Supreme Court of Canada Confirms That the Duty to Accommodate Applies to Workers Injured at their Workplace

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On February 1, 2018, the Supreme Court of Canada[1] confirmed the decision rendered by the Québec Court of Appeal on June 15, 2015, holding that the provisions of the *Act respecting industrial accidents and occupational diseases* (the"AIAOD") regarding the rehabilitation of injured workers and their reinstatement in their positions must be interpreted in light of the Québec *Charter of Human Rights and Freedoms* (the "Charter").

The AIAOD provides a complete compensation scheme for injured workers, but imposes no express duty on employers to accommodate such workers. The Supreme Court has nevertheless confirmed that the duty to accommodate is one of the central principles of the Charter, and one that must necessarily apply to the provisions of the AIAOD. The Supreme Court has thus upheld the principle that all statutes must be construed within the context of the Charter.

Employers are therefore obliged to continue applying the practices they have adopted since July 2015 and to accommodate workers suffering from functional limitations resulting from employment injuries when they return to their jobs. The employer is therefore still required to adapt and adjust the workplace and/or the duties of any worker who has sustained an employment injury, unless such changes would entail undue hardship.

With regards to the employer’s duty to accommodate, we remind you that the employer need not show that it is impossible to accommodate the worker, but rather that no reasonable or practical accommodation is possible under the circumstances. Although the duty stops at the point of undue hardship, the employer must nevertheless be prepared to endure a certain hardship.

The *Commission des normes, de l’équité, de la santé et de la sécurité du travail* (the "CNESST"), for its part, must continue to ensure that employers make genuine efforts, up to the point of undue hardship, to accommodate employees who are able to return to work.

Finally, it is also noteworthy that the Administrative Labour Tribunal, through its Occupational Health and Safety Division, (the "ALT"), retains jurisdiction to determine whether an employer has fulfilled its duty to accommodate a worker returning to his or her job after suffering from an employment injury, before concluding that there is no suitable position available within the company for the employee concerned.

Practical Advice

We therefore reiterate the practical advice that was offered when the Court of Appeal's rendered its decision in July 2015:[2]

- Perform an analysis in order to identify all possible accommodations when the injured worker begins his rehabilitation. Claiming that no suitable employment is available without actually making any efforts to find a position compatible with the worker's limitations will not be sufficient.
- Make a suggestion to the CNESST, when it is performing an analysis of the pre-injury employment, to also evaluate other available positions that could potentially be compatible with the identified functional limitations.
- Create and update, when available, an ergonomic analysis of the requirements for each position in order to be able to provide alternatives or to anticipate undue hardship situations.
- As the expiry of the time limit for exercising the right to return to work approaches, gather all updated medical information in order to evaluate if this right may be exercised, as well as the prognostic of the injury.
- In unionized environments, involve the union in the search for alternatives, since it also has a duty to collaborate with regard to accommodation.

[1] *Québec (Commission des normes, de l'équité, de la santé et de la sécurité du travail)* v. *Caron*, 2018 SCC 3.

[2] Katherine Poirier, "Employment Injury: The employer's duty to accommodate employment injuries is now more onerous," *BLG Publications,* July 13, 2015.

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