Case In Point

Grievor’s Poor Performance in Modified Work Not Due to Disability, Employer Met its Duty to Accommodate

Date: July 18, 2013

Arbitrator Jasbir Parmar has found that an employer met its duty to accommodate when it placed a grievor in a position that was within her physical restrictions and provided her with ample training. The fact her performance was inadequate in the position was not due to her disability, and it was appropriate for the employer to require her to meet the same standards as other employees in the role.

The grievor, who had performed cleaner/caretaker functions for the employer, was provided with a variety of accommodations for her health issues. Eventually, she was found to be medically fit only to perform sedentary duties. In 2006, after appropriate assessments, the grievor was placed into the position of Maintenance Enquiry Clerk (“MEC”) in a call centre. She then went off work for two years as a result of an injury. Upon her return, she was again provided with training, which consisted of job-shadowing and classroom training. The grievor was unable to perform the MEC job, and in January 2010 she was sent home as the employer had no suitable work available for her. A grievance was filed. The employer continued to search for suitable positions for the grievor, but without success.

The union argued that the employer failed to establish that it would be a hardship to provide the grievor with more training in the MEC role, or to place her in an alternative position. The employer argued that, despite its attempts, it was unable to provide the grievor with suitable employment and that it had attempted to accommodate her in the MEC role through the provision of extensive training, which was in excess of what other employees new to that position were given.

Arbitrator Parmar dismissed the grievance. She found that the MEC position was consistent with the grievor’s physical restrictions and that the grievor was not only provided with training that was sufficient, the grievor was provided with additional training as well. Despite the training and being advised of the proper procedures, she was unable to adequately perform in the position and repeatedly made mistakes.

The arbitrator considered whether the employer should have kept the grievor in the MEC role regardless of her inadequate performance, and stated:

23. […] the purpose of accommodation is to ensure that the fact that an individual has a disability does not form a basis to exclude the individual from the workplace. In other words, accommodation is not about ensuring the individual remains in the workplace, but rather to ensure the disability is not a basis to exclude the individual. The requirement that the individual be “otherwise fit to work” remains unaltered.

The arbitrator concluded that the grievor’s physical disability was not a factor in her ability to perform the MEC role:

30. The purpose of accommodation is to ensure that disabled employees are not unfairly excluded as a result of a disability. There is nothing unfair about a person not being given a job because he or she doesn’t have the skills to adequately perform that job for reasons unrelated to the disability. That is the case for all employees. An individual who happens to have a disability is not entitled to any different treatment, or any greater level of job security, when the existence of the disability is unrelated to whether he or she can meet the skill and performance requirements.

There was no evidence that even if additional training had been provided the grievor would have succeeded in the position: “As the reason for her unsuitability is based on her skills, rather than being related to her disability, she is not entitled to any modified performance standards in respect of that role.” Moreover, the employer had made numerous reasonable attempts at

accommodation and there was no breach of the collective agreement or the *Human Rights Code*.

As can be seen from this case, the duty to accommodate for employers remains onerous and time-consuming, regardless of whether the employee ultimately is able to remain in the workplace. However, this decision confirms that employees requiring accommodation are not entitled to be treated better than those employees who do not require accommodation. When faced with the question of whether an employee can be accommodated, it is important that employers have clear criteria outlining the skills and abilities required to perform a job, and whether these skills and abilities relate to an individual's disability.

Toronto Community Housing Corporation and Toronto Civic Employees' Union, Local 416, CUPE (5 June 2013, Parmar)