

## EXPLORING THE PARAMETERS OF THE DUTY TO ACCOMMODATE

*Lafrance v. Treasury Board (Statistics Canada)* and *Ideal Roofing Co. v. United Steel Workers*

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### **Introduction**

In a pair of recent arbitration decisions, *Lafrance v. Treasury Board (Statistics Canada)*, [2007] C.P.S.L.R.B. No. 32 (Nadeau), and *Ideal Roofing Co. v. United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (United Steel Workers) (Gauthier Grievance)*, [2007] O.L.A.A. No. 140 (Baxter), adjudicators have been required to determine whether employers have made sufficient efforts to discharge their duty to accommodate disabled employees. In both cases, the answer was 'yes'.

### ***Lafrance v. Treasury Board (Statistics Canada)* (“Stats Can”)**

In the *Stats Can* case, the grievor was a Senior Project Officer. Her job consisted of preparing surveys and training guides based on information received from clients and ensuring that the surveys were conducted properly. As part of her job, the grievor had access to confidential information, which was maintained on a very secure server, and also participated in extensive team meetings, during which the development of surveys and training materials were discussed. Commencing in 2000, the grievor developed a sleep disorder, and shortly thereafter her physician recommended that she be assigned full-time “telework” duties. Early in the process of attempting to accommodate the grievor, the employer did not pay enough attention to the grievor’s needs. This resulted in a complaint to the Canadian Human Rights Commission. The complaint was resolved, with the parties agreeing to attempt a reintegration of the grievor into the workplace.

During the search for accommodation, the employer repeatedly sought clarification of the grievor’s limitations in an effort to identify duties that the grievor might be able to perform. However, the grievor’s physician provided little detail and merely reiterated her recommendation that the grievor be provided full-time telework. Despite its best efforts, the employer was only able to identify a small quantity of work that could be performed by the grievor from her home without participating in team meetings or having access to data on the secure server.

At arbitration, the grievor argued that Stats Can had not made all reasonable efforts to accommodate her. In particular, the grievor challenged the assertion of the employer that full-time telework was impossible without the employer incurring undue hardship. The employer adduced evidence of its extensive search for duties to meet the grievor’s limitations, including two projects that were provided to the grievor. However, the employer further asserted that being present in the workplace was an essential element of her position because of the team-oriented nature of the work and the necessity of accessing confidential information that was maintained under heavy security.

Adjudicator Georges Nadeau determined that the grievor did, in fact, suffer from a disability, and that she was subject to differential treatment by virtue of not being able to attend the workplace and earn a living. However, the adjudicator was also persuaded that presence at meetings and access to data, which was only available in the workplace, was essential to the grievor's position. The Adjudicator, therefore, found that attendance at work was a *bona fide* occupational requirement, and that modifications to permit the grievor to work solely from home were not feasible. The employer had shown good faith in its efforts to identify methods of accommodation, but those efforts proved fruitless. In the result, the grievance was dismissed.

**Ideal Roofing Co. v. United Steel Workers (“Ideal Roofing”)**

In *Ideal Roofing*, the grievor had been a truck driver until he lost his “AZ” licence due to a heart condition. Holding a licence with the “AZ” designation was an essential requirement of the job, but the employer continued to employ the grievor as a “Helper”. His truck driver wages were red-circled for a period of almost fourteen months, although he was performing duties which attracted a much lower pay rate. During this period, the grievor was offered a position as Shipper, which paid comparable wages to his previous position. The grievor rejected this offer. Instead, the grievor continued to work as a Helper, and occasionally drove fork lift. When a Fork Lift Operator position came available, he applied for it. However, he was not successful in obtaining the job because the position required an “AZ” licence (due to some shunting duties that were required of Operators).

The union grieved, claiming that the employer had failed to accommodate the grievor in denying him the vacancy. The union claimed that the employer should have considered “unbundling” the shunting duties from the Fork Lift Operator position, thereby permitting the grievor to perform this job. The employer argued that “unbundling” or other modifications to existing positions was not relevant to the grievance as the duty to accommodate was effectively discharged once the grievor rejected an offer of reasonable accommodation. In the alternative, the employer asserted that the shunting of trucks was an essential duty of the Fork Lift Operator position and that the grievor could not perform these duties due to his lack of a licence. Removing this duty from the Fork Lift Operator would constitute an undue hardship, the employer argued.

Arbitrator Baxter considered the jurisprudence on an employee's duty to facilitate the search for accommodation and agreed with the employer that the grievor could not expect or demand “a perfect solution”. The duties, hours and rate of pay for the Shipper position were sufficiently comparable to the position of Truck Driver and the offer was therefore “reasonable”. The Arbitrator concluded that when the grievor refused the employer's offer of a reasonable accommodation, the duty to accommodate was discharged.

The Arbitrator also accepted the employer's argument that the ability to drive trucks (i.e., holding a valid “AZ” licence) was an essential duty of the Fork Lift Operator position, and that there would not always be another employee present with an “AZ” licence to perform that aspect of the job. Accordingly, even if the employer was required to consider accommodation in the grievor's preferred position, such accommodation would impose undue hardship on the employer. Therefore, the grievance was dismissed.

## **Conclusion**

These two decisions provide some insight into the scope of an employer's duty to accommodate, and highlight the importance of being able to identify the essential duties of an employee's pre-disability position or any other position in which accommodation may be sought. The decisions also suggest, however, the extent of accommodation options that should be canvassed before determining that an employee cannot be accommodated. Failure to engage in a thorough consideration of alternatives may result in a finding that the employer has not discharged its duty to accommodate.

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