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Disability in the Workplace – Understanding the Duty to Accommodate

By Karin Pagé, Litigation Lawyer

The law is clear that an employer is required to retain an employee who becomes ill or disabled during their employment unless the person is incapable of performing the essential duties of the position because of the disability, taking into account whether the needs of the employee may be accommodated without undue hardship, considering cost, outside sources of funding, and health and safety requirements.

But - what constitutes “undue hardship”?

There is no simple answer to this question, as it requires a case by case assessment, and encompasses both a procedural and a substantive element.

The procedural element of the duty to accommodate requires the employer to

- a) obtain all relevant information about the person’s disability to the extent it is available; and
- b) consider how it might meet its obligations to the employee.

The substantive part of the test is whether the employer has in fact accommodated the employee to the point of undue hardship. The use of the term “*undue*” means that a certain degree of hardship to the employer is expected. The following are factors that may be considered in determining whether undue hardship exists:

- The interchangeability of the workforce and facilities;
- Whether the employee’s job itself exacerbates the disability;
- The extent of the disruption of a collective agreement;
- The effect on the rights of other employees;
- The effect on the morale of other employees;
- Costs to the employer of the proposed accommodation, including the impact on efficiency, wage increases and other direct financial costs to be incurred (e.g. renovations); and
- The impact on the safety of the individual, other employees, patients or the general public.

With few exceptions, if an employee requires time off work due to an illness or disability and the nature of the work is such that it would be relatively easy to hire a replacement, such would be unlikely to constitute undue hardship.

However, an employer is not required to create a position which does not assist the employer in getting the work done in an efficient and economic manner.

As a result, discharge may be justified where:



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- a) the employee is no longer able to perform his regular job duties;
- b) there is no other position available to accommodate the disability; and
- c) there is no reasonably foreseeable prospect of the employee being able to perform his regular job duties.

We have highlighted above the employers' obligations in the accommodation process, but the employee also bears some responsibility.

For instance, an employee has a responsibility to

- make their employer aware of a disability requiring accommodation
- provide a medical assessment
- advise the employer of any limitations in work performance due to the disability

In addition, an employee must take all reasonable steps to facilitate the success of rehabilitation and treatment. Finally, if an employer makes a reasonable proposal to accommodate the employee, and the employee refuses it, the employer's duty will have been discharged.

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