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• APPELLATE COURT FINDS PREFERENTIAL TREATMENT OF WSIB CLAIMANTS IN WORKPLACE NOT DISCRIMINATORY •

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The Ontario Divisional Court recently released *Carter v. FCA Canada Inc and Human Rights Tribunal of Ontario*, [2019] O.J. No. 250, 2019 ONSC 142 (Ont. Div. Ct.), a decision which affirms that differential treatment between employees with work-related injuries and employees with non-work-related injuries is not discriminatory under the Ontario *Human Rights Code* (Code).

The applicant, who had a non-work-related injury, sought to return to work in May 2013 but failed to provide his employer with medical information with respect to his capacity to work and restrictions until August 2013. At that point, the employer searched for a position for him but did not consider temporary jobs. The applicant then alleged discrimination on the basis of disability before the Human Rights Tribunal of Ontario (Tribunal) which concluded that the respondent employer discriminated against the applicant by not considering whether he was capable of doing temporary and non-standard jobs from the period of August 2013 to May 2014. However, no discrimination was found for the period from May 2013 to August 2013. The Tribunal awarded the applicant $5,000 for injury to dignity, feelings and self-respect, and ordered that the employer undertake a review of its return-to-work procedures as a remedy.

The applicant sought judicial review, where he argued that the Tribunal's decision was unreasonable for the following three reasons:

1. The Tribunal gave primacy to the *Workplace Safety and Insurance Act, 1997* (WSIA) over the Code.
2. The Tribunal unreasonably gave primacy to the seniority provisions in the collective agreement, as seniority should not be considered in determining undue hardship under s. 17 of the Code.
3. The remedy was unreasonable, because the Tribunal made no damages award for lost wages despite the employer's breach of its procedural duty to accommodate.

1) PRIMACY OF THE WSIA OVER THE CODE

The applicant argued that the employer gave preferential treatment to employees with work-related injuries who were receiving Workplace Safety and Insurance Board (WSIB) benefits over those with non-work-related injuries. The employer participated in the WSIB experience rating system (NEER), which

provides incentives to employers who successfully accommodate, at full pay, workers who have suffered a work-related injury. The applicant believed that the NEER incentive program led the employer to preferentially accommodate those with work-related restrictions over other disabled workers, such as himself.

The Tribunal held that such preferential treatment of workers due to the NEER program was not discrimination on the basis of disability under the Code, as the distinction did not arise from disability but rather from the operation of a statutory scheme. The Court upheld the Tribunal's decision and found it was reasonable.

2) PRIMACY OF THE SENIORITY PROVISIONS IN THE COLLECTIVE AGREEMENT

The applicant's employment relationship was governed by a collective agreement, which required that seniority have an impact on an employee's bumping rights upon their return to work and which conferred the right of a disabled employee to displace a more junior employee.

The applicant alleged that consideration of seniority was not a proper factor in the duty to accommodate analysis but the Tribunal held that it is not a part of the duty to accommodate to extend this collective agreement right to displace a more senior employee. It noted that the duty to accommodate does not give employees in a non-unionized workplace the right to displace another employee, and unionized employees have no greater rights to displace employees in other positions, absent collective agreement language. The Court agreed with the Tribunal and affirmed that the duty to accommodate does not include an obligation to displace another employee out of their job. As such, seniority rights remain a relevant consideration for employers when determining whether there are available positions to accommodate employees.

3) REMEDY

On judicial review, the applicant raised the Tribunal's failure to award damages for loss of income and the low quantum of the amount awarded. The Tribunal explained that there was no sound basis to quantify and award compensation for lost income, as there was a lack of data on job availability. Its order for damages was based on the fact that the applicant was not considered for temporary or non-standard jobs because of his disability. The Court found that the Tribunal's rationale was reasonable and it did not intervene.

Significance for Employers

This decision provides a helpful reminder on what the duty to accommodate entails, which can be distilled as follows:

1. Preferential treatment of employees with work-related injuries over those with non-work-related injuries with regards to accommodation opportunities is not discriminatory when motivated by the WSIB's experience and merit rating program.
2. The seniority provisions of a collective agreement are a relevant consideration for employers in their undue hardship analysis and such consideration is not discriminatory.
3. The duty to accommodate does not include an obligation to bump or displace another employee from their job. An employer's job search can reasonably be limited to vacant jobs for which the employee is reasonably qualified (or for which only reasonable training is required) and which meet the employee's medical restrictions.

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