An Update on the Duty to Accommodate

Date: September 17, 2012

Lawyers You Should Know: Maria Kotsopoulos

Original Newsletter(s) this article was published in: Employment Notes: September 2012

Some recent arbitration decisions dealing with the duty to accommodate highlight the interplay between the various workplace parties in the development of an individual's accommodation plan. These cases affirm that meaningful participation is required by all workplace parties. The employer, the employee and the union must cooperate in the process with the ultimate aim being an employee's successful return to work where possible. From time to time, other employees in the bargaining unit will also be impacted in the accommodation process.

A Refresher on the Duty to Accommodate:

The *Human Rights Code* (the "Code") entitles people to equal treatment with respect to employment without discrimination because of any of the enumerated grounds. Arising from this entitlement is the duty and the related right to be accommodated in one's position. In some instances, the duty to accommodate requires employers to alter the terms of employment or the conditions of the workplace in order to enable an employee to perform the essential functions of his or her job. The duty to accommodate recognizes that each person's needs will be different and unique. As such, each case must be assessed individually and, where reasonable, an accommodation provided that permits the individual to perform or fulfill the essential duties or requirements of his or her employment short of undue hardship. Where an individual is incapable of fulfilling the essential duties or requirements of his or her job, however, a failure to accommodate the employee's needs may not breach the *Code*.

Recent Statements on the Duty to Accommodate:

EMPLOYEES MUST PARTICIPATE IN THE ACCOMMODATION PROCESS

In *Star Choice Television Network Inc. v Tatulea* (February 2012) the dismissal of an employee was upheld by an arbitrator under the *Canada Labour Code*. The basis for doing so included the employee's failure to participate in the accommodation process.

Mr. Tatulea started work with Star Choice in April 2008 as a Customer Service Agent. At the end of 2009, he took time off work and requested leave with pay due to neck pain and cervical strain. His physician had recommended a three week leave of absence. Mr. Tatulea filed a claim with the Commission de la Santé et de la Securité au Travail in Quebec and applied for short term disability benefits. Both claims were denied. The employer, however, recommended and offered to provide accommodation to Mr. Tatulea in his position on two separate occasions.

Upon further communications from the employee's physician recommending another leave of absence and the employee's claim for long term disability benefits, the employer continued its attempts to communicate with Mr. Tatulea in order to facilitate his return to work. At Star Choice's request, Mr. Tatulea agreed to see a physiatrist who diagnosed him with fibromyalgia. Upon being advised that his failure to cooperate could result in termination, Mr. Tatulea then agreed to be examined by specialists. Star Choice recommended and offered Mr. Tatulea a six week program of accommodation to facilitate his successful return to work, which included physiotherapy and occupational therapy, as well as reduced and modified hours of work. Mr. Tatulea attended on the first day but left and ultimately refused to participate in any part of the accommodation plan. He also ceased communications with Star Choice. The employer tried to discuss with Mr. Tatulea his return to work on subsequent occasions, but he would not participate in these discussions. Star Choice terminated his employment.

In discussing the duty to accommodate, the arbitrator found that Star Choice had made numerous requests and reasonable attempts to "originate a solution" and facilitate the employee's return to work through offers of accommodation, but that the employee did not live up to his part of the bargain "to assist and cooperate" [paragraph 44]. In ultimately upholding the termination, the arbitrator concluded that Mr. Tatulea provided no valid reason for his refusal to cooperate or communicate with his employer's reasonable accommodation plan.

EMPLOYEES MUST ASK FOR AND REQUIRE ACCOMMODATION

In *Canadian Mental Health Association v the Ontario Public Service Employees Union Local 133* (February 2012) the Union grieved the termination of probationary employee with epilepsy on the basis that her termination was discriminatory and in contravention of the collective agreement. In ultimately dismissing the grievance, the arbitrator commented upon the content of the employer's obligation to accommodate.

The grievor started work with the Association in a contract crisis response position as a crisis worker. Her contract included a probationary period. Subsequent to her hire, and following various meetings at which the grievor received feedback on her performance, the grievor disclosed that she had a medical condition, namely epilepsy, and that she took medication from time to time. The employer acknowledged that it would attempt to provide accommodation to her, if it was required, specifically with respect to the length of her shifts. The Association advised the grievor that she should advise if accommodation was necessary at any time.

In cross examination, the grievor agreed that neither her epilepsy nor her medication had anything to do with any of the performance issues identified by the Association to her. She also confirmed that she did not ask for accommodation. Nonetheless, the grievance alleged that her termination was discriminatory on the basis that the Association did not give her a proper chance to demonstrate her ability to do the job with accommodation. On behalf of the grievor, the union submitted that the Association was in the best position to investigate and assess the grievor's needs and the potential accommodations which could be made available to her and that it was not up to the grievor to tell the employer what her needs where. In short, the union submitted that the employer simply did not do enough from a procedural perspective under either the collective agreement or the *Code*.

In addressing the issue of the employer's duty to accommodate, the arbitrator held that there was no evidentiary basis upon which he could conclude that it was more probable than not that the employer knew or reasonably ought to have known that the grievor had epilepsy before she disclosed it to her supervisor. Further, there was no evidence that she had experienced any seizures or displayed any symptoms which could reasonably have been attributed to epilepsy during her earlier volunteer periods with the employer. Ultimately, the arbitrator concluded, *in the context of the facts of this case*, that the employer was not required to investigate further after the grievor indicated that she did not need accommodation.

THE DUTY TO ACCOMMODATE MAY TRUMP SENIORITY RIGHTS

In *Chatham-Kent Professional Firefighters Association v The Municipality of Chatham-Kent* (June 18, 2012), an arbitrator considered the interplay between the duty to accommodate and seniority rights under a collective agreement and concluded that the duty to accommodate outweighed seniority rights with respect to a posted position.

In this case, the Association grieved the decision of the Municipality to deny an upcoming vacancy to the grievor. The grievor was the only proposed applicant to the position and he had passed the requisite exams for the position. However, prior to the posting, another employee had gone off on disability. In fact, the employer's evidence was that it was the only position in which this other employee could be successfully accommodated within the bargaining unit. The Municipality conceded during the course of the hearing that the grievor was qualified for the position and that in the normal course he would have been awarded the position but for the rights of the other employee under the *Human Rights Code* and the collective agreement. The Municipality argued that in the circumstances, the other employee's rights trumped those of the grievor to the position.

In discussing the interplay between seniority rights and the duty to accommodate, the arbitrator confirmed that an employer is neither required nor permitted in all cases to displace another employee in order to accommodate an employee with a disability. However, vacant positions are properly considered to be available for accommodation purposes and seniority rights may have to give way to the duty to accommodate in certain cases.

Conclusions

These cases illustrate the need for all parties involved in the accommodation process to work together to try and find a solution where possible. Whereas employers are required to “originate a solution”, this process necessarily involves the employee. Employees must be forthcoming with information regarding their specific needs when requesting accommodation and employers must do what is possible to the point of undue hardship to allow the employee to fully participate in his or her employment. But, the employer and the employee are not always the only participants in the accommodation process. In some instances, the rights of other employees may be affected. While arbitrators have concluded that employers need not necessarily bump employees or create new positions, negotiated terms under a collective agreement, including seniority rights, may be weighed against the overarching duty to accommodate. The process involves careful consideration, appropriate information and meaningful discussion.