



# MILLER THOMSON LLP

Barristers & Solicitors  
Patent & Trade-Mark Agents



September 29, 2009

A publication of Miller  
Thomson LLP's Health  
Industry Group

## COMMUNIQUÉ FOR THE HEALTH INDUSTRY

### DUTY TO ACCOMMODATE – REASONABLE ACCOMMODATION VS. PREFERRED ACCOMMODATION

*Shane Smith*  
Toronto  
416.595.8166  
[ssmith@millerthomson.com](mailto:ssmith@millerthomson.com)

A recent arbitration decision highlights that the duty to accommodate does not require that an employee be provided with their preferred accommodation where more than one option is available. Rather, the duty to accommodate requires an employer to provide reasonable accommodation.

In the recent case of *SEIU Local 2 and McMaster University*, Arbitrator Ian Anderson addressed the issue of whether the University breached its obligation in accommodating two employees in positions that had a different work schedule than the employees used to work.

#### **Background**

Two long service employees working in food services for the University were returned to work from WSIB related absences in positions different than what they had occupied prior to their injuries. The University created new positions for the two individuals because they were unable to perform the essential duties of their former positions.

The two employees did not suffer any reduction in compensation in the new positions. The only material difference between the new positions and the old positions were the schedules. In their old positions, both employees had been scheduled to work Monday to Friday. In their new positions, both employees were now scheduled to work Sunday to Thursday.

The Union claimed that the change in the schedule of the employees was a breach of the duty to accommodate. The Union asserted that the employees could have been scheduled to work Monday to Friday, and because that was the employees' previous schedule it was a breach of the duty to accommodate to not do so.

#### **Duty to Accommodate**

In analyzing the case, the Arbitrator confirmed the general principle that the duty to accommodate is a duty to provide reasonable accommodation, but not necessarily the preferred accommodation sought by an employee.

Further, in situations where an employer offers accommodation to an employee that is reasonable, then the issue of undue hardship does not arise. This means there is no requirement for an employer to demonstrate that the accommodation that the employee prefers would amount to undue hardship for the employer.

The Arbitrator stated that where there is more than one type of accommodation that respects the dignity of the individual, meets the individual's needs, and promotes integration and participation in the workplace, the employer has the right to choose which accommodation to offer to the employee.

The Arbitrator dismissed the Union's claims of a breach of the duty to accommodate in this instance because the positions that were created for the two employees met the following criteria and were therefore reasonable accommodation:

- a) the employees were qualified for the positions;
- b) the positions met the employees' medical restrictions;
- c) the positions provided for full integration and participation in the workplace;
- d) the positions were not demeaning to the employees;
- e) the wage rate was the same; and
- f) the terms and conditions of the positions were in accordance with the collective agreement.

The Arbitrator did not accept that putting the grievors into positions that had a different work schedule was a breach of the duty to accommodate. To give these two employees the right to dictate the schedule for the new positions according to their preferences would be providing a superior benefit than existed for other employees or was provided for in the collective agreement. Providing a superior benefit was not required as part of the accommodation process.

### **Summary**

This case is helpful for two reasons. One, it affirms that an employer has the ability to explore more than one option for accommodation and, where there is more than one reasonable alternative, to select the one to offer to the employee.

Second, the decision provides some guidelines for assessing what qualifies as a reasonable accommodation (see items (a) to (f) above).

### **About the Author:**

*Shane Smith* is a partner in the Health Industry Group at Miller Thomson LLP and also a member of the firm's Labour and Employment Group.

Our National Health Industry Group is dedicated to providing comprehensive and integrated legal services to health industry clients. For more information about our group, visit our website at [www.millerthomson.com](http://www.millerthomson.com) or contact one of our regional contacts:

## REGIONAL CONTACTS

### National Chair

Joshua Liswood  
416.595.8525  
jliswood@millerthomson.com

### Edmonton

Brian Curial  
780.429.9788  
bcurial@millerthomson.com

### Vancouver

David Martin  
604.643.1229  
dmartin@millerthomson.com

### Toronto/Markham

Kathryn Frelick  
416.595.2979  
kfrelick@millerthomson.com

### Calgary

Ivan Bernardo  
403.298.2425  
ibernardo@millerthomson.com

### Montréal

André Dugas  
514.871.5410  
adugas@millerthomson.com

### Southwestern Ontario

Glenn F. Jones  
519.931.3508  
gjones@millerthomson.com

Miller Thomson LLP uses your contact information to send you information on legal topics that may be of interest to you. It does not share your personal information outside the firm, except with contractors who have agreed to abide by its privacy policy and other rules.

This *Communiqué* is provided as an information service and is a summary of current developments of interest to our clients. Readers are cautioned not to act on information provided in this *Communiqué* without seeking specific legal advice.

© Miller Thomson LLP, 2009. All Rights Reserved. All Intellectual Property Rights including copyright in this publication are owned by Miller Thomson LLP. This publication may be reproduced and distributed in its entirety provided no alterations are made to the form or content. Any other form of reproduction or distribution requires the prior written consent of Miller Thomson LLP, which may be requested from the editor at [healtheditor@millerthomson.com](mailto:healtheditor@millerthomson.com)

[www.millerthomson.com](http://www.millerthomson.com)