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LITIGATION
- Employment Update

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Duty to Accommodate – Supreme Court of Canada Rehabilitates the Undue Hardship Threshold

A recent decision of Canada's top court signals a pendulum swing in the judicial attitude towards the employer's burden.

By Peter L. Biro

An employer's duty to accommodate the legitimate needs of employees from a human rights standpoint – whether based on religious belief, illness, disability or some other factor – has long been established. What's been difficult to establish is the extent to which employers must go to accommodate these needs. In recent years, employers have often had to demonstrate that it was virtually impossible to accommodate the employee in order to establish that accommodation would result in undue hardship for the employer, thereby relieving the employer of the accommodation requirement.

Well, "the times, they are a-changing"! The recent Supreme Court of Canada decision in Hydro-Québec reflects a reconsideration of the prevailing orthodoxy on the undue hardship test and has infused it with a renewed reasonableness standard. The case (this one out of Québec) is the latest in a string of Court of Appeal and Supreme Court of Canada decisions – *Mulvihill v. Ottawa, Honda v. Keays,* and *Evans v. Teamsters* – that reflect an unmistakable shift in judicial attitude towards a more practical and reasonable approach to the interpretation and application of the rules of engagement in the historic bargain between master and servant.

Duty to accommodate based on illness

In the Hydro-Québec case, the complainant employee had an employment history marked with many physical and mental health problems, from tendonitis and hypertension on the physical side, to a significant personality disorder on the mental health side that affected her relationship with supervisors and co-workers. These problems resulted in extensive absences from work. In the final seven and one-half years of her employment, she had missed 960 days of work.

Hydro-Québec had adjusted the employee's working conditions on several occasions in an attempt to accommodate her limitations. These included actions ranging from assigning lighter duties to providing a gradual return to work following a depressive episode. None of the actions improved the complainant's ability to report to work regularly and she was eventually dismissed.

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At the time of her dismissal, the complainant had been absent from work for over five months, the employer had obtained a psychiatric assessment that confirmed that the employee would not be able to work regularly without extended absences, and the complainant's own doctor had recommended that she stop working for an indefinite period.

The employee grieved the dismissal, and her grievance was dismissed by both the arbitrator and by the Québec Superior Court on appeal. The union appealed again to the Québec Court of Appeal and won its case, with the Court of Appeal stating that the employer had to prove that it was impossible to accommodate the complainant's characteristics.

More moderate standard emerges

The Supreme Court of Canada disagreed with the Court of Appeal's approach. In a unanimous decision, Justice Deschamps stated that:

"What 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."

Justice Deschamps went on to state that:

" … the 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 the employer 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 for 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 Supreme Court of Canada allowed Hydro-Québec's appeal. The Court found that if an employee's condition hampers business operations or prevents an employee from working in the foreseeable future – even though the employer has tried to accommodate them – the employer will have satisfied the undue hardship test and the dismissal will be non-discriminatory.

Assess the facts on a case-by-case basis

The Supreme Court of Canada's acknowledgement that proof of undue hardship can take as many forms as there are circumstances reaffirms the fact that each case must be judged on its own merits – with the standard for proving undue hardship now far short of proving that accommodation is impossible.

For these reasons, consultations between your organization's human resources professionals and internal or external counsel can be invaluable in helping you assess the limits of any accommodation requirements, if and when such a situation arises. □

Is Your Business Protected When Employees Leave?

The non-competition agreement you have with employees may not be worth the paper it's printed on. More than ever, protecting your business interests when employees leave requires more than boilerplate wording.

By Krista R. Chaytor & Elisabeth A. Patrick

One of your top-producing employees leaves your organization and, while you're naturally worried about finding a good replacement, the non-competition agreement he or she signed means you won't have to worry about the ex-employee taking business from you.

Or will you? Unless the non-competition or non-solicitation agreement was carefully drafted with the employee's role in mind, there's a good chance the agreement is unenforceable and that your business may be more vulnerable than you think.

Recent case brings clarity

A recent Ontario Court of Appeal decision – *H.L. Staebler v. Allan* 2008 ONCA 576 – brings some important clarity to the law regarding non-solicitation and non-competition agreements for departing employees. Here is what happened in that case.

Two employees worked for H. L. Staebler Company Limited selling commercial insurance. On October 15, 2003, the

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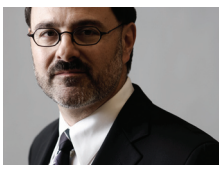

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employees resigned and immediately began working in a similar capacity for a competitor. Both employees had written employment contracts with Staebler, which contained a non-competition clause.

Within two weeks of their departure, approximately 118 clients had moved their business from Staebler to the new employer. Staebler sued the employees for, among other things, breach of the non-competition clause. The employees' new employer was also named as a defendant.

The non-competition clause in question read as follows:

"In the event of termination of your employment with the Company, you undertake that you will not, for a period of 2 consecutive years following such termination, conduct business with any clients or customers of H.L. Staebler Company Limited that were handled or serviced by you at the date of your termination."

While the trial judge found this non-competition clause to be enforceable – and awarded Staebler $2 million in damages – the Court of Appeal disagreed and overturned the decision and the awarding of damages.

Focus on non-solicitation, not non-competition

The Court of Appeal stated that a non-competition agreement will only be enforceable in exceptional circumstances – and that none of these exceptional circumstances arose in the Staebler case. Even though this particular clause was limited to conducting business with clients or customers, the court still found this to be a non-competition agreement, and not a non-solicitation agreement, as the clause referred broadly to "conducting business" not "soliciting business".

In this case, the court found the non-competition clause unreasonable in several respects.

- Too wide a scope. The clause contained no geographic limit on the activities it sought to restrict. The employees would be restrained from doing business with their former clients "even if they relocated to the far reaches of Ontario or, for that matter, elsewhere in Canada."

- No limit on type of business. The clause did not in any way restrict the type of business that could be done, including work that in no way competed with Staebler. The court found that the absence of a geographical limit combined with a blanket prohibition on "conducting business" rendered the non-competition clause overbroad and unenforceable.

- Less intrusive means available. The court found that a less intrusive client non-solicitation clause would have adequately protected the employer's interests in this case for a number of reasons.

First, there was an imbalance in bargaining power between the employees and Staebler when the employment contracts were negotiated. Second, the employees were commercial insurance salespeople – not managers, directors or key employees – and did not owe a fiduciary duty to Staebler. Finally, it was the industry norm for salespeople to have close relationships with their clients, and these relationships were not exclusive as other Staebler employees served the clients in various capacities.

All of these factors favoured a non-solicitation agreement instead of a non-competition agreement. In fact, Staebler had different agreements with other salespeople in which salespeople could solicit clients and customers and conduct business with Staebler clients so long as they did so outside of a 50-mile radius of the Waterloo region.

Make sure you're protected

With the many restrictions that courts place on enforcing non-solicitation and non-competition clauses, it's essential for organizations to move beyond boilerplate language in their employment contracts as a means of protecting their interests. If your business is potentially vulnerable from the departure of one or more key employees, be sure to get the legal advice you need to ensure your interests are properly protected and that any contract language is enforceable. □

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Are You Prepared for the New Customer Service Accessibility Laws?

By April D. Brousseau

The *Accessibility for Ontarians with Disabilities Act, 2004* ("AODA") came into force in June 2005, but its impact is just beginning to be felt. Accessibility standards for customer service have now been established by regulation, with almost every public and private sector organization in Ontario needing to comply by January 1, 2010, for most public sector entities and January 1, 2012, for the private sector.

What it means to you

The customer service standards under the AODA came into force on January 1, 2008. These standards govern your organization's provision of goods or services to persons with disabilities.

Beginning in either 2010 (public sector) or 2012 (private sector), you will be required to comply with these standards and use reasonable efforts to ensure that you provide your goods or services in a manner that respects the dignity and independence of persons with disabilities.

Specifically, your manner of goods or service delivery should be integrated with that provided to others (unless an alternate measure is necessary) and ensure disabled clients have an equal opportunity to obtain, use, and benefit from your goods or services. Among other things, this means permitting the use of service animals, support persons, or other means of assistance when necessary, and facilitating alternative measures where the use of service animals is otherwise prohibited by law.

In addition, all organizations must:

- Establish policies that outline how you will provide goods or services to persons with disabilities – with these policies reduced to writing for all public sector organizations and those private sector companies with at least 20 employees. These written policies must be made available to individuals upon request. Organizations must also file accessibility reports with the Ministry of Community and Social Services.

- Provide training to all persons (employees, agents, volunteers, etc.) who deal with members of the public or other third parties on behalf of your organization, and to all persons involved in developing your organization's accessibility policies.

- Provide a process for receiving and responding to feedback on how your organization provides services to the disabled.

A new age in enforcement

In addition to any enforcement process developed specifically under the AODA, the AODA is also subject to the *Regulatory Modernization Act*, *2006*, which provides an integrated approach to enforcing provincial laws and regulations across Ontario government ministries. This means that inspectors who collect information about your organization in the course of their duties under one provincial law or regulation can now make observations that are likely to be relevant to enforcement or administration under the AODA. These observations can then be shared with AODA enforcement officials. This effectively expands the potential scope of inspection to which your organization may be subject and increases the chance that you'll face a full or partial inspection you are not prepared for.

With the deadline for the public sector to comply with AODA accessibility standards just over a year away, and the private sector's deadline also approaching, this is the time to review the AODA requirements and assess the actions that may be needed for your organization to comply. □

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