Case In Point

Duty to Accommodate Does Not Extend to Permitting Excessive Employee Absenteeism

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In Ontario Public Service Employees Union v Ontario (Children and Youth Services), the Divisional Court recently affirmed that an employer's duty to accommodate does not extend to allowing an employee not to work, stating that the "purpose of the duty to accommodate is to allow employees to fulfill their employment duties, not to allow employees not to fulfill those duties." In dismissing this judicial review application, it agreed with the decision of the Grievance Settlement Board (GSB) that "the duty to accommodate does not require alteration of the fundamental essence of the employment contract, that is, payment made for work done." This decision highlights the fundamental feature of the employment relationship (and its tension with excessive absenteeism) that an employee attend and perform work in exchange for wages and benefits. Where an employee is unable to uphold their end of the bargain, such as in the case of excessive absenteeism, an employer has grounds for termination of employment.

In this case, the grievor was a youth services officer who was afflicted with a chronic degenerative back condition. He was fully capable of performing his duties when his condition was not active; however he was unable to work when it flared up without notice, as it often did. The GSB found his average rate of absenteeism was 35%, which was 25% above the institutional average, and he was repeatedly cautioned that his employment was in jeopardy due to these absences. Notably, due to the nature of his condition the grievor could not identify any "workplace barriers" to his ability to work and he rejected the various accommodation proposals offered to him by the employer. Eventually his employment was terminated on account of his excessive absenteeism, his inability to be accommodated and the fact that his excessive absenteeism would not improve in the foreseeable future. He brought this grievance which was dismissed by the GSB, a decision upheld by the Divisional Court on judicial review.

The GSB and Divisional Court decisions are very helpful for employers who deal with the difficult issue of innocent absenteeism. They affirm the principle that the workplace bargain requires performance of work in exchange for remuneration (per *Hydro Quebec*) and underscore the importance both of having a reasonable attendance management policy in place and following the steps in that policy. They also affirm that the duty to accommodate does not extend to allowing an employee to be regularly absent from the workplace.

Furthermore, while it remains the case that innocent absenteeism cannot be grounds for discipline, in certain circumstances it can warrant termination provided that an employer can establish an employee (1) has a record of absenteeism that is excessive, (2) is incapable of regular attendance in the future and (3) has been provided with accommodation to the point of undue hardship. Where an employer has an attendance management policy in place, this decision serves as a reminder to ensure that the choice of attendance standard is reasonable in which case it may better withstand an arbitrator's scrutiny.