

Case In Point

Arbitrator Provides Guidance for Employers Managing Commute to Work Accommodation Requests, Self-Reported Medical Restrictions, and Surveillance Evidence

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In [*Toronto District School Board v Local 4400, Canadian Union of Public Employees*](#), Arbitrator Stout dismissed an allegation of disability-related discrimination and failure to accommodate in the context of a commute to work. The case elaborates on the reasoning of Arbitrator Nyman in [*Ontario Secondary School Teachers' Federation and Toronto District School Board, Grievance # 13-50 \(Accommodation\)*](#), where issues involving accommodating commutes to work and multi-site employers arose (this case was summarized in a prior [Case in Point](#)).

Commuting Options

On September 1, 2017, the grievor slipped and fell in a workplace parking lot, which caused an injury to her right knee. The grievor worked in an administrative role at the Toronto District School Board (TDSB) at the time and upon her return to work, the only restriction requiring accommodation was with respect to her ability to commute to and from the workplace. Initially, the Workplace Safety and Insurance Board (WSIB) paid for her taxi transport to and from her pre-injury workplace, but ultimately ceased providing this financial support on June 15, 2018 at which time the grievor began driving to work. Two weeks later, the grievor stopped attending work, reporting that she could no longer drive to work.

The medical documentation provided by the grievor was inconsistent. It ranged from not being able to drive at all, to a limitation of 10-15 minutes of driving which was increased up to 30-35 minutes. It was suggested by the WSIB and the TDSB that the grievor could take breaks during her drive and/or use public transportation to facilitate the commute, but the grievor refused such options.

Between November 2019 and January 2020, the grievor was offered two alternate positions with the TDSB. One of the locations could be accessed quickly with use of Highway 407 (a toll highway) and the other location was a 5 minute drive further than a location the grievor had identified as suitable. The grievor did not accept either of these positions.

Surveillance

Due to the discrepancies in the medical documentation, the TDSB conducted surveillance on the grievor in early 2020. The grievor was observed over seven days and on one occasion she drove

20 minutes from her home, parked the car for 20 minutes, and then drove home for another 20 minutes. The Union objected to the admissibility of this evidence, stating that it would violate the grievor's right to privacy, however Arbitrator Stout allowed it. He held that the TDSB had reasonable cause to conduct surveillance based on the grievor's repeated failure to provide objective evidence supporting the alleged driving restriction, the inconsistencies in the driving restrictions reported by her healthcare providers, and the significant reliance in the medical evidence on the grievor's self-reporting and subjective preferences. The grievor's refusal of the alternate locations, given their proximity, also justified the TDSB's suspicions. Arbitrator Stout further concluded that the surveillance was conducted in a reasonable manner, as the grievor was only observed in public spaces and the investigators did not access private property.

Discrimination and Accommodation

Citing Arbitrator Nyman's decision (above), Arbitrator Stout noted that discrimination may be proven if it is demonstrated that the disability was a factor in the adverse impact. In this case, Arbitrator Stout determined that the adverse impact of not attending work was not caused by discrimination. Instead, it was caused by the grievor's unreasonable restrictions on her commute based on her personal preferences.

In Arbitrator Stout's view, the grievor refused to properly consider the accommodation options that the TDSB proposed. By insisting that she commute to work using one continuous drive, she failed to even attempt breaking up her drive and/or taking public transit for some or part of her commute.

The Arbitrator also found that, at all material times, the TDSB provided appropriate modified work and fulfilled its duty to accommodate. The grievor failed to substantiate her belief that she could not commute to the alternate locations offered by the TDSB by taking breaks and/or using public transit. Arbitrator Stout was also concerned that her doctor was "less than objective and acting more as an advocate for the Grievor".

Key Takeaways

Employees don't have an obligation to originate a solution, but they do have an obligation to accept reasonable accommodation options proposed by employers. This decision confirms that, subject to medical evidence to the contrary, using public transit, taking breaks while driving, or even using toll highways are all steps that an employee can be expected to take in the context of accommodating commutes to work.

This decision also affirms an employer's right to conduct surveillance when an employee fails to provide objective justification for their alleged physical restrictions. Inconsistent reporting regarding medical restrictions, significant reliance on self-reporting or subjective impressions, and suspicious accommodation preferences can all assist in justifying the use of surveillance evidence in the process of accommodation. This is particularly true when the surveillance is solely conducted in

public spaces.

Finally, the decision supports the notion that employers may be justified in questioning medical evidence that is inconsistent and highly reliant on subjective self-reporting by the employee. In these situations, it can be helpful to request additional medical information from another healthcare provider, like a specialist.

Should you have any questions about this decision or its possible implications for your workplace, please contact [Daniel Fogel](#), who successfully argued the case for the TDSB, or your regular Hicks Morley lawyer.