MAKING THE IMPOSSIBLE POSSIBLE:
SCC REVISITS THE DUTY TO ACCOMMODATE

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INTRODUCTION

Impossible. That is the standard that many decision-makers have applied in determining whether an employer has met its duty to accommodate an employee with a disability. That is, has the employer demonstrated that it is impossible to accommodate the employee pursuant to its obligations under human rights legislation?

The Supreme Court of Canada recently clarified the limits of an employer's duty to accommodate an employee with a disability in *Hydro-Québec v. Syndicat des employés de techniques professionnelles et de bureau d'Hydro-Québec, section locale 2000 (SCFP-FTQ).*[i] In *Hydro-Québec*, the Supreme Court rejected the view that an employer must accommodate an employee with a disability pursuant to human rights legislation unless it is "impossible" to do so. Rather, the Court found that the impossibility benchmark was necessarily linked to the undue hardship standard. That is, an employer has a duty to accommodate an employee unless it is impossible to do so *without undue hardship*. In order to fully understand the *Hydro-Québec* decision, it is first necessary to briefly review the earlier significant decision of the Supreme Court of Canada in *British Columbia (Public Service Employee Relations Commission) v. BCGSEU* ("*Meiorin*").[ii]

THE *MEIORIN* DECISION

In 1999, the Supreme Court of Canada issued the landmark decision in *Meiorin* that changed the landscape of the law of human rights. Meiorin was a female firefighter who alleged discrimination when she was laid off because she failed certain physical fitness tests. Meiorin alleged that the tests indirectly discriminated against her because she was a woman and the tests had been developed for men. In determining whether discrimination had occurred, the Supreme Court established a three-part test applicable to assessing the legality of employers' rules and standards in the human rights context. The test determines whether the rule or standard is a *bona fide* occupational requirement. The test remains the starting point for any

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[i] [2008] S.C.J. No. 44.

[2] [1999] 3 S.C.R. 3.

assessment of workplace rules and standards alleged to have a discriminatory impact. The test provides:

> An employer may justify the impugned standard by establishing on the balance of probabilities:
>
> 1. that the employer adopted the standard for a purpose rationally connected to the performance of the job;
>
> 2. that the employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfillment of that legitimate work-related purpose; and
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> 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)

The third part of the test from *Meiorin* has been the subject of varying interpretations by arbitrators, tribunals and courts alike. Following *Meiorin*, many were of the view that, to discharge its burden, an employer had to establish that it was *impossible* to accommodate an employee protected by human rights legislation. The Supreme Court's decision in *Hydro-Québec* provides clarity to the issue and closes the gap between diverging views. The *Hydro-Québec* decision indicates that it is in fact possible to meet the impossibility standard articulated in *Meiorin*.

THE HYDRO-QUÉBEC DECISION

Facts

Hydro-Québec involved a sales clerk with 24 years of service who suffered from several physical and mental illnesses including tendonitis,

bursitis, hypertension, a drug overdose, bouts of major depression and two suicide attempts. The employee's mental conditions resulted in an acrimonious relationship with her colleagues and supervisor.

In her last seven and a half years of employment, the employee was absent 960 working days; an average of 128 days per year. In the year prior to her dismissal, the employee was absent more than 210 days and had been absent from work for more than five months at the time of the termination of her employment. She was late sending her medical certificates and was communicating with the Employer only through her daughter.

The Employer had employed several accommodation measures including authorizing lengthy absences, modification of her workstation, part-time work, two temporary assignments under a different supervisor and in a different city even when her position was abolished and she was declared surplus under the collective agreement, and a gradual return to work.

Shortly before her dismissal, the employee was diagnosed with mixed personality disorder. The employee's physician recommended an indefinite absence from work. The Employer had two psychiatrists assess the employee. Both found that the employee's attendance and condition were unlikely to improve significantly in the future. The employee was dismissed due to her exceptionally high rate of absenteeism and her current and future inability to regularly and reasonably perform her job.

The employee's union, SCFP-FTQ, grieved the employee's dismissal alleging that it violated the *Québec Charter of Human Rights and Freedoms*. While *Hydro-Québec* was decided in the context of the Québec human rights legislation, the decision has a much broader application to similar human rights legislation, such as the Ontario *Human Rights Code*, that requires an employer to accommodate an employee with a disability to the point of undue hardship.

The Arbitration Decision

At arbitration, the Union argued that the employer failed to accommodate the employee's disability. The Union's expert suggested that the employee could be accommodated by providing the employee with a periodic complete change in work environment to cope with the employee's

acrimonious work relationships caused by her mental illness. The Arbitrator disagreed.[iii]

In particular, the Arbitrator found that the Union's suggestion would constitute undue hardship given that:

> ... [T]he employer would have to periodically, on a recurring basis, provide the complainant with a new work environment, a new immediate supervisor and new co-workers to keep pace with the evolution of the 'love-hate' cycle of her relationships with supervisors and co-workers.

The Arbitrator also noted that some of the stressors that contributed to the employee's condition were beyond the Employer's control (e.g. family environment). The Arbitrator found that the Employer's attendance standard was a *bona fide* occupational requirement. Taking into account the totality of the accommodation offered by the Employer, the employee's chronic absenteeism and the prognosis that the employee's condition and attendance were not likely to improve in the foreseeable future, the Arbitrator determined that the Employer met its duty to accommodate to the point of undue hardship and dismissed the grievance.

The Union's application for judicial review to the Québec Superior Court was dismissed.[iv]

[iii] (unreported, September 19, 2003), (G. Corbeil).

[iv] [2004] J.Q. no 11048.

The Court of Appeal

The Court of Appeal[v] allowed the Union's appeal and overturned the Arbitrator's and lower court's decisions. The Court of Appeal found that the Arbitrator misapplied the test from *Meiorin* because he failed to recognize that the Employer was required to prove that it was *impossible* to accommodate the employee. Certain doctors had indicated that the employee might be able to return to work on a gradual basis with long-term medication and psychotherapy. The Court of Appeal also determined that the duty to accommodate must be assessed based on the information at the time the decision to dismiss is made, and not based on the employee's entire history of absenteeism.

The Court of Appeal ordered that the employee be reinstated with full compensation.

The Supreme Court of Canada

In a unanimous decision, the Supreme Court of Canada faulted the Court of Appeal in two respects. First, the Court of Appeal misapplied the test from *Meiorin* for determining whether an employer had fulfilled its duty to accommodate an employee with a disability. Second, the Court of Appeal erred in assessing the duty to accommodate based only on the circumstances at the time the decision to terminate the employee's employment was made.

(a) Making the Impossible Possible

The Supreme Court stated that it is essential to strike a balance between the employer's duty to accommodate and the employee's duty to perform his or her work in a manner that does not alter the essence of the employment bargain. The Supreme Court articulated the applicable test as follows, at paragraph 12:

> ... [W]hat 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. ...

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[v] [2006] Q.J. No. 907.

And at paragraphs 14-16:

> [T]he goal of accommodation is to ensure that an employee who is able to work can do so. In practice, this means that the employer must accommodate the employee in a way that, while not causing undue hardship, will ensure that the employee can work. The purpose of the duty to accommodate is to ensure that persons who are otherwise fit to work are not unfairly excluded where working conditions can be adjusted without undue hardship.
>
> However, the purpose of the duty to accommodate is not to completely alter the essence of the contract of employment, that is, the employee's duty to perform work in exchange for remuneration. The burden imposed by the Court of Appeal in this case was misstated ...
>
> 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.

Accordingly, the test is not whether it is impossible to accommodate the employee. Rather, the test is whether it is impossible to accommodate the employee *without undue hardship*. The concepts of impossibility and undue hardship are inextricably linked.

The Supreme Court emphasized that rigid rules must be avoided to allow for the flexibility necessary to effectively deal with the individualized nature of the duty to accommodate.[vi] However, in cases of chronic

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[vi] At paragraph 17.

absenteeism, where the employer can demonstrate that the employee is unable to return to work in the reasonably foreseeable future despite accommodation, or that the proper operation of the business is hampered excessively, the employer has fulfilled its duty to accommodate to the point of undue hardship.

(b) A Global Assessment of the Duty to Accommodate

Moreover, the Supreme Court found that a decision to dismiss an employee because the employee will not be able to work in the reasonable foreseeable future must be assessed globally taking into account the employee's entire history of absenteeism due to the illness and/or disability.[vii] A global assessment is required in order to properly assess evidence regarding the employee's future prognosis and attendance. The Supreme Court determined that the Court of Appeal was incorrect in assessing the decision based only on the circumstances existing at the time the decision to dismiss was made given that this approach compartmentalized the accommodation process.

Assessing all of circumstances as a whole, the Supreme Court agreed with the decision of the Arbitrator and the Québec Superior Court and found that the Employer had fulfilled its duty to accommodate the employee to the point of undue hardship.

[vii] At paragraphs 20-21.

PRACTICAL APPLICATION

There are several significant principles that can be gleaned from the *Hydro-Québec* decision:

- ✓ Be flexible and avoid rigid rules.
- ✓ Assess the duty to accommodate globally.
- ✓ Apply an individualized approach to accommodation.
- ✓ The employer's duty to accommodate must be balanced against the employee's duty to perform his or her work.
- ✓ Accommodate until it is impossible to do so without undue hardship.
- ✓ The Employer does not have to change working conditions in a fundamental way; however, it must make any changes possible up to the point of undue hardship.
- ✓ The duty to accommodate chronic absenteeism to the point of undue hardship will be satisfied where the employer has engaged in reasonable accommodation for a lengthy period and the employee will not be able to work in the reasonable foreseeable future and/or the proper operation of the business is hampered excessively.

THE DUTY TO ACCOMMODATE AND UNDUE HARDSHIP

The duty to accommodate is one of the most significant issues in the workplace today. Employers must be alert to workplace practices, policies and/or standards that may have an adverse effect on employees with disabilities. Human Rights legislation in jurisdictions across Canada imposes a statutory duty upon employers to accommodate employees with disabilities. The duty is substantial, requiring an employer to make a diligent and genuine effort to meet the employee's accommodation needs.

However, although the duty is a significant one, as confirmed by the Supreme Court of Canada in the *Hydro-Québec* decision, it is not without limitations. The duty extends only to the point of "undue hardship". Beyond this standard an employer is relieved of its obligation to accommodate a disabled employee.

In Ontario, the duty to accommodate has been codified in the Ontario *Human Rights Code* (the "*Code*").[viii] Section 5 of the *Code* provides that all employees are entitled to equal treatment with respect to employment free of discrimination on the basis of a disability. Section 10 of the *Code* defines "disability" in the following way:

[viii] R.S.O. 1990 c. H.19

> "disability" means,
>
> (a) any degree of physical disability, infirmity, malformation or disfigurement that is caused by bodily injury, birth defect or illness and, without limiting the generality of the foregoing, includes diabetes mellitus, epilepsy, a brain injury, any degree of paralysis, amputation, lack of physical co-ordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment, or physical reliance on a guide dog or other animal or on a wheelchair or other remedial appliance or device,
>
> (b) a condition of mental impairment or a developmental disability,
>
> (c) a learning disability, or a dysfunction in one or more of the processes involved in understanding or using symbols or spoken language,
>
> (d) a mental disorder, or
>
> (e) an injury or disability for which benefits were claimed or received under the insurance plan established under the *Workplace Safety and Insurance Act, 1997*.

An employee with a disability that falls within the definition of section 10 is entitled to protection under the *Code*. Part of this protection involves the employer's statutory duty to accommodate. This duty arises from both sections 11 and 17 of the *Code*.

Subsection 11(1) provides that a requirement, qualification or factor which is not discriminatory on its face may inadvertently operate in a manner which constructively discriminates against members of a protected group (i.e., adverse effect discrimination). An employee could potentially challenge a workplace practice, policy or standard based on this provision.

In the event that this occurs, subsection 11(2) provides that an employer may offer a defence by demonstrating that the practice, policy or standard is a reasonable and *bona fide* occupational requirement. To successfully raise this defence, an employer must satisfy the three-part test from *Meiorin* discussed above.

Unlike section 11, section 17 explicitly addresses the issue of discriminating against an employee with a disability:

> 17. (1) A right of a person under this Act is not infringed for the reason only that the person is incapable of performing or fulfilling the essential duties or requirements attending the exercise of the right because of disability.
>
> Accommodation
>
> (2) No tribunal or court shall find a person incapable unless it is satisfied that the needs of the person cannot be accommodated without undue hardship on the person responsible for accommodating those needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any.

Following the Supreme Court of Canada's ruling in *Meiorin*, which created a uniform approach to direct and adverse effect discrimination, the Ontario Court of Appeal confirmed that both sections 11 and 17 of the *Code* apply to persons with a disability.[ix] In addition, although the duty to accommodate requires employers to make every effort to accommodate a disabled employee, subsections 11(2) and 17(2) impose a limit based on the standard of "undue hardship". The *Code* itself does not define undue hardship beyond the factors of cost, outside sources of funding and health and safety requirements; however, the concept has been interpreted by the courts.

[ix] *Entrop v. Imperial Oil Ltd.* (2000), 137 O.A.C. 15 (O.C.A.) at para. 77.

Undue Hardship

The undue hardship standard recognizes that the duty to accommodate is not without boundaries. Undue hardship provides the means for courts, arbitrators and tribunals alike, to strike a balance between the employee's right to be free of discriminatory treatment and the employer's right to manage its business in a safe, efficient and economically viable manner.

The Supreme Court of Canada has commented that "the use of the term 'undue' infers that some hardship is acceptable; it is only 'undue' hardship" that will satisfy an employer's duty to accommodate an employee with a disability.[x]

In *Meiorin*, the Court remarked that the duty to accommodate requires an employer to demonstrate that it is "impossible to accommodate individual employees without imposing undue hardship".[xi] The Court commented that an innovative and practical approach should be taken in the context of the particular circumstances. The Supreme Court of Canada has defined hardship as "impossibility, serious risk or excessive cost."[xii]

Evidently, the obligation on employers is quite high. In particular, employers will be required to consider all available options and make every reasonable effort to accommodate an employee with a disability within the boundaries of the undue hardship standard.

However, an employer may experience difficulty in assessing whether or not it has met its duty to accommodate under the *Code* given that there is no objective standard with respect to the undue hardship threshold. Rather, undue hardship is a fluid concept and will vary along with the particular circumstances of each case.

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[x] *Central Okanagon School District No. 23 v. Renaud* (1992), 95 D.L.R. (4th) 577 (S.C.C.), at p. 585.

[xi] *Meiorin*, *supra*, footnote 2, at para. 54.

[xii] *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights) (Grismer)* (1999), 181 D.L.R. (4th) 385 (S.C.C.), at 398.

To assist an employer in making this determination, the Supreme Court of Canada has provided a non-exhaustive list of factors that should be considered in determining whether an employer has accommodated up to the point of "undue hardship".[xiii] These factors include financial cost, impact on the collective agreement, employee morale, interchangeability of the workforce and facilities, size of the employer and safety. Madame Justice Cory explained that these factors "are not engraved in stone".[xiv] Rather, they must be applied together with common sense and flexibility on a case-by-case basis.

In Ontario, subsection 17(2) of the *Code* provides that cost, outside sources of funding, and health and safety are the only factors that may be taken into consideration. Moreover, the Ontario Human Rights Commission's "Policy and Guidelines on Disability and the Duty to Accommodate",[xv] while not having the force of law, explicitly excludes the factors of business inconvenience, employee morale, third party preferences and collective agreements from consideration. Nonetheless, the Commission's policies can be persuasive factors in orders and decisions made by the Tribunal. The Tribunal can consider the policies of the Commission on its own initiative or on the request of any party.[xvi]

The foregoing general principles in respect of the duty to accommodate and undue hardship should be considered in any circumstance in which an employer is faced with an employee with an injury or illness triggering the need for accommodation under the *Code*.

IMPLICATIONS AND CONCLUSION

The *Hydro-Québec* decision does not alter the fact that an employer's duty to accommodate remains a substantial and far reaching

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[xiii] *Central Alberta Dairy Pool v. Alberta (Human Rights Commission)* (1990), 72 D.L.R. (4th) 417 (S.C.C.), at p. 439.

[xiv] *Chambly, Commission scolaire régionale v. Bergevin*, [1994] 2 S.C.R. 525, 115 D.L.R. (4th) 609.

[xv] (November 23, 2000), available online at: www.ohrc.on.ca/en/resources/Policies/PolicyDisAccom2.

[xvi] *Human Rights Code* section 45.5.

obligation. The decision does not relieve the employer of the responsibility to search high and low and near and far to exhaust all accommodation options to the point of undue hardship.

Nevertheless, *Hydro-Québec* allows employers to breathe a sigh of relief in knowing that there is a limit to its duty to accommodate. An employer does not have to establish that it is absolutely impossible to accommodate an employee with a disability. Rather, it must demonstrate that it is impossible to accommodate the employee without undue hardship.