Employer's Change to a Gratuitous Benefit is Not a Failure to Accommodate

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The Ontario Divisional Court's recent decision in *City of Toronto v. Canadian Union of Public Employees, Local 79*, 2019 ONSC 4045 concluded that the duty to accommodate was not breached by an employer removing an entitlement to a gratuitous benefit that was based on work performance, even where the benefit had previously been provided to an employee with a disability despite his reduced work schedule. In making its finding, the Divisional Court quashed an arbitrator's award that had come to the opposite conclusion, and concluded that the arbitrator's decision was unreasonable.

The Reduction in Benefits to an Accommodated Employee

The employer in the matter provided differing benefits to unionized employees in two separate bargaining units: one composed of part-time employees, and another composed of full-time employees.

The grievor in the matter was a unionized employee who had initially worked on a full-time basis, and belonged to the full-time bargaining unit. When the grievor was no longer able to work full-time due to disabilities, he received accommodation in the form of a work schedule reduction to four days per week, and then to three days a week. Because the reduction in the grievor's work schedule resulted from an accommodation, he was permitted to remain in the full-time bargaining unit and received the corresponding benefits provided to full-time employees — including paid sick leave for up to 26 weeks per year. This benefit allowed the grievor to consistently draw from his paid sick bank and receive income replacement for days he was unable to work.

In 2016, the employer ended its practice of maintaining part-time employees in the full-time bargaining unit where there was no reasonable expectation that the employees would be able to return to full-time hours. As a result, the grievor was placed into the part-time unit and his previous paid sick leave entitlements were pro-rated accordingly.

A grievance resulted, alleging that the employer's actions amounted to discrimination on the basis of the grievor's disability.

The Arbitrator's Decision

An arbitrator agreed with the grievor, and found that the employer had failed to demonstrate that any undue hardship justified removing the grievor from his previous accommodated position in the full-time unit. The arbitrator accordingly upheld the grievance and ordered that the grievor be returned to the full-time bargaining unit with corresponding full benefits.

The Divisional Court Quashes the Arbitrator's Decision

In its ruling overturning the arbitrator's decision as unreasonable, the Divisional Court found that the arbitrator's decision departed from longstanding case law establishing that it is reasonable and *bona fide* for an employer to require work in return for compensation. Based on this case law, the employer's decision to provide different compensation and benefits to the grievor based on the number of hours he was able to work — and not his disability — did not amount to discrimination. Since changing the grievor's benefits did not amount to discrimination in the first place, the Divisional Court also affirmed that the employer therefore did not need to to demonstrate undue hardship to justify the change.

The Divisional Court's decision went on to find that, in providing the grievor with access to full-time benefits while he was only able to work part-time hours, the employer had provided a gratuitous benefit that "went beyond its legal duty to accommodate the grievor for a long time." In the Divisional Court's view, such gratuitous benefits were not integral to the grievor's accommodation, and could therefore be clawed back at the employer's discretion without contravening the duty to accommodate.

The Divisional Court quashed the arbitrator's decision without remitting the matter back to arbitration, thereby effectively dismissing the grievance in its entirety.

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