

**SUPREME COURT OF CANADA REVISITS THE LIMITS
OF THE DUTY TO ACCOMMODATE**

Hydro-Québec v. Syndicat des employé-e-s de technique professionnelles et de bureau d'Hydro-Québec, section locale 2000 (SCFP-FTQ), 2008 SCC 43 (CanLII)

Introduction

When the Supreme Court of Canada issued its decision in *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3 (“*Meiorin*”) almost ten years ago, it heralded a new “unified approach” to the analysis of discrimination. Gone was the distinction between direct and adverse effect discrimination. Employers were required to accommodate employees to the point of undue hardship in all cases. However, the decision in *Meiorin* suggested that employers might be required to establish that it was “impossible” to accommodate a disabled employee in order to make out the undue hardship defence. This premise was put to the test in the recent decision of the Supreme Court in *Hydro-Québec*, in which the Court held that an employer need not show that accommodation is “impossible”.

The Facts

The complainant was an employee of Hydro-Québec who had missed a substantial amount of time from work due to a variety of physical and mental disabilities. In fact, she had missed a total of 960 work days over the course of seven and a half years. The employer had made numerous efforts to accommodate the employee, but eventually received a psychiatric assessment indicating that there was no reasonable prospect of improvement in her condition or her attendance in the foreseeable future.

The complainant's employment was terminated, and her union filed a grievance alleging that the termination was not justified. After considering all of the efforts made by the employer and the complainant's poor prognosis, including a 90% probability of depressive relapse, the Arbitrator dismissed the grievance as Hydro-Québec had established that it could not accommodate the complainant without incurring undue hardship. The decision of the Arbitrator was judicially reviewed. Matteau J. of the Québec Superior Court dismissed the application, finding that the Arbitrator had correctly applied the test for accommodation to the point of undue hardship.

The Québec Court of Appeal, however, concluded that the Arbitrator had erred. The Court found that the Arbitrator was mistaken in his assessment of the evidence, and that it would have been possible for the employer to accommodate the complainant within the test set out in *Meiorin*. In particular, the Court of Appeal found that it was not “impossible” for Hydro-Québec to accommodate the complainant, so the defence of undue hardship was not made out. The Court also concluded that the Arbitrator erred in considering the complainant's past absenteeism and the employer's accommodation efforts, as the duty to accommodate should be assessed at the time of termination.

The Supreme Court Upholds the Arbitrator's Decision

In a unanimous decision (Bastarache J. not taking part), the Supreme Court reviewed the *Meiorin* analysis undertaken by the Court of Appeal. In the Court's reasoning, the difficulty with the Court of Appeal decision arose from the third step of the test set out at para. 54 of *Meiorin*:

An employer may justify the impugned standard by establishing on the balance of probabilities:

...

- (3) that the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer.

[emphasis added]

After further citing from Justice McLachlin's reasons in *Meiorin*, the Supreme Court stated (at para. 12):

What is really required is not proof that it is impossible to integrate an employee who does not meet a standard, but proof of undue hardship, which can take as many forms as there are circumstances. ...

The Court went on to observe that the purpose of the duty to accommodate is to enable disabled persons to perform their work, without being unfairly excluded, but that the duty does "not completely alter the essence of the contract of employment, that is, the employee's duty to perform work in exchange for remuneration" (para. 15).

At para. 16, the Court concluded its analysis, saying:

The test is not whether it was impossible for the employer to accommodate the employee's characteristics. The employer does not have a duty to change working conditions in a fundamental way, but does have a duty, if it can do so without undue hardship, to arrange the employee's workplace or duties to enable the employee to do his or her work.

Given that Hydro-Québec had tried for a number of years to adjust the complainant's working conditions, without improving the likelihood of her regular attendance in future, the employer had discharged its burden of proof with respect to undue hardship. In this regard, the Court stated at para. 18:

Thus, the test for undue hardship is not total unfitness for work in the foreseeable future. If the characteristics of an illness are such that the proper operation of the business is hampered excessively or if an employee with such an illness remains unable to work for the reasonably foreseeable future even though the employer has tried to accommodate him or her, the employer will have satisfied the test. In these circumstances, the impact of the standard will be legitimate and the dismissal will be deemed to be non-discriminatory. ...

The Supreme Court also held that the time of termination is not the sole, relevant period for assessing undue hardship. The Court stated that such an approach "compartmentalized" the accommodation process, and that a global assessment of the employer's duty to accommodate (including the employee's past attendance, measures taken by the employer and the employee's prognosis) must be applied. Accordingly, the Court of Appeal's approach (which focused on what the employer knew of the employee's condition at the time of termination) was in error.

In the result, the employer's appeal was allowed and the decision of the Arbitrator was affirmed.

Conclusion

The decision in *Hydro-Québec* provides some long-needed clarity with respect to an employer's duty to accommodate, and should put to rest any suggestion that *Meiorin* imposed an "impossibility" standard for accommodation. Instead, the Court has reaffirmed the principle that an employer can expect employees to perform their part of the employment bargain, provided that the employer makes the necessary effort to accommodate those who require it. When it becomes evident that an employee cannot "fulfill the basic obligations associated with the employment relationship for the foreseeable future", it is not discriminatory for an employer to end the relationship.