

Equal, Not Better, Treatment: Accommodating Employees With Disabilities



In *Jardine v. Costco Wholesale Canada*, 2014 BCHRT 214, the employer was able to accommodate an employee, while holding its ground on certain requests from the employee.

Facts

Cherelle Jardine was a long service, regular full-time (RFT) employee at Costco Wholesale Canada, with 40 hours scheduled per week and full benefits. Regular part-time employees were scheduled between 35 and 39 hours and received reduced benefits. Limited part-time (LPT) employees were not guaranteed any hours and were not eligible for any benefits, unless grandfathered in 2004.

Jardine went on medical leave in 2009, which manifested into a disability. She was accepted for short term disability (STD) and long term disability (LTD) benefits while attempting a graduated return to work. The graduated return to work plateaued at 20 hours per week due to Jardine's permanent disability. As a result, Jardine was classified as LPT and not eligible for benefits. Costco topped-up her wages during the graduated return to work and extended her RFT benefits on a temporary basis.

Jardine requested that Costco accommodate her with RFT benefits on a permanent basis despite her LPT status. When Costco declined, Jardine brought a complaint to the B.C. Human Rights Tribunal seeking guaranteed hours of work and RFT benefits.

Costco applied to dismiss the complaint under section 27(1)(c) of the *Human Rights Code*, which required the Tribunal to consider if there was "no reasonable prospect that the complaint will succeed". The Tribunal first concluded that

Jardine's request for guaranteed employment was premature as she had not been terminated and, in any event, such a right would put her in a better position than her LPT co-workers.

Next, the Tribunal determined that there was a possible prima facie nexus between the disability and the reduction of her benefits. Consequently, it turned to assess Costco's bona fide occupational requirement (BFOR) defence.

The Tribunal focused its analysis on the jurisprudence, which says that a distinction between compensation-based benefits and non-compensation based benefits is not prima facie discriminatory. The Tribunal concluded that Costco was entitled to require certain working thresholds in exchange for certain compensation/benefits. Reduced to the most basic example: an employee who cannot work due to his/her disability cannot expect to be paid wages by the employer.

Considering undue hardship, the Tribunal accepted that accommodating Jardine would either force the flood-gates to open for other employees requesting similar accommodation, with an exposure of \$1.4 million, or cause Costco to deny those other employees in a discriminatory and unconscionable manner.

In the result, the complaint was dismissed for having no reasonable prospect of success.

Take-Away Points for Employers

1. While not expressly mentioned, the "comparator group" approach implicit in the Tribunal's finding was that Jardine should be treated the same as all other employees working 20 hours per week. Stated differently, a disabled employee is entitled to equal treatment to an employee without a disability, not better treatment.
2. Characterizing benefits as being compensation based (based on the work, hours being performed or tangible contribution) is critical to attract the BFOR justification. Conversely, benefits characterized as length of service (e.g. accruing seniority) will typically not attract a BFOR defence.
3. Costco was likely assisted by its other accommodation efforts regarding Jardine's leave, graduated return to work and temporary extension of benefits (although the latter were likely not required under the duty to mitigate).

Last Updated: March 2 2015

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