

Is The Duty To Accommodate Less Onerous For Probationary Employees? Possibly...



A recent case from the Alberta Court of Appeal considered this question in the context of an employee with Asperger's syndrome working at a call center but, unfortunately, did not provide a definitive answer. Although the decision suggests that the duty to accommodate can be less onerous for probationary and short service employees, the threshold for establishing undue hardship is onerous and is always judged on a case by case basis. Therefore, employers should carefully consider the circumstances before taking the position that accommodation cannot continue (or commence).

In *Telecommunications Workers Union v Telus Communications Inc.*, 2014 ABCA 154 ("Telus"), a technical support employee with Asperger's syndrome was dismissed within the 90-day probationary period outlined in the collective agreement. On his application form, the employee had indicated that he had a disability; however, the form did not request additional information about the nature of the disability or whether accommodation was required. Over the course of the probationary period, performance issues were observed through in-person monitoring as well as with random recorded calls. The grievor scored well below the Telus policy and the employee was dismissed.

The union alleged that the performance issues and resulting termination were due to Asperger's syndrome, arguing that Telus failed to accommodate the grievor's condition by not placing him in a more suitable position. Telus maintained that the grievor did not request accommodation and that, in any event, accommodation was impossible in the circumstances.

The arbitrator recognized the impact of the employee's disability on his performance and its correlation with his dismissal but dismissed the grievance on the basis that insufficient information was provided to Telus for it to assess the issue of accommodation. In the circumstances, Telus' conduct was not discriminatory because Telus did not have actual knowledge that the employee required accommodation. Further, no accommodation that would allow the grievor to meet performance standards was available and, the arbitrator concluded, there was no obligation to find a job within the Telus network for the grievor (since he was only a probationary employee).

The decision was upheld by the Court of Queen's Bench on judicial review and subsequently by the Alberta Court of Appeal ("Court"). Despite finding that a seemingly neutral policy applicable to all employees can be discriminatory even where

the employer has no knowledge of the disability (i.e. adverse effect discrimination), the Court found that conforming to the policy was a *bona fide* occupational requirement and accommodation of the grievor would constitute undue hardship. Ultimately, the Court accepted Telus' submission that there was no possible accommodation within the employee's position and did not accept that Telus was required to consider accommodation of a probationary employee outside of the position for which the employee was hired.

What this means for employers

Employers need to be aware that an employer's lack of knowledge of an employee's disability will not serve to protect the employer from an adverse effect discrimination claim.

In discharging the duty to accommodate on the basis that a policy or practice is a *bona fide* occupational requirement, employers have to establish:

- They adopted the standard for a purpose that is rationally connected to the performance of the job.
- The standard was adopted in an honest and good faith belief that it was necessary to the fulfillment of that legitimate work-related purpose.
- The standard is reasonably necessary to that purpose and it is impossible to accommodate the employee without undue hardship.

This is a useful case for employers as it suggests that the duty to accommodate a probationary employee may not be as onerous as it might be for longer service employees because accommodating probationary employees does not require considering positions beyond that for which the employee has been hired. That said, it is critical that employers carefully examine each individual situation where the need for accommodation arises.

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