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The *Hydro-Québec* Decision: Restoring Balance to the Accommodation Analysis

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INTRODUCTION

Following on the heels of its recent decisions in *McGill University Health Centre* and *Honda Canada Inc. v. Keays*, the Supreme Court of Canada has issued yet another helpful decision dealing with the employer's duty to accommodate.

In *Hydro-Québec v. Syndicat des employé-e-s de techniques professionnelles et de bureau d'Hydro-Québec, section locale 2000 (SCFP-FTQ)*, 2008 SCC 43, the Supreme Court unanimously held that the company did not discriminate against the grievor when it terminated her employment for innocent absenteeism. The Court held that, although the company had made several attempts over the years to accommodate the grievor, she remained unable to attend work on a regular basis and the medical evidence did not indicate a likelihood of improvement in the foreseeable future. The Court stated that "[t]he employer's duty to accommodate ends where the employee is no longer able to fulfill the basic obligations associated with the employment relationship in the foreseeable future".

In the course of its decision, the Supreme Court took the opportunity to provide some much-needed clarification regarding the scope and purpose of the employer's duty to accommodate, as well as the standard against which the employer's accommodation efforts will be judged. The decision goes a considerable distance towards restoring the balance between employer and employee interests in the accommodation analysis – a balance some feared had shifted permanently in employees' favour after the Supreme Court's 1999 decision in *Meiorin*. As such, the *Hydro-Québec* decision should prove helpful to employers facing far-reaching accommodation requests from unions and employees.

FACTUAL BACKGROUND

The *Hydro-Québec* decision focussed on the last 7.5 years of the grievor's employment with the company. During that period, she suffered from a variety of physical and mental disabilities. In addition to a number of physical ailments (some of which were ultimately corrected surgically), she suffered from depression and from a personality disorder which caused difficulties in her relationships with supervisors and co-workers.

As a result of her various health issues, the grievor had missed 960 days of work during the last 7.5 years of her employment. Over the years, the employer had provided her with a variety of accommodations, including light duties and gradual return to work programs. However, she continued to experience a high rate of absenteeism.

At the time of her termination on July 19, 2001, the grievor had been continuously absent from work since February 8, 2001. Her physician had recommended that she stop working for an indefinite period pending the resolution of certain workplace conflicts. At the employer's request, the grievor had been assessed by a psychiatrist, who concluded that she would likely continue to experience an absenteeism problem in the future. Based on her excessive absenteeism, her inability to work on a regular basis, and the fact that the medical evidence did not indicate that there was any reasonable likelihood of improvement, the company terminated her employment.

A grievance was filed with respect to the grievor's termination. The arbitrator upheld the termination and dismissed the grievance. The Québec Superior Court upheld the arbitrator's decision on judicial review. However, on appeal from the Superior Court, the Québec Court of Appeal held that the arbitrator had misapplied the Supreme Court of Canada's decision in *Meiorin*. According to the Court of Appeal, the *Meiorin* decision required the employer to establish that it was impossible to

accommodate the grievor in order to justify termination. The Court of Appeal was also of the view that the arbitrator should not have considered the entire history of absenteeism and accommodation efforts, but rather should have focussed exclusively on whether it was impossible to accommodate the grievor at the time the decision to terminate her employment was made. The Supreme Court of Canada allowed the appeal, set aside the Court of Appeal's decision, and restored the Superior Court's decision upholding the arbitration award.

THE SUPREME COURT'S DECISION

Justice Deschamps, writing for the unanimous Supreme Court, began her judgment by observing that the case required the Court "to take another look at the rules protecting employees in the event of non-culpable absenteeism and the rules governing contracts of employment" and, in particular, to "consider the interaction between the employer's duty to accommodate a sick employee and the employee's duty to do his or her work".

This focus on striking a balance between the employee's obligation to perform work and the employer's duty to accommodate has been a recurring theme in the Supreme Court's recent accommodation decisions – first *McGill University Health Care*, then *Honda Canada*, and now *Hydro-Québec.* In *Hydro-Québec,* the Supreme Court carried this theme a step further by expressly holding that this balance is to be struck in a way which does not alter the essence of the employment "bargain" or change terms and conditions of employment in a fundamental way.

(a) *MEIORIN* DID NOT CHANGE THE STANDARD FROM UNDUE HARDSHIP TO IMPOSSIBILITY

One of the first issues addressed by Justice Deschamps was the Court of Appeal's finding that the *Meiorin* decision imposed a standard of "impossibility" on employers – or, stated slightly differently, that the *Meiorin* decision equated "undue hardship" with "impossibility". This notion arose from Chief Justice McLachlin's formulation of the third step of the *bona fide* occupational requirement (BFOR) test in *Meiorin* in which she stated, "To show that the standard is reasonably necessary, it must be demonstrated that *it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship on the employer*" [emphasis added]. Some commentators and decision-makers concluded based on Chief Justice McLachlin's use of the word "impossible" that, to prove undue hardship, an employer was required to prove that accommodation was indeed impossible.

In *Hydro-Québec*, the Supreme Court clarified that the standard imposed on employers is not "impossibility" but "undue hardship". Pointing to the broader context of Chief Justice McLachlin's words, as well as passages elsewhere in the *Meiorin* decision which made clear that the duty to accommodate is to be applied with flexibility and common sense, Justice Deschamps stated: "What is really required is not proof that it is impossible to integrate an employee who does not meet a standard, but proof of undue hardship, which can take as many forms as there are circumstances".

(b) ACCOMMODATION DOES NOT ALTER THE ESSENCE OF THE EMPLOYMENT CONTRACT

Having clarified the interpretation to be given to the *Meiorin* case, Justice Deschamps went on to discuss the purpose of accommodation. She held that the purpose of accommodation is to assist employees to participate in work, not to alter the essence of the employment "bargain":

[T[he goal of accommodation is to ensure that an employee who is able to work can do so. In practice, this means that the employer must accommodate the employee in a way that, while not causing the employer undue hardship, will ensure that the employee can work. The purpose of the duty to accommodate is to ensure that persons who are otherwise fit to work are not unfairly excluded where working conditions can be adjusted without undue hardship.

However, the purpose of the duty to accommodate is not to completely alter the essence of the contract of employment, that is, the employee's duty to perform work in exchange for remuneration….

The test is not whether it was impossible for the employer to accommodate the employee's characteristics. The employer does not have a duty to change working conditions in a fundamental way, but does have a duty, if it can do so without undue hardship, to arrange the employee's workplace or duties to enable the employee to do his or her work.

The Supreme Court also emphasized in *Hydro-Québec* (as it had emphasized earlier in *McGill University Health Centre*) that accommodation must be considered on an individualized basis. As a result, the Court stated, "rigid rules must be avoided". However, Justice Deschamps' decision appears to focus the employer's duty to accommodate on measures to assist the employee to perform his or her work, rather than on fundamental changes to the employment relationship or the terms and conditions of employment.

(c) APPLICATION TO CHRONIC ABSENTEEISM CASES

In applying this approach to chronic absenteeism cases, Justice Deschamps held that it is not discriminatory for an employer to terminate employment where, despite the employer's efforts to accommodate the employee, the employee will be unable to attend work regularly for the reasonably foreseeable future:

[I]n a case involving chronic absenteeism, if the employer shows that, despite measures taken to accommodate the employee, the employee will be unable to resume his or her work in the reasonably foreseeable future, the employer will have discharged its burden of proof and established undue hardship.

Thus, the test for undue hardship is not total unfitness for work in the foreseeable future. If the characteristics of an illness are such that the proper operation of the business is hampered excessively or if an employee with an illness remains unable to work for the reasonably foreseeable future even though the employer has tried to accommodate him or her, the employer will have satisfied the test. *In these circumstances, the impact of the standard will be legitimate and the dismissal will be deemed to be non-discriminatory…. [Citing another decision:] "[in such cases,] it is less the employee's handicap that forms the basis of the dismissal than his or her inability to fulfill the fundamental obligations arising from the employment relationship".*

The duty to accommodate is therefore perfectly compatible with general labour law rules, including both the rule that employers must respect employees' fundamental rights and the rule that employees must do their work. *The employer's duty to accommodate ends where the employee is no longer able to fulfill the basic obligations associated with the employment relationship for the foreseeable future.*

[emphasis added]

(d) THE ENTIRE ACCOMMODATION PROCESS MUST BE CONSIDERED

Finally, as in its earlier decision in *McGill University Health Centre*, the Supreme Court emphasized that the entire accommodation process – not merely the final step in the process – must be considered in evaluating whether the employer has fulfilled its obligation to provide accommodation to the point of undue hardship:

A decision to dismiss an employee because the employee will be unable to work in the reasonably foreseeable future must necessarily be based on an assessment of the entire situation. Where, as here, the employee has been absent in the past due to illness, the employer has accommodated the employee for several years and the doctors are not optimistic regarding the possibility of improved attendance, neither the employer nor the employee may disregard the past in assessing undue hardship.

CONCLUDING COMMENTS

In the *Hydro-Québec* case, the Supreme Court of Canada has affirmed yet again that an employer's duty to accommodate is neither unlimited nor absolute. Many employers will be reassured to see the Supreme Court take steps to "rein in" some of

the more far-reaching interpretations given to the *Meiorin* decision, recognize that there are reasonable limits on an employer's accommodation obligations, and acknowledge once again that the entirety of the employer's accommodation efforts should be considered in determining whether "undue hardship" has been established.

Of course, the challenge of managing complex disability cases often lies in translating general statements of principle – such as those found in *Hydro-Québec* – into concrete action plans. Your Hicks Morley lawyer would be happy to discuss the impact of this helpful decision on cases you are managing in your workplace.

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