

legal source

More Good News for Employers from the Supreme Court Of Canada: Another Employer Takes One for the Team – Clarification of “Undue Hardship” with Chronically Absent Employees

by Patty Fraser



Over recent years, few areas of law have become more of a moving target than that of employers' rights and obligations for managing chronic absenteeism in the case of disabled employees. In the October issue of Perspective, Jean Torrens reported on the June 2008 decision of Honda Canada Inc.

v. Keays, [2008] S.C.J. No. 40 (S.C.C.) (“Keays”). Before this appeal, Honda had already been involved in several arduous years of litigation with Mr. Keays, including an indeterminate number of hours spent by Honda's valuable senior executives in lawyers' offices instead of their own. Honda's final appeal to the Supreme Court of Canada redeemed not only its own reputation, but effectively facilitated a much needed “do-over” of the Canadian legal test for mental distress damages claimed by employees for the conduct of dismissal. While the Court still found that Honda had jumped the gun in terminating Mr. Keays' employment (and that it was therefore liable for wrongful dismissal), Honda's attempts to clarify Mr. Keays accommodation needs were ultimately found not to be unreasonable nor deserving of punishment, contrary to the lower Courts' findings. More significantly, the Supreme Court's decision also offered long-awaited reassurance to Canadian employers about the ability to assess (and re-assess) the basis for an employee's accommodation request, highlighting the Courts' recognition of common challenges associated with the management of chronically absent employees.

In this month's issue of Perspective, we are pleased to report of another successful appeal by an employer to the Supreme Court of Canada delivered shortly after Keays, namely, *Hydro Québec v. Syndicat des employé-e-s de techniques professionnelles et de bureau d'Hydro Québec, section locale 2000 (SCFP-FTQ)*, 2008 SCC 43 (“Hydro-Québec”). Unlike Keays, which focussed primarily on the law of wrongful dismissal, Hydro-Québec speaks more directly to human rights obligations imposed on employers, and, specifically, just how far an organization must go to accommodate an employee who is chronically absent due to disability.

Legal Snapshot: The Duty to Accommodate to the Point of Undue Hardship

All Canadian employers are subject to human rights legislation which prohibits discrimination against employees on the basis of disability. Whether an employer is federally regulated (and therefore subject to the Canadian Human Rights Act, R.S.C. 1985, c. H-6), or provincially regulated under the laws of a given province (for Alberta, the Human Rights, Citizenship and Multiculturalism Act, H-14 R.S.A. 2000), the bottom line obligation is essentially the same: employers may not refuse to employ an individual, or, discriminate against them on any term of employment, based on a perceived or actual disability. Where employers tend to become subject to a challenge is under one of two exceptions to this basic obligation, namely, where the employer is attempting to justify a form of discrimination based on a bona fide occupational requirement, or, as was the employer's argument in *Hydro-Québec*, where accommodation of an employee's disability would place the employer beyond the point of “undue hardship”.

As most HR managers would agree, assessing the latter to determine when this tipping point has been reached, and pulling the trigger to withdraw a form of accommodation, is not for the faint of heart. Moreover, such decisions are no more heavily scrutinized than those involving employees suffering from so-called “self-reporting” illnesses (e.g., chronic fatigue syndrome, depression, etc.) where frequent absences from work without discipline is often the only form of accommodation available. *Hydro-Québec* offers a positive and practical example of a situation where an employer fully discharged its burden to provide reasonable accommodation to an employee in such a scenario.



Hydro-Québec: The Facts

In this case, the employee was a sales clerk employed with Hydro Québec for twenty-four years. She suffered from a number of physical and mental problems including tendonitis, epicondylitis, bursitis, hypothyroidism, hypertension, a drug overdose, numerous surgical procedures for various problems, episodes of reactive depression, mixed personality disorder, and borderline and dependent character traits, resulting in problem relationships with her supervisors and co-workers. She was away from work repeatedly and for extended periods of time starting in 1994. After a number of unsuccessful attempts to return to work (e.g., light duties, gradual return to work, modification of her workstation, part-time work, assignment to a new position, etc.), she was dismissed in July 2001 due to her especially high rate of absenteeism and her current and future inability to perform any reasonable amount of work on a regular basis. The employee grieved her dismissal pursuant to Hydro Quebec’s collective bargaining agreement.

The grievance arbitrator dismissed her claim in the first instance. In reviewing the employer’s attempts at accommodation, he found that the only way to accommodate her, in light of her personal characteristics, was to effectively recreate, on a periodic basis, a new working environment with a different immediate superior and new colleagues. On that basis, he found that no accommodation

was possible and that the employer had otherwise treated the employee correctly, having displayed patience and tolerance over an extended period. The arbitral award was confirmed by the Superior Court in a decision that was later overturned by the Court of Appeal who ordered her reinstatement. Hydro-Quebec appealed to the Supreme Court of Canada.

On July 17, 2008, the Supreme Court overturned the decision of the Court of Appeal, focusing its reasons on the delicate balance between an employer’s duty to accommodate a sick employee and the employee’s duty to do his or her work. In restoring the arbitrator’s original decision, the Supreme Court clarified two fundamental aspects a Canadian employer must take into account when assessing whether it has fulfilled its duty to accommodate:

1. **Has the Employer Met the Point of Undue Hardship?**
 In considering both sides of the accommodation equation, the Supreme Court clarified the underlying intent of legislation as follows: “the employer must accommodate the employee in a way that, while not causing the employer undue hardship, will ensure that the employee can work”. While each situation must be assessed on a case-by-case basis, the analysis must not lose sight of the fact that “the purpose of the duty to accommodate is not to completely alter the essence of the contract of employment” which, the Supreme Court stated succinctly as “the employee’s duty



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to perform work in exchange for remuneration.” Following this basic premise, an employer does not have to prove that accommodating the employee’s characteristics is impossible in order to demonstrate undue hardship. Rather, it must attempt to “arrange the employee’s workplace or duties to enable the employee to do his or her work”. Having done so, an employer will have generally met its burden if it can show that, despite the measures taken, the employee will be unable to resume his or her work. While this must also be assessed on a case-by-case basis, the Supreme Court clarified that an employer need not prove total unfitness for work, a standard that is often mistaken as the benchmark. Instead, an employer need only prove that the characteristics of an employee’s illness are such that “the proper operation of the business is hampered excessively” if the employee remains unable to work for the “reasonably foreseeable future”.

2. What Efforts Has the Employer Made to Accommodate the Employee Over Time?

The Supreme Court also considered the period of time over which an employer’s accommodation attempts will be assessed. Rather than simply focusing on the time frame during which the decision to dismiss is made, a broader analysis must be taken into account:

“A decision to dismiss an employee because the employee will be unable to work in the reasonably foreseeable future must necessarily be based on an assessment of the entire situation. Where, as here, the employee has been absent in the past due to illness, the employer has accommodated the employee for several years and the doctors are not optimistic regarding the possibility of improved attendance, neither the employer nor the employee may disregard the past in assessing undue hardship.”

By reinforcing a global approach to the assessment of an employee’s ability to attend at work, the Supreme Court has further highlighted the right of the employer to be able to rely upon the entirety of its efforts in considering whether or not the point of undue hardship has been met.

Practical Implications for Employers

Both Hydro-Québec and Keays confirm the basic requirement to consider each request for accommodation earnestly, and to arrive at a plan for accommodation on a compassionate, yet realistic, case-by-case basis. The ability to terminate employment in connection with chronic absenteeism without risking undue exposure to liability will generally depend on the collective efforts made by the employer to accommodate the employee’s illness over time.


At a minimum, an employer defending its decision to terminate must be able to clearly demonstrate both having performed this analysis (ideally with input from and collaboration with the employee) and the results of actual attempts to implement

the accommodation plan over a reasonable time frame. More specifically, the employer will need to be able to show that in spite of those efforts, the employee’s sporadic attendance will both hamper the employer’s business, while at the same time, there exists little indication of the employee’s attendance improving. In practical terms, this means that an employer will generally have discharged its obligation if, based on the above factors, the employee would still be unable to work successfully without the employer altering the very essence of the employment contract.

For H.R. representatives dealing with chronic absenteeism on the front lines, performing an objective assessment of the modifications required to accommodate an employee’s disability will always have its challenges. Nonetheless, the victories of employers in cases like Hydro-Québec and Keays offer some support in having confirmed that the duty to accommodate is not limitless. Moreover, it would appear that the Courts have begun to reaffirm that the employer’s needs will remain a valid consideration in determining exactly how far accommodation efforts must go.

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