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Reasonable Accommodations: How Far Must Employers Go?

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FANNED BY MEDIA HYPE, the concept of "reasonable accommodations" has inflamed passions and captivated the public's attention for the last two years. Now that calmer heads have prevailed, this is the appropriate time to point out that reasonable accommodations are practical issues which mainly employers have to deal with. Making its first appearance in Canadian jurisprudence a quarter of a century ago, the duty to accommodate employees spread throughout the work place and has become a key concept in the administration of human resources for managing employees with disabilities. But how far do employers have to go?

In legal terms, the answer is quite simple: the duty to accommodate stops at the point of undue hardship. For many managers, undue hardship only further begs the question. However, we can safely presume that employers have to suffer at least a minimum degree of hardship before it becomes "undue." Furthermore, as each case is specific, it is important to determine for each employee and each particular situation exactly when the hardship becomes undue. Businesses must demonstrate that they have measured their point of undue hardship without speculation or impressionistic ideas about the available forms of accommodation.

Undue hardship is not a scientific formula or a financial calculation. Rather, it is the culmination of a process that takes into account the individual characteristics of the employee and the means at disposal of the employers.

Generally, relying on pre-determined rules and standards to establish a threshold for undue hardship is a mistake. Undue hardship can be defined as that decisive phase when managers can conclude, in all justice and fairness, that the business fully played its part in accommodating the employee's handicap or illness.

That being said, benefits are not considered a form of accommodation. Although, one might think that employers who offer disability insurance or a pension plan meet a duty to accommodate employees suffering from disabilities or older employees, jurisprudence has sent a very clear signal that this is not the case.

The Supreme Court of Canada confirmed in 2007 that "[i]t is quite true that substitute for the duty to accommodate."

Technically, Employers cannot therefore include the cost of fringe benefits, disability pensions or retirement benefits in their evaluation of undue hardship.

Recent jurisprudence helps to better define the elusive notion of undue hardship in those matters most commonly seen in practice – cases of absenteeism. Businesses can be deemed to suffer undue hardship by the absence itself of an employee. As the absence grows longer, the hardship amplifies and could eventually become undue with the passage of time if the prognosis remains dim. Thus, the Supreme Court has also ruled that "the employer does not have a duty to change conditions of employment in a fundamental way." Since the performance of work for pay is the essence of the employment agreement, there is undue hardship in cases of absenteeism where employees cannot demonstrate that, at the end of a long absence, they will be able to return to work in the short term.

In addition to maintaining the employment relationship for a reasonable length of time, employers can be expected to make certain changes to work schedules or the duties of a position to facilitate their employees' return to work or to allow them to perform work adequately on a regular basis given the circumstances and taking into consideration the impact such accommodations will have on clients and other employees.

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