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EMERGING ISSUES IN DISABILITY MANAGEMENT - DUTY TO ACCOMMODATE

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DUTY TO ACCOMMODATE

Section 13 of the *British Columbia Human Rights Code*, R.S.B.C. 1996 c.210 (the "*Code*") prohibits discrimination in the employment context based on any of the enumerated grounds. The "enumerated grounds" in the *Code* includes "physical or mental disability."

The *Code* does not statutorily define the employer's duty to accommodate employees who might allege discrimination during or following the accommodation process. However, a series of Supreme Court of Canada decisions clearly indicate that when discrimination occurs in the employment context, the employer has a duty to accommodate the employee. The case law imposes a duty on the employer to take "reasonable steps" to accommodate the employee when he or she has suffered (or will suffer) discrimination based on any of the enumerated grounds up to the point of "undue hardship." What constitutes "undue hardship" is determined on a case-by-case basis.

With the emerging changes at the workplace, including an increase in budget constraints, minimal number of vacancies available, frozen funding, hiring reductions, layoffs, only seasonal or short-term work available and other new trends, an employer's duty to accommodate an employee with a "physical or mental disability" has become even more challenging than in the past. Further, with the recent increase of employees disabled with a "mental" condition, an employer's duty to accommodate has become even more difficult than in previous years; however, the employer is still required to accommodate the employee up to the point of "undue hardship."

The recent British Columbia Supreme Court case of *Rush v British Columbia Human Rights Tribunal et al,* 2012 BCSC 1661, is a case that covers a number of elements of the employer's duty to accommodate including what is the duty, when does it arise, who has the duty, and what satisfies the duty. In this case, Teresa Rush, the complainant, was employed as a firefighter for ten years with the Richmond Fire Rescue Department (the "RFR"). The Richmond Firefighters Association, Local 1286 (the "Union"), represents the bargaining unit of employees in the City of Richmond's Fire Department. Throughout Ms. Rush's employment with the City, she had been a member of the Union.

During the course of her employment, Ms. Rush was absent from work due to illness on several occasions. She eventually went on sick leave from March 16, 2007 to July 31, 2008 and she continued on an unpaid sick leave thereafter until her employment was terminated on June 9, 2010.

Ms. Rush had anxiety associated with her work, her prognosis was poor and her return to work date was uncertain. The City requested additional medical information and her family physician described her medical condition as "reactive depression and anxiety secondary to workplace stressors." In the following year, she was formally diagnosed with Post-Traumatic Stress Disorder (PTSD) and her condition was described as permanent.

Medical reports provided by Ms. Rush's treating physicians stated that she would not be able to return to her job with the RFR. In an attempt to accommodate her, the City searched for employment in other departments. It was difficult for the City to find a position that was suitable for her given her "mental" condition, budget constraints and her qualifications. In September of 2009, the City offered Ms. Rush a position as a Building Services Worker (the "BSW") which most closely met her medical capabilities; however, she declined the offer.

In 2010, Ms. Rush reversed her position and requested to be accommodated with a position within the RFR. The City requested medical evidence to support the assertion that her PTSD would now allow her to function within the RFR. Ms. Rush provided medical evidence but not from the physicians or in the form requested by the City.

On May 21, 2010, the City made a second offer of accommodation to Ms. Rush for another BSW position; however, Ms. Rush declined the offer for the second time because she felt it was not a reasonable accommodation as it was essentially a janitorial position, had a negative impact on her dignity, and it was degrading.

The City eventually terminated Ms. Rush's employment in June 2010 and advised her that it had fulfilled its legal duty to accommodate her up to the point of "undue hardship." Ms. Rush challenged the decision and made a complaint to the BC Human Rights Tribunal. The British Columbia Human Rights Tribunal dismissed the complaint. Ms. Rush then sought a judicial review and the British Columbia Supreme Court upheld the Tribunal's decision and again dismissed the complaint.

ACCOMMODATION STEPS TAKEN BY THE EMPLOYER

An employer's duty to accommodate to the point of "undue hardship" is case specific. In the *Rush* case, the Employer took a number of different steps in trying to accommodate Ms. Rush and eventually met the threshold of "undue hardship." These steps included the following:

- A meeting was held with a City representative and Ms. Rush to talk about her accommodation and the possibility of it being outside the RFR in one of the inside or outside bargaining units represented by another union, the Canadian Union of Public Employees (CUPE).
- The City identified Ms. Rush's accommodation requirements which included medical evidence that supported the following: a position outside the RFR; a position in which Ms. Rush could work three days per week initially; work which Ms. Rush was qualified to perform; work which did not involve conflict; work in a non-male dominated workplace; and work in a collaborative and collegial workplace where Ms. Rush could work independently.
- The City identified several positions in both bargaining units, but it determined that each position was unsuitable for Ms. Rush for a variety of reasons, including: her qualifications; the work was seasonal or short-term; the work failed to meet the parameters set out in the medical reports; frozen funding; and no vacancy was expected in the foreseeable future.
- On September 1, 2009, the City provided a formal offer to Ms. Rush for a BSW position. The City identified the BSW position as the closest fit for Ms. Rush within either the inside or outside employees' bargaining unit. The City identified the position as situated in a low-conflict, non-male dominated and collaborative workplace. It would also provide Ms. Rush with the opportunity to work independently. The City said the job could be made available for two days a week initially, and although Ms. Rush did not meet the posted qualifications for the position, the City would, on a without prejudice basis, provide Ms. Rush with basic on-the-job BSW training.
- After Ms. Rush declined the first accommodation offer that was made in September 2009, the City resumed the accommodation process in 2010.
- The City wrote to Ms. Rush on February 4, 2010 advising her that it was once again examining accommodation options for which she was qualified. The City stated it continued to search for accommodation between February and May 2010. This gave rise to its requests for updates on her medical information and her résumé. The City stipulated that Ms. Rush provide this information by February 15, 2010.

ACCOMMODATION CHALLENGES

The City's search for an accommodation for Ms. Rush was not easy and it had a number of different challenges. For instance, the City's number of vacancies throughout its operations was minimal that year, hiring reductions were in place and they were expected to remain in place due to municipal budget constraints, and there had also been layoffs within the employees' bargaining unit.

Further, the search for accommodation outside the RFR was hindered by Ms. Rush's specialized qualifications and experience in fire-related work. Her résumé indicated that she completed a high school education, supplemented by fire-related courses and accreditations. This made it difficult to find employment outside the RFR without significant re-training.

Although Ms. Rush expressed an interest in being accommodated in the Occupational Health and Safety field (in January 2009 and then again in March 2010), the City noted that this was not feasible because it only had two positions available, both of which were occupied by long-term employees. Apart from her interest in the Fire and Life Safety field (in March 2010) it did not appear that Ms. Rush was interested in being accommodated in any other positions.

BUILDING SERVICES WORKER IS A REASONABLE ACCOMMODATION

The Tribunal identified a number of reasons why the offer of the BSW position was reasonable: a) it developed parameters for the search for accommodation that were based on the collective medical advice of Ms. Rush's medical caregivers. This included the recommendation that the City search for positions outside the RFR; b) Ms. Rush's professional qualifications limited the scope of the search for accommodation; c) the City faced budget constraints, further limiting the employment pool; d) there was a lack of correlation between Ms. Rush's expressed interests for accommodation and her professional qualifications; e) the BSW position corresponded with Ms. Rush's qualifications and it met her medical limitations; and f) the length of time over which her unpaid absence was extended to proceed with accommodation.

MEETING THE THRESHOLD OF UNDUE HARDSHIP

It is not easy for an employer to meet the threshold of "undue hardship." It takes time, creativity, follow up, meetings, and a lot of patience. In this case, the City did the following:

- Accommodated Ms. Rush's absences from work for over three years. This included Ms. Rush being absent from work due to illness on several occasions prior to her last sick leave; her sick leave from March 16, 2007 to July 31, 2008; and her unpaid sick leave from August 1, 2008 to June 8, 2010.
- Reminded Ms. Rush of her legal duty to cooperate with the City in the accommodation process.
- Explained to Ms. Rush on a number of occasions that it is her responsibility to provide medical information to support her claim in order for the City to determine the extent of its duty to accommodate and to analyze and identify reasonable accommodation offers.
- The City offered Ms. Rush's two different reasonable offers of accommodation.
- The City sought further information when the medical evidence it possessed was vague or insufficient.
- The City found work that Ms. Rush was able to do, which was available to her, and met the limitations specified by her medical caregivers. Notwithstanding her refusal of the first offer, the City continued her leave of absence for an additional eight months while searching for alternative accommodation.
- Explained and reminded Ms. Rush of her responsibility to provide medical information to the City in a timely manner.
- Showed that the City was receptive to the information tendered by Ms. Rush during the accommodation process.

EMPLOYEE'S DUTY IN THE ACCOMMODATION PROCESS

It is clear from this decision that the "disabled employee" also has a role to play in the accommodation process. Some of these duties include:

- To participate and co-operate in the accommodation process.
- Provide supporting medical documentation to her employer in a timely manner. Employers are entitled to ask employees to support leaves of absence for medical reasons by providing current medical documentation, particularly when the leave is extended.
- All participants, including the "disabled employee" in the accommodation process are required to act reasonably and cooperatively in searching for and effecting reasonable accommodation: *Central Okanagan School District No. 23 v. Renaud* (1992) 16 CHRR D/425 ("*Okanagan*"), para. 45.
- Where an employer has initiated a reasonable proposal that would, if implemented, fulfill the duty to accommodate, then the employee has a duty to facilitate implementation: *Okanagan*, paras. 43-45. The "disabled employee" seeking an accommodation cannot expect a perfect solution. If a proposal that would be reasonable in all the circumstances is turned down, the employer's duty is discharged: *Okanagan*, para. 44.
- The employee may be required to accept a position at a lower wage and stature as part of the accommodation process: *Gershony v. Aly*, 2005 BCHRT 492 at paras. 21 - 22; *Hancorn v. New Westminster (City) Police Service*, 2006 BCHRT 63 at para. 29.

UNION'S ROLE IN DUTY TO ACCOMMODATE

In unionized settings, the union is in a unique position to assist in the accommodation process. For example, the union is able to remind the "disabled employee" seeking an accommodation of his or her role in the accommodation process. In addition, the union is able to work with the "disabled worker" and employer to facilitate an accommodation. Further, the union could assist in the accommodation process by staying involved and help facilitate ongoing issues that may arise.

CLOSING COMMENTS

The employer's duty to accommodate to the point of "undue hardship" is not easily defined. However, we do know that the "undue hardship" threshold is very high and varies from case to case.

In duty to accommodate types of situations, the adjudicator will consider the conduct and interaction of the parties over the course of the accommodation process which may tip the scale on how a decision will ultimately be determined.

For instance, in this case, the Tribunal observed that the City had a procedure in place to afford Ms. Rush accommodation. Even after her first refusal of an offer, the City extended Ms. Rush's leave of absence for an additional eight months. It resumed the search for alternative accommodation in 2010 and ultimately made a second offer. The Tribunal also noted the City's repeated efforts to accommodate Ms. Rush. Further, the accommodation process was lengthy: almost three and one-half years.

Being aware of the individualized nature of duty to accommodate is important. This means that the accommodation process can vary from case to case. However, being consistent in the process such as seeking medical to support the disability in every accommodation case is crucial in order to obtain "buy-in" from the other stakeholders such as co-workers, supervisors, and managers.

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