

A question of comparison: Appeal Court rules on restrictions to benefits, seniority and service accumulation of disabled employees

Is it discriminatory under Ontario human rights law to restrict seniority and service accrual and the benefits entitlements of employees absent from work due to long-term disability? Readers of *FOCUS* may recall that, in our series on accommodating disability, we indicated that the prevailing view among arbitrators was that collective agreement provisions that suspend seniority accumulation of disabled employees after a specified period of absence are discriminatory, but provisions that link various forms of compensation, such as vacation entitlement and employer benefit contributions, to ability to perform work are permissible. (See ["The accommodation of disabled employees - a guide to the legal landscape"](#), ["The duty to accommodate in action"](#) and ["Accommodating disability short of undue hardship"](#).)

This bifurcated approach has been examined and reaffirmed by the province's highest court. The ruling by the Ontario Court of Appeal in *Ontario Nurses' Association v. Orillia Soldiers Memorial Hospital and Sault Ste. Marie General Hospital* (January 12, 1999) restored an award of the majority of a board of arbitration which had been partially reversed by the Divisional Court. The union was contesting the legality of collective agreement provisions addressing employer benefits contributions, service accrual and seniority.

THE DISPUTED PROVISIONS

Employees on unpaid leave of absence included those receiving workers' compensation and long-term disability payments. The employer made full contributions to benefits for active employees, but more limited contributions for employees on unpaid leave of absence. Nurses on unpaid leave of absence were also restricted in their right to service accrual, used to calculate various forms of compensation.

Finally, the agreement provided that seniority was a consideration for the purpose of filling vacancies and determining the order in which employees were laid off and recalled to work. The seniority clause in the agreement was a competitive clause. The principal considerations for filling vacancies were skill, ability, experience and qualifications. Seniority would be a deciding factor only in cases of relative equality among competing employees. Similarly, for layoffs and recalls, seniority would govern only if the most senior employee was qualified to perform the available work. Nurses on unpaid leave of absence were limited in their right to accumulate seniority.

The parties disagreed about the appropriate group to which disabled employees should be compared for the purpose of assessing discrimination - all employees in the bargaining unit, or only employees on unpaid leave of absence.

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The Court of Appeal stated that, in order to determine the appropriate group for comparison, it was necessary to discern the purpose of the plan in question. In the Court's view, the purpose of employer contributions to benefit premiums and the service accrual provisions was to provide additional forms of compensation *in exchange for work*. Given this purpose, it was permissible for the employer to draw a distinction between those who worked and those who did not:

"Disabled nurses do not receive this compensation because they are not providing services to their employer. It is not prohibited discrimination to distinguish for purposes of compensation between employees who are providing services to the employer and those who are not. It would be prohibited discrimination for the employer to provide different compensation to different groups of employees providing services, if the distinction were based on a prohibited ground."

The appropriate group for comparison was therefore other employees not providing work to the employer and, as these were treated no better than the disabled nurses, the Court ruled that there was no discrimination contrary to the *Human Rights Code*. (See also "[Arbitrator rules different benefits for different sick leaves not discriminatory](#)".)

SENIORITY ACCUMULATION: DISCRIMINATION FOUND

Because, in the collective agreement, seniority was not directly related to compensation and was only one factor in filling vacancies and determining layoff and recall order, the Court held that these provisions were not aimed at providing forms of compensation in exchange for work. Rather, seniority provisions related to one's status as an employee, a status retained by long-term disabled employees. The appropriate comparison group was therefore all other employees.

Depriving disabled employees of seniority accrual during their absence from work placed them at an unfair disadvantage once they returned, or attempted to return, to active service. These provisions were therefore discriminatory in nature. The Court further held that the statutory defence of incapability did not apply:

"We were not referred to any training, additional qualification, or particular on-the-job experience that is necessary to enable a nurse to continue to accumulate seniority. Put another way, it has not been shown that while on long-term disability, the employee is incapable of performing any essential duty or requirement relating to the accumulation of seniority in this agreement."

As a result, the Court declared the seniority provisions discriminatory and ordered them struck down.

In Our View

The Court had some interesting observations in this decision on the limits of the duty to accommodate. Under the Code, this duty extends up to the point of undue hardship, "considering the cost, outside sources of funding, if any, and health and safety requirements, if any." However, the Court observed that it did not believe that accommodation simply requires an employer to top up the wages of disabled employees

accommodation simply requires an employer to top up the wages of disabled employees who are unable to "perform close to the same level as the able-bodied employees". Such a remedy would amount to "reverse stereotyping" of the disabled, and was inimical to the principles underlying the Code. Rather, the employer has a duty "to take all steps short of undue hardship to accommodate the needs of the person discriminated against so that they can compete equally with other employees".

Readers should keep in mind that the Court's holdings on seniority provisions were specific to the collective agreement at issue. If it can be shown that "compensation"- like benefits flow directly from the seniority provisions in an agreement, a different result might obtain.

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