You Make the Call: Did the Employer Commit Pregnancy Discrimination?

SITUATION

A collective agreement includes an employer rule requiring customs inspectors to perform shift work of 3 or more shifts over a 56-day schedule. The rule is "neutral" in the sense that it applies to all PM-1 customs inspectors who work at Pearson International Airport regardless of sex, race, religion, etc. Anna Conda, a customs inspector experiencing a difficult pregnancy requests to be transferred from rotational shift work to daytime duties on the advice of her physician. The employer refuses, insisting that making an exemption to the mandatory shift work rule would look like preferential treatment and harm the other customs inspectors' morale. So, Anna files a complaint with the Human Rights Commission.

YOU MAKE THE CALL

Does Anna have valid claims for pregnancy discrimination and failure to accommodate?

1. No, because the shift work policy is neutral and non-discriminatory
2. No, because being available to do shift work is required by the collective agreement
3. No, because the negative impact on morale would constitute undue hardship to the employer
4. Yes

ANSWER

4) Anna's claims of discrimination and failure to accommodate are legally valid.

EXPLANATION

This scenario, which is based on an actual Ontario case, [Brown v. Canada (Department of National Revenue), 1993 CanLII 683 (CHRT)] debunks 3 common myths about not only pregnancy but all forms of illegal discrimination:

1. A policy that's neutral on its face may still have discriminatory effects;
2. A collective agreement can't trump an employer's duty to accommodate; and
3. Harm to morale isn't undue hardship for purposes of determining whether accommodations are required.

WHY WRONG ANSWERS ARE WRONG

1 is wrong. True, the shift work rule applies to all individuals regardless of race, etc. But human rights laws don't require equality, they require accommodation. And, by its very nature, accommodation involves affording a protected employee special treatment—in this case, exempting an employee with pregnancy-related medical problems from the blanket shift work rule.

2 is wrong because human rights obligations take precedence over contractual obligations. In other words, employers can't contract out of their duty to make accommodations.

3 is wrong but sounds right because the duty to accommodate does not require employers to make accommodations that would impose undue hardship. It's also true that accommodating an employee may look like preferential treatment. But courts and tribunals have consistently ruled that harm to moral is not undue hardship. In other words, the fact that employees don't like it is not justification to avoid making an accommodation that is otherwise appropriate and reasonable.