DIVISIONAL COURT REAFFIRMS THE ORILLIA HOSPITAL TEST FOR ACCOMMODATION

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In a recent decision, the Ontario Divisional Court quashed the decision of Arbitrator Newman. The Divisional Court found that the Arbitrator had veered from establishing legal principle and rejected her approach, re-affirming the test for accommodation that was initially set out in *ONA v. Orillia Soldiers Hospital*.

Background Facts

The grievor was hired into a full-time position with the City in 1991. In 1999, the grievor became disabled. From that point onwards he was only able to work part-time hours. Despite this fact, the City kept the grievor in the full-time bargaining unit and maintained his access to full-time benefits.

In 2016, the City gave notice to the Union that it would be discontinuing this practice. Part-time employees would not be allowed to remain in the full-time bargaining unit once it was established they had no reasonable expectation of returning to full-time hours. As part of this change, the grievor (who had been working at part-time hours for 17 years) was unilaterally moved into the part-time bargaining unit. The Union filed a grievance, alleging that the City's actions amounted to a failure to accommodate.

The Arbitration Decision

At arbitration, Arbitrator Newman found that the City had the right to unilaterally transfer an employee from full-time to part-time status. She determined that this transfer was an administrative act within the scope of the City's management rights. She also concluded that the City had met its duty of reasonable accommodation by allowing the grievor to remain in the full-time unit while working part-time hours.

Despite these findings, the Arbitrator proceeded to conclude that the City had in fact violated section 17 of the Ontario *Human Rights Code* (the "*Code*"). In arriving at this conclusion she created a new test for establishing a violation of section 17. She outlined the appropriate test in these circumstances to be the following:

1. Has there been a change in the employee's condition?

2. Has there been a relevant change in the nature of the work or in the employer's circumstances that affects the reasonableness of the accommodation?

3. Would continuation of the accommodation create a situation of undue hardship for the employer?

Relying on this test, she concluded that the City had not demonstrated a change in circumstances or proof that continuation of the accommodation would amount to undue hardship. On this basis, she found that the City had failed to meet its obligations under the *Code* and allowed the grievance.

The Arbitrator's Decision is Found to be Unreasonable

The Divisional Court held that the Arbitrator's reasoning with respect to section 17 of the *Code* was unreasonable. The Court focused on the inconsistency in the Arbitrator's decision. Specifically, it acknowledged the stark contrast between her findings that the City had a unilateral right to move employees to part-time status and that it met its duty to accommodate the employee with her finding that the City was in violation of the *Code*. The Court noted that "one would have thought that the logical conclusion [from her findings] would be that the grievance must fail".

The Divisional Court went on to discuss the test that had been employed by the Arbitrator. It noted that the test was one of the Arbitrator's own creation and not supported by any existing legal principles. The Court went on to set out four critical errors that the Arbitrator made in relying on this test, including that:

1. Neither party had put forth the test, nor was it argued before her;

2. There was no case law to support her test;

3. The case did not turn on the scope of the duty to accommodate or undue hardship; and

4. The arbitrator's conclusion was inconsistent with other arbitral findings.

The Court concluded that these errors had resulted in an unreasonable decision. The Court found that, employing the correct test, the evidence made it clear that the City had gone beyond its obligations under the *Code* in keeping the grievor in the full-time bargaining unit for as long as it had.

Significance for Municipal Employers

The decision of the Divisional Court re-affirms the limits on an employer's duty to accommodate and the continued applicability of the Ontario Court of Appeal's decision in *Orillia Hospital*. The Divisional Court clarified that there is no discrimination in failing to provide full-time benefits to persons working part-time hours, even if that they are working part-time hours because of a disability. As stated in *Orillia Hospital* this difference in treatment with respect to compensation and/or benefits is due to hours worked, not an employee's disability. The duty to accommodate does not require an employer to compensate a disabled employee for a service which they do not perform.

Amanda Cohen and Jessica Toldo specialize in labour and employment matters facing municipalities. If you have any questions about this or any other employment matter, do not hesitate to contact Amanda at 416-864-7316 or Jessica at 416-864-7529. They may also be reached by email at: amanda-cohen@hicksmorley.com and jessica-toldo@hicksmorley.com.

* We wish to thank articling students Danika Winkel and Ali Fusco for their assistance in the preparation of these article.

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NEW INSIGHTS INTO THE DISCLOSURE OF HIGHLY SENSITIVE PERSONAL INFORMATION AND THE MFIPPA PUBLIC INTEREST OVERRIDE

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A recent decision of the Ontario Court of Appeal has provided clarification on how to consider and apply the "public interest override" in Ontario's freedom of information statutes – a clause that gives the public a right to access information that would otherwise be exempt on public interest grounds.

Background Facts

The issue in this case related to the hiring of an interim Chief Financial Officer for Algoma Public Health ("APH"). The CFO left APH just months after his hire. Media reports indicated that he had a past criminal record relating to multiple frauds. Following the release of this information, questions arose as to how he could have been hired and whether APH had suffered any financial losses as a result of his employment with them.

APH hired KPMG to conduct a forensic investigation into potential conflicts of interest in the CFO's hiring and whether there had been any financial losses as a result of his term at APH. The Report was provided to APH in March 2015. The media sought access to the report under MFIPPA. This request gave rise to the initial decision and appeal.

APH decided to release this report. This decision was appealed to the Information and Privacy Commissioner of Ontario by the Applicant, the former CEO and Medical Officer of Health for APH. The Applicant had been involved in the CFO's hiring process. She opposed the request to disclose on the basis that her personal information was exempt from disclosure under *MFIPPA* and that she had spoken with the KPMG investigators on the condition of confidentiality.

The History of the Proceeding

The Commissioner agreed that the Report contained highly sensitive personal information related to the Applicant, but found there was a compelling public interest in disclosure of the report under section 16 of *MFIPPA*. On this basis, he ordered the unredacted Report to be released.

The Applicant applied for a reconsideration, which was denied. She then sought judicial review. On the judicial review, the Divisional Court found the Commissioner's decision to be unreasonable. The Court focused on the fact that the Commissioner's analysis did not identify each item of personal information that was exempt from disclosure and then balance that information against the section 16 override.

The Decision of the Court of Appeal

The Court of Appeal disagreed with the Divisional Court and restored the Commissioner's decision. In making this finding, the Court of Appeal rejected the Divisional Court's emphasis on the need for a piecemeal approach to the analysis. Specifically, the Court of Appeal stated:

> [92] While a piece-by-piece analysis may well be required in some circumstances, in other cases, such as this one, a piece-by-piece analysis in the reasons is not required. In this case, it is the story told when the whole of the protected information is disclosed that sheds light on the operations of APH and, more specifically, whether a conflict of interest existed in the hiring of the former interim CFO and whether APH suffered any losses as a result of his hiring. Viewed individually, each piece of protected information reveals little of the underlying story and, on its own, holds little public interest, let alone a compelling public interest in disclosure that would outweigh the s. 14 protection. The public interest in disclosure is of the information as a whole and it is when this interest is weighed against the purpose of the s. 14 protections at issue that the s. 14 protection must yield. […]

The Court of Appeal noted that the issue before the Commissioner had required a weighing and balancing of interests that were both nuanced and contextual. It emphasized that this weighing and balancing was a task that the legislature had specifically entrusted with the Commissioner, that the application and interpretation of section 16 were "at the heart of the Commissioner's specialized expertise" and that the Commissioner was in the best position to make these determinations. The Court also found that the Commissioner was alive to the Applicant's legitimate concerns of the possibility of unfair pecuniary or other harm and the potential damage to her reputation and reasonably concluded, with this evidence in mind, that the Report should be disclosed.

Leave to appeal has been filed with the Supreme Court of Canada on this case.

Takeaways for Municipal and Other Public Sector Employers

This decision clarifies how the public interest override applies and illustrates how municipal and other public sector employers can demonstrate transparency without inviting privacy-related liability to employees by use of the freedom of information regime. Although this case provides an example of where the public disclosure override was favoured, the norm is certainly to keep and maintain internal investigation reports in confidence. Such reports are also often entirely excluded by the right of public access because they are "employment-related" and excluded based on this status.

Hicks Morley helps public sector organizations with the legal aspects of public affairs and crisis management, often by providing strategic counselling and representation of freedom information requests. Amanda Cohen and Jessica Toldo specialize in labour and employment matters facing municipalities. If you have any questions about this or any other employment matter, do not hesitate to contact Amanda at 416-864-7316 or Jessica at 416-864-7529. They may also be reached by email at: amanda-cohen@hicksmorley.com and jessica-toldo@hicksmorley.com.

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