

Wrongful Dismissal Update –
2008 Decisions of the Supreme Court of Canada

Part III – Employer’s Obligation to Accommodate Disabled Employees is Limited: *Hydro-Québec v. – Syndicat des employés de techniques professionnelles et de bureau d’Hydro-Québec, section locale 2000 (SCFP-FTQ) –*

By Kenneth Krupat

In August 2008, the Supreme Court of Canada issued a relatively short and unanimous decision addressing the issue of frequent absences and discussing the obligations of employers in handling these absences.

This case originally came from an arbitrated dispute involving a union. The employee had a lengthy record of absences – missing 960 days of work over a span of 7 years. The employer had adjusted working conditions to try to meet the employee’s needs but these efforts had not been entirely successful. Eventually, the employee brought a physician’s note indicating that she would “no longer be able to work on a regular and continuous basis without continuing to have an absenteeism problem.” The employer dismissed the employee, who then filed a grievance. At arbitration, the arbitrator held that the employee was unable to work for the foreseeable future, as required, and the employer had no further obligations. The case made its way up to the Supreme Court of Canada after the Québec Court of Appeal overturned the lower Court decision and sided with the employee.

The Supreme Court of Canada discussed the concept of “undue hardship” when an employer is required to accommodate a disabled employee. Employers must be flexible in adopting a standard that is appropriate – to ensure that the employee can work. However, the employer does not need to “alter the essence of the contract of employment.” Employers should be required to offer their employees variable work schedules, lighten work loads or authorize shift transfers if these steps can be taken to accommodate the needs of disabled employees.

The Court noted that if an employee’s illness means 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” and will not be required to keep the employee any longer.

The Supreme Court’s decision in this case is not strikingly different from existing case law dealing with disabled employees. Employers have never been required to provide that it is “impossible” to accommodate a disabled employee. Employers should not be required to create entirely new positions or put up with

inappropriate levels of chronic absenteeism. Although this decision is another victory for employers, it was a unanimous decision of the Supreme Court of Canada which did not fundamentally change the law.

The one concern that employees may have however, is the absence of genuine empathy in the decision in reviewing the case history. Where Supreme Court of Canada decisions in the past have focused on “vulnerable employees” and the sheer gap in bargaining power between employees and employers, this Supreme Court of Canada decision is most concerned with employer needs to carry on business efficiently and productively.

Perhaps it is too early to assess the impact of this type of thinking on other factual scenarios, but this decision is one of a number of significant decisions issued by the Supreme Court in 2008. All of the decisions sided with employers. Looking at the language used in *Hydro-Quebec* and the results of the other decisions, employees in Canada certainly have cause to worry about what other decisions might be coming down the pipeline.

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