Case In Point

Arbitrator Renders Helpful Decision for Multi-Site Employers Dealing with Commute to Work Accommodation Requests

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In *Ontario Secondary School Teachers' Federation and Toronto District School Board, Grievance # 13-50 (Accommodation)*, Arbitrator Nyman held that the refusal of the Toronto District School Board (TDSB) to transfer the grievor, a secondary school teacher who suffered from chronic pain and fatigue, to a school located within 15 kilometers of her home to ease her commute did not amount to *prima facie* discrimination since the dispute involved her "preferences" rather than her medical "needs." Even if *prima facie* discrimination had been established, he would have found no failure to accommodate. This decision is helpful for employers who have multiple sites and who receive commute to work accommodation requests from employees to work at a different site.

Background

The grievor had worked at School X, located in the City of Toronto, since 2003. It was located 16.5 kilometers from her home. In 2006, the grievor moved to Markham. Her home was now much further from School X, involving a commute in rush hour that could last more than 90 minutes. She commuted from 2007 to 2011 without issue, despite suffering from diagnosed fibromyalgia, chronic fatigue syndrome and a number of other debilitating conditions. She then took a leave of absence in 2011-2012 to travel and spend time with her family.

Upon her return to work in September 2012, the grievor learned that someone with whom she had previously experienced serious interpersonal difficulties had been appointed as the new Principal of School X. At the end of the first week of school, the grievor saw her doctor and then requested a transfer to a school that was closer to her home in Markham as an accommodation for her diagnosed disabilities. She provided a medical note from her doctor stating that she needed to work within 15 kilometers from her home to accommodate her medical conditions.

The TDSB declined to transfer the grievor without receiving more specific information concerning her actual restrictions – specifically why a 15 kilometer limit was necessary. The grievor continued to attend work until mid-October, and then remained off work for the rest of the school year and for some time thereafter.

A meeting was held between the TDSB, the grievor and her union (OSSTF) representative in early November, 2012. The TDSB offered to provide a number of in-school accommodations at School X that would reduce the physical demands placed on the grievor in performing her teaching duties, suggesting that these alternatives be tried before the issue of a transfer was pursued. The grievor refused, insisting that she needed to be moved to a school closer to her home, in accordance with her medical note. This position was taken by the grievor without reviewing the TDSB's suggested accommodations with her doctor.

The TDSB ultimately arranged, with the grievor's consent, for a "file review" to be conducted by a medical specialist of its choosing, allowing it greater insight into her conditions. The TDSB's specialist was also permitted to communicate with the grievor's doctor to learn the basis upon which the 15 kilometer limit had been established. This revealed that the actual medical restriction was that the grievor had to be allowed to stretch her back every 20-30 minutes. The TDSB's specialist advised that he could see no reason why the grievor could not arrange her commute to School X in such a way as to allow her to stretch as necessary. On this basis, the TDSB declined the request for a transfer.

The grievor remained off work, the OSSTF filed a grievance and the matter was referred to arbitration.

During the course of the hearing, through the production of documents requested by the TDSB, it was learned that, in addition to her medical issues, the grievor had experienced a significant perceived trauma shortly after her return to work in September 2012 due to the perceived bullying of her by another teacher, coupled with the perceived alignment with that teacher of the Principal in the dispute. It was also determined, through the production of medical records requested by the TDSB, that this conflict, rather than the strain of commuting, had been the proximate cause of the grievor's departure from work in October, 2012.

The Award

The grievance alleged that the TDSB had discriminated against the grievor by refusing her transfer request, and that it had failed to meet its duty to accommodate.

Arbitrator Nyman dismissed both arguments.

He first considered the case law, finding that there can be circumstances where the conditions of an employee's commute to work may amount to *prima facie* discrimination that requires accommodation under the *Human Rights Code* (Code). For example, if the conditions around the commute imposed by the employer cause a barrier to working that is connected to the employee's membership in a protected group, it could constitute *prima facie* discrimination.

Importantly, in determining whether the situation before him reflected *prima facie* discrimination, Arbitrator Nyman considered the entire course of conduct between the parties, rather than focussing on a "snapshot" of the situation taken at the end of the sequence of events. He held that a decision-maker must look at all of the facts of the parties' conduct and determine if those facts establish that the claimant has suffered adverse treatment and that their disability (or other protected ground) was a factor in that adverse treatment. This worked to the advantage of the TDSB, which had demonstrated flexibility and a creative approach to the problem, as compared to the grievor's insistence on one solution without even attempting any other options.

As a part of this analysis, Arbitrator Nyman emphasized that an employer is obliged to accommodate an employee's needs, but not their preferences. An accommodation may well be reasonable so long as it accommodates the employee's needs, even if it is not the employee's preferred accommodation. In the case before him, the grievor's need to stretch every 20 or 30 minutes could be met whether or not her assigned school was within 15 kilometers of her home.

Based on the evidence, he concluded that the grievor sought to change schools primarily because she preferred a shorter drive and because she did not want to work with the Principal and the other teacher. He found that the grievor's disability was not a factor in the adverse effect caused by her commute. The length of her commute was impacted significantly by her refusal to take the 407 toll road (for what she had described as "political reasons"), her choice to live in Markham, the time at which she departed on her commute and other decisions. None of these decisions related to her disability.

Conclusion

Arbitrator Nyman concluded that the there was no *prima facie* discrimination effected by the TDSB against the grievor. The evidence did not establish that the grievor's professed need to change schools was medically required.

Even if *prima facie* discrimination had been established, Arbitrator Nyman would have found that the TDSB fulfilled its accommodation obligations. At their November meeting, the TDSB offered to meet the grievor's in-school needs and provided most, if not all, of the in-school accommodations. However, the union and the grievor refused to consider any solution short of a transfer to a closer school. Arbitrator Nyman concluded that the union and the grievor frustrated the accommodation process by their insistence on a change in schools rather than exploring other available alternatives.

The Arbitrator also rejected the claim that there was a violation of the procedural duty to accommodate given the TDSB's continuing efforts to find a solution despite the opposition it encountered.

Key Takeaways

The duty to accommodate does not necessarily begin at the employer's door. An employer may have a duty to accommodate an employee's commute to work. Claims for accommodation of travel restrictions must involve a thorough and contextual analysis of the facts. This analysis places a high expectation on the employee in terms of trying to solve or reduce the extent of the problem themselves. It also emphasizes that the role of the employee's doctor is to identify restrictions, rather than purporting to "solve" the problem by specifying the workplace response to those restrictions. This latter step is for determination by the employer.

When presented with commute-related accommodation requests, employers should review the medical evidence and consider the following:

- Does the employee's commute cause them a disadvantage/adverse treatment?
- Is their disability (or other protected ground, such as family status) a factor in the disadvantage suffered by the commute, or is the disadvantage because of some other employee decision or choice?
- What supports or alternatives are available to the employee independently of the workplace that may help alleviate this disadvantage (e.g. alternative modes of transportation such as public transit or car pooling)?
- What is the underlying need that the request for a change in commute is trying address? Are there other, reasonable workplace solutions the employer can offer to meet this need (e.g. flexibility in working hours)?

This Award also emphasizes the fact that accommodation is a multi-party process where the accommodation-seeker has a duty to facilitate a solution and to accept a reasonable offer of accommodation. The accommodation process may be brought to an end (and the employer's obligations terminated) by an employee's failure to do so.

Should you have any questions about this decision or its possible implications for your workplace, please contact Michael Hines, who successfully argued the case for the TDSB, at 416.864.7248, or your regular Hicks Morley lawyer.

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