

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

December 02, 2019

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 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.

By

[Maciej Lipinski](#)

Expertise

[Labour & Employment](#)

---

## BLG | Canada's Law Firm

As the largest, truly full-service Canadian law firm, Borden Ladner Gervais LLP (BLG) delivers practical legal advice for domestic and international clients across more practices and industries than any Canadian firm. With over 725 lawyers, intellectual property agents and other professionals, BLG serves the legal needs of businesses and institutions across Canada and beyond – from M&A and capital markets, to disputes, financing, and trademark & patent registration.

[blg.com](http://blg.com)

### BLG Offices

#### Calgary

Centennial Place, East Tower  
520 3rd Avenue S.W.  
Calgary, AB, Canada  
T2P 0R3

T 403.232.9500  
F 403.266.1395

#### Ottawa

World Exchange Plaza  
100 Queen Street  
Ottawa, ON, Canada  
K1P 1J9

T 613.237.5160  
F 613.230.8842

#### Vancouver

1200 Waterfront Centre  
200 Burrard Street  
Vancouver, BC, Canada  
V7X 1T2

T 604.687.5744  
F 604.687.1415

#### Montréal

1000 De La Gauchetière Street West  
Suite 900  
Montréal, QC, Canada  
H3B 5H4

T 514.954.2555  
F 514.879.9015

#### Toronto

Bay Adelaide Centre, East Tower  
22 Adelaide Street West  
Toronto, ON, Canada  
M5H 4E3

T 416.367.6000  
F 416.367.6749

The information contained herein is of a general nature and is not intended to constitute legal advice, a complete statement of the law, or an opinion on any subject. No one should act upon it or refrain from acting without a thorough examination of the law after the facts of a specific situation are considered. You are urged to consult your legal adviser in cases of specific questions or concerns. BLG does not warrant or guarantee the accuracy, currency or completeness of this publication. No part of this publication may be reproduced without prior written permission of Borden Ladner Gervais LLP. If this publication was sent to you by BLG and you do not wish to receive further publications from BLG, you may ask to remove your contact information from our mailing lists by emailing [unsubscribe@blg.com](mailto:unsubscribe@blg.com) or manage your subscription preferences at [blg.com/MyPreferences](http://blg.com/MyPreferences). If you feel you have received this message in error please contact [communications@blg.com](mailto:communications@blg.com). BLG's privacy policy for publications may be found at [blg.com/en/privacy](http://blg.com/en/privacy).

© 2024 Borden Ladner Gervais LLP. Borden Ladner Gervais LLP is an Ontario Limited Liability Partnership.