee's request for accommodation arises out of a non-essential request for a new work arrangement, this will figure in the balance of competing interests relevant to the threshold of undue hardship. (For previous articles related to the accommodation of disability, see "The accommodation of disabled employees – a guide to the legal landscape", "The duty to accommodate in action", "Accommodating disability short of undue hardship", "Managing innocent absenteeism in the unionized workplace", "Emerging issues in attendance management", "Discharging the duty to accommodate: Hospital case provides some pointers", "Bill S-5 to amend the *Canadian Human Rights Act*", and "A question of comparison: Appeal Court rules on restrictions to benefits, seniority and service accumulation of disabled employees" on our Publications page.)

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