Case In Point

Union Need Not be Involved in Every Accommodation Request, Appeal Court Rules (and the Supreme Court Agrees)

Date: September 11, 2017

Earlier this year, the British Columbia Court of Appeal issued a helpful decision for employers dealing with accommodation issues in a unionized context. On September 7, 2017, the Supreme Court of Canada denied the union's request for leave to appeal from the B.C. Court of Appeal decision.

The B.C. Court of Appeal decision considered the union's role in the accommodation process and held that in the absence of a negotiated right, an employer may be able to deal directly with its unionized employees during the accommodation process. At arbitration, the union had successfully argued that it had a right to receive notice from the employer of all medical disability accommodation requests made by employees covered by the collective agreement. The employer had argued that union involvement should only occur where the accommodation required an adjustment to a negotiated term or where the employee requested such involvement.

On judicial review, the Supreme Court of B.C. held that the arbitrator's decision was unreasonable. The Court of Appeal agreed, stating that the collective bargaining authority of the union does not "compel its engagement in all requests for accommodation for medical disabilities."

Had the arbitration decision not been reversed on judicial review, the union would have had an "independent right to notice, information and consultation" of all accommodation requests, even in cases where the employee did not request union involvement. This would have potentially made the accommodation process more onerous for employers than it may already be. Furthermore, the Court noted that granting the union such right presupposes that all accommodation requests involve discrimination, which is not the case.

The following findings of the Court are noteworthy:

- in the prior round of bargaining, the union had proposed a clause to provide for its participation in all requests for accommodation, which did not make it into the collective agreement;
- the employer in this case received many accommodation requests (1000 per year), involving ergonomic accommodation, changes in lighting, and adjustments to work locations, among other things;
- not all accommodation requests involve discriminatory circumstances; therefore the union's argument that the discrimination provision of the collective agreement compelled union involvement in every accommodation request was not reasonable;
- to accept the union's view would be to expand union responsibility and potential liability far beyond what was contemplated in *Renaud* (a seminal Supreme Court of Canada case on the duty to accommodate).

The Court concluded as follows:

[28] …the non-discrimination provision of the collective agreement, adopting the *Canadian Human Rights Code* [sic] obligations, does not provide a basis for Union participation in all employee requests for accommodation, and the submission advanced by the Union wrongly anticipates a circumstance of discrimination where none may ever exist.

Fortunately for employers, on judicial review, the Court reiterated the principles enunciated in *Renaud* and noted that employers ought to engage the union only under very specific circumstances:

- If the union has participated in creating a discriminatory policy or rule;
- If the union's agreement is necessary to facilitate accommodation (by alleviating the application of a term of the collective agreement); or,
- If an employee requests the union's involvement.

Practically speaking, when an employer receives a request for accommodation from a unionized employee, it should assess whether the request falls into one of the above mentioned three categories or if there is a term in the collective agreement that explicitly requires the union's involvement. If such is not the case, then the union's participation is not required and the employer may choose to directly engage its employee in the accommodation process.

While it may be the case that involvement by / notification to the union is not required, all parties to the employment relationship (employer, employee and union) have a duty to cooperate in the accommodation process and there may be many circumstances where the union may be very helpful in managing the expectations of employees through the accommodation process. Employers should continue to approach each request for accommodation on an individual basis, taking into consideration the specific circumstances surrounding the request and the terms of the applicable collective agreement.

Telus Communications Inc. v. Telecommunications Workers' Union, 2017 BCCA 100 (CanLII), application for leave to appeal denied September 7, 2017.