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Discharging the duty to accommodate: Hospital case provides some pointers

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In our series on accommodating disability (see "The accommodation of disabled employees – a guide to the legal landscape", "The duty to accommodate in action", and "Accommodating disability short of undue hardship" on our Publications page), we discussed the broad themes emerging from the case law, such as the factors bearing on the assessment of undue hardship, the extent of workplace modifications expected of employers, and the level of performance that employers are entitled to expect from accommodated employees. A recent case provides a useful checklist of the types of practical measures employers should consider implementing to demonstrate compliance with the duty to accommodate.

The case, *Ottawa General Hospital v. Ontario Nurses' Association* (December 4, 1997), involved a nurse who, due to a lower back ailment, was placed on sick leave. After being advised that her long term disability (LTD) benefits were to be terminated in four months' time, she contacted the hospital to ask if there was any work available for her to perform. The Hospital arranged for a Functional Abilities Evaluation (FAE) which, in June 1994, confirmed that the nurse was fit to perform only sedentary work, but not any nursing duties as these existed in the Hospital.

The nurse's LTD benefits ceased in July 1994 and, after further testing, she was placed in a part-time clerical position in January 1995 at her nurse's rate of pay and with full-time benefits. She continued to request that more hours be made available, and was eventually returned to a full-time nursing position in October 1996. She grieved, claiming compensation for the period between July 1994 and January 1995, and for loss of income that resulted from the delay this period represented in her rehabilitation and, ultimately, her return to full employment. Her union argued that the Hospital should have placed the grievor immediately into a modified-duty position in July 1994. It also contended that the Hospital should have diverted 'NEER' funds (provided by the Workers' Compensation Board to return employees with work-related injuries to modified duties) to assist in the grievor's accommodation, even though she had not suffered a work-related injury.

A Board of Arbitration, chaired by Michel Picher, dismissed the grievance, ruling that the union's requested remedy would have caused the Hospital undue hardship.

WHAT THE HOSPITAL HAD DONE

In ruling against the grievor, the Board surveyed the evidence of what the Hospital had in fact done to discharge its duty to accommodate. It noted the following about the Hospital's efforts:

- The Hospital had developed procedures regarding accommodation and modified work as part of its attendance management policy.
- In the relevant period, it was accommodating some 46 disabled nursing employees.
- It consulted extensively with the grievor over the period at issue and offered her more work as it became available.
- It arranged for the FAE and then tested the grievor's skills with a view to finding her other duties.
- It placed her in the first available position within her limitations.

NO OBLIGATION TO CREATE UNPRODUCTIVE POSITION

The evidence in the case established that no clerical position had become available before January 1995. The Board noted that, while it accepted the view that the duty to accommodate may extend to making adjustments to existing jobs so that disabled employees can perform them, there was no support in the case law for the proposition that employers had to "create a position which did not previously exist and which cannot be justified from the standpoint of productivity, solely for the purpose of accommodating a disabled employee."

Further, the Board noted, it was especially difficult to justify requiring the Hospital to create a position for the grievor when it had laid off some 50 employees in 1995. The duty of accommodation did not go that far:

"To direct [the Hospital to effectively create a make-work project], particularly in a time when employees were being laid off and there was little turnover, would in our view go beyond the threshold of undue hardship. As important as the duty of reasonable accommodation is to the disabled employee, it cannot be construed as an absolute guarantee of employment, particularly where … the evidence discloses that there was simply no work available for the injured employee to perform."

NO REQUIREMENT TO DIVERT 'NEER' FUNDS TO UNINTENDED PURPOSE

The Board accepted the Hospital's submission that it should not be required to use NEER funds to create work for the grievor. NEER funds enable employers to realize financial gains by minimizing the number of work days lost due to compensable injuries. It was therefore clearly to the advantage of both the Hospital and employees who suffer work-related injuries to allow the employer to restrict NEER funds to their intended purpose. Directing it to do otherwise would force it to deplete an important financial asset for purposes not intended.

In Our View

Employers should consider the measures undertaken by the Hospital in this case. It is important for an employer to be able to establish, in case of dispute, that it has been thorough in attempting to

comply with the legal obligation to accommodate disabled employees. Also, as we noted in our series on accommodating disability, while it seems that employers are not required to create what are clearly 'make-work' positions involving work of dubious necessity, the outcome is less clear where the grievor can demonstrate that a useful position could be created by reassigning existing duties. (For more information, see "Arbitrator rules against "perfect" accommodation for phobic technician" on our Publications page.)

For more information on this subject, please contact Carole Piette, who presented the case on behalf of the Hospital: (613) 563-7660, Extension 227.