

Suitable Employment And The Duty To Accommodate: The Superior Court Turns The Case Law On Its Ear



On June 5, 2014, the Quebec Superior Court, sitting in judicial review of a decision of the *Commission des lésions professionnelles* (the “CLP”)¹ caused considerable consternation regarding the interpretation of the *Act Respecting Industrial Accidents and Occupational Diseases* (the “Act”) by concluding that an employer, despite having contributed to a comprehensive regime for rehabilitating a worker following an industrial accident, must also fulfil the duty to accommodate under Quebec’s *Charter of Human Rights and Freedoms* (the “Charter”).

Consequently, unless the Court of Appeal overturns the Superior Court’s decision, an employer can no longer simply maintain that a position constituting “suitable employment”, as defined in the Act, does not exist within its organization: in order to respect the worker’s functional limitations the employer must now also examine the reasonable possibility of accommodating the worker by adapting his or her current position – or even some other position – to make it compatible with those limitations.

In the *Caron* case, the employer had informed the worker and the workplace health and safety board, the *Commission de la santé et de la sécurité du travail* (the “CSST”) that no suitable employment position compatible with the worker’s functional limitations was available. The CSST had accordingly agreed to put together a personalized rehabilitation program in order to allow the worker to find a different position elsewhere on the job market.

The worker contested this decision up to the level of the CLP, arguing that the employer was bound to fulfill its duty to accommodate under the Charter. More specifically, the worker maintained that the employer was capable of adapting a position within its organization so as to make it compatible with his functional limitations.

The CLP dismissed the worker’s contestation². It held that neither the CSST nor the CLP has the power to order any remedial measures other than those set out in the Act. In accordance with the clear majority trend in the case law, the CLP reiterated that the rehabilitation process provided for in the Act constitutes reasonable accommodation as mandated by the Charter.

The worker appealed that decision via a motion for judicial review by the Superior Court, contending that the CLP's decision was unreasonable.

Decision of the Superior Court

The Superior Court concluded that the CLP had erred by refusing to compel the employer to fulfil its duty to reasonably accommodate the worker pursuant to the Charter of rights.

Specifically, the Court considered that the CLP should have determined whether the employer had discriminated against the worker when it maintained that it had no suitable employment position available. If it determined that the employer had in fact discriminated, the CLP should then have applied section 49 of the Charter and ordered the employer to accommodate the worker. Consequently, the Superior Court remanded the case to the CLP, instructing it to decide on the worker's contestation in light of the Charter's requirements for reasonable accommodation.

Even more surprisingly, the Court opened the door to a contestation of the constitutionality of the prescribed period within which a worker may exercise his or her right to return to work under section 240 of the Act (one year or two years, depending on the number of employee's in the organization) by suggesting that it could eventually be declared inoperative.

Conclusion

If the Superior Court's decision is upheld by the Court of Appeal, the CSST and the CLP will henceforth have to determine, in cases such as this, the feasibility for the employer, without undue hardship, of altering the duties of the worker's pre-injury position to render it compatible with his or her functional limitations. The employer would then have to establish that it had examined every potential means for accommodating the worker, and was unable to do so without undue hardship.

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Article by [Julie Samson](#) and [Éric Thibaudeau](#)