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## LABOUR AND EMPLOYMENT COMMUNIQUÉ

### SUPREME COURT CLARIFIES EMPLOYERS' DUTY TO ACCOMMODATE

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It goes without question that Canadian employers must accommodate disabled employees, unless the accommodation would cause the employer undue hardship. However, the practical application of this principle is far from straight-forward. After all, what is "undue hardship"?

In *Hydro-Québec v. Syndicat des employé-e-s de techniques professionnelles et de bureau d'Hydro-Québec, section locale 2000 (SCFP-FTQ)*, the Supreme Court of Canada acknowledged the ongoing confusion: "[d]espite the large number of decisions concerning the rules developed in [the caselaw], the concept of undue hardship seems to present difficulties." The Court sought to clarify the law regarding the interaction between an employer's duty to accommodate an employee with a disability, and the employee's duty to do her work.

The Court made the following clarifications, which are helpful for employers to keep in mind when managing their workforce and considering how far they must go to accommodate those with disabilities:

Note:

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- The correct test is whether the employee can be accommodated without imposing undue hardship upon the employer. The test is not whether it is "impossible" to accommodate the employee;
- The purpose of the duty to accommodate is to ensure that persons who are otherwise fit to work are not unfairly excluded where working conditions can be adjusted without undue hardship to the employer;
- The duty to accommodate does not require the employer to completely alter the essence of the employment contract, which is that employees have a duty to perform work in exchange for remuneration;
- Employers must be flexible when developing accommodation measures. In situations where the employer can, without undue hardship, provide a variable work schedule, or lighter duties, or even arrange for staff transfers in order to allow the employee to do her work, it must do so as part of the accommodation process.

The Court confirmed that in chronic absenteeism cases, if the employer can show that, in spite of efforts to accommodate, the employee will not be able to resume her work in the reasonably foreseeable future, the employer will have discharged its burden of proof and established undue hardship. In other words, "the employer's duty to accommodate ends where the employee is no longer able to fulfill the basic obligations associated with the employment relationship for the foreseeable future". In such circumstances, the Court agreed with the notion that "it is less the

employee's handicap that forms the basis of the dismissal than his or her inability to fulfill the fundamental obligations arising from the employment relationship."

### **Facts**

In this case, the unionized employee of Hydro-Québec had a number of physical and psychological conditions which led to severe absenteeism. Over a period of approximately seven and a half years, she missed 960 days of work. Hydro-Québec had made efforts to accommodate the employee's disability by adjusting her working conditions in order to reflect her limitations.

Despite the accommodation efforts, the employee's absenteeism continued. The complainant was ultimately terminated after being absent from work for a continuous period of over five months. Around that time, her doctor had recommended that she stop working for an indefinite period. Hydro-Québec also had received a psychiatric report indicating that the complainant's absenteeism was not likely to improve.

Upon termination, the complainant filed a grievance which was dismissed by the arbitrator on the basis that at the time of dismissal, the complainant was unable to work steadily and regularly for the reasonably foreseeable future. Furthermore, according to the arbitrator, the conditions required for her return to work would have constituted undue hardship. A motion for judicial review was dismissed by the Québec Superior Court, but the Québec Court of Appeal set that judgment aside and found that Hydro-Québec had not established that it was impossible to accommodate the complainant's disability.

In yet another decision that should be well-received by employers across Canada, the Supreme Court allowed Hydro-Québec's appeal and found that Hydro-Québec had shown that it could not have accommodated the employee any further without undue hardship.

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