

**NEWSLETTER – JULY AND AUGUST 2008**

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**EMPLOYER'S DUTY TO ACCOMMODATE  
CHRONIC, NON-CULPABLE ABSENTEEISM AND  
EMPLOYEE'S DUTY TO DO HIS OR HER WORK**

How does an employer's duty to accommodate chronic, non-culpable absenteeism interact with an employee's duty to do his or her work?

This question was squarely addressed by the Supreme Court of Canada in *Hydro-Québec v. Syndicat des employé-e-s de techniques professionnelles et de bureau d'Hydro-Québec, section locale 2000 (SCFP-FTQ)*, [2008] S.C.J. No. 44.

In a unanimous decision issued on July 17, 2008, the Court held that "[t]he employer's duty to accommodate ends where the employee is no longer able to fulfil the basic obligations associated with the employment relationship for the foreseeable future".

**Facts**

M.L., a sales, rates and programs clerk, was employed by Hydro-Québec (the "Employer") for 24 years.

She suffered from numerous physical and mental problems and, on account of those medical problems, missed 960 days of work over the last 7.5 years of her employment.

One of M.L.'s main problems was that she suffered from a personality disorder resulting in "deficient coping mechanisms" and strained and difficult relationships with her supervisors and co-workers.

Over the years, the Employer accommodated M.L.'s medical problems by making adjustments to her working conditions. The Employer permitted her to work light duties, allowed her to participate in a gradual return to work following a depressive episode, and "assigned her to a position she was not owed, although the [U]nion had not consented to this".

In July 2001, the Employer provided M.L. with a letter informing her of her dismissal from employment. The Employer referred to her chronic absenteeism, her inability to work on a "regular and reasonable" basis, and the fact that it was not expected her attendance at work would improve.

Around the time of her dismissal, the Employer received a recommendation from M.L.'s attending physician that she should stop working for an indefinite period of time. The Employer also obtained a psychiatric assessment that concluded M.L. would no

longer be able to “work on a regular and continuous basis without continuing to have an absenteeism problem as in the past”.

The Syndicat des employé-e-s de techniques professionnelles et de bureau d’Hydro-Québec, section locale 2000 (SCFP-FTQ) (the “Union”) filed a grievance on behalf of M.L. It was alleged that the termination of M.L.’s employment was not justified and that the Employer failed to accommodate her medical condition.

### **Grievance Arbitration**

Arbitrator Gilles Corbeil denied M.L.’s grievance, holding that the Employer had “acted properly – with patience and even tolerance – toward [M.L.]”.

According to the arbitrator:

“[T]he [E]mployer could terminate its contract of employment with [M.L.] if it could prove that, at the time it made that administrative decision, [she] was unable, for the reasonably foreseeable future, to work steadily and regularly as provided for in the contract.”

Arbitrator Corbeil highlighted the evidence of the Employer’s experts that “no medication [could] effectively treat a condition such as a personality disorder” and “psychotherapy [could] at most alleviate the symptoms very slightly”. The arbitrator also noted that the Employer’s experts estimated the risk of depressive relapse at more than 90 percent.

The arbitrator also considered the evidence of the Union’s expert to the effect that M.L. could “work in a satisfactory manner” if it

were “possible to eliminate the stressors – both those related to her work and those arising out of her relationship with her immediate family – that [affected] her and [made] her unable to work”.

Arbitrator Corbeil found that if the recommendation of the Union’s expert were to be implemented, undue hardship would be caused to the Employer.

M.L.’s particular characteristics meant that “the [E]mployer would have to periodically, on a recurring basis, provide [her] with a new work environment, a new immediate supervisor and new co-workers to keep pace with the evolution of the ‘love-hate’ cycle of her relationships with supervisors and co-workers”.

In addition, some stressors that affected M.L. and made her unable to work (like those arising out of her relationship with her immediate family) were beyond the Employer’s control and could not be eliminated by the Employer.

### **Quebec Superior Court**

The Union applied for judicial review of Arbitrator Corbeil’s decision to deny M.L.’s grievance.

Madam Justice Lise Matteau of the Quebec Superior Court dismissed the application for judicial review. She held that “[t]he arbitrator’s findings on the duty to accommodate [were] ... correct”.

The judge expressly rejected the Union’s argument that the Employer had to establish M.L.’s absences would have had “insurmountable consequences”.

## Quebec Court of Appeal

The Union responded by appealing the Superior Court's decision.

The Quebec Court of Appeal allowed the appeal, reversing the Superior Court's decision and quashing the arbitrator's award.

The Court of Appeal held that M.L. was not *totally* unable to work, and that Arbitrator Corbeil had misapplied the approach set out by the Supreme Court of Canada in *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3 ("*Meiorin*").

According to the Court of Appeal, the Employer had to prove that it was *impossible* to accommodate M.L.'s specific characteristics. The appellate court stated:

"[The Employer] did not establish that [M.L.'s] assessment revealed that it was *impossible* to [accommodate] her characteristics; *in actual fact, certain measures were possible and even recommended by the experts.*"

[Emphasis added.]

Additionally, in the Court of Appeal's view, the arbitrator was wrong in taking only M.L.'s absences into account since the Employer had to assess the duty to accommodate "as of the time of the decision to dismiss".

## Supreme Court of Canada

The Employer appealed the Court of Appeal's decision to the Supreme Court of Canada.

The appeal was allowed. The Court of Appeal's decision was set aside, and the Superior Court's decision to dismiss the application for judicial review was affirmed.

Madam Justice Marie Deschamps, delivering the unanimous judgment of an eight-member panel of the Court<sup>1</sup>, stated that the Court of Appeal's decision contained two errors of law – "one relating to the standard for assessing undue hardship and the other relating to the time that is relevant to the determination of whether the employer has fulfilled its duty to accommodate".

### A. *What is the standard for assessing undue hardship?*

Madam Justice Deschamps began by reviewing the *Meiorin* approach:

"An employer may justify the impugned standard by establishing on the balance of probabilities:

- (1) that the employer adopted the standard for a purpose rationally connected to the performance of the job;
- (2) that the employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfilment of that legitimate work-related purpose; and
- (3) that the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose.

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<sup>1</sup> Mr. Justice Michel Bastarache heard the appeal but took no part in the judgment.

To show that the standard is reasonably necessary, *it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer.*"

[Emphasis added.]

Madam Justice Deschamps focused on interpretation of the word "impossible" in the third step of the *Meiorin* approach.

According to the judge, the Court of Appeal erred in requiring the Employer to prove that it was impossible to accommodate M.L.'s characteristics. All the law required the Employer to do was prove that it was impossible to accommodate M.L.'s characteristics without causing undue hardship to the Employer.

Madam Justice Deschamps put the matter as follows:

"[T]here is a problem of interpretation in the instant case that seems to arise from the use of the word 'impossible'. But it is clear from the way the [*Meiorin*] approach was explained by McLachlin J. that this word relates to undue hardship ....

*What is really required is not proof that it is impossible to integrate an employee who does not meet a standard, but proof of undue hardship, which can take as many forms as there are circumstances.*"

[Emphasis added.]

Madam Justice Deschamps said that the objective of accommodation is to ensure that:

- "an employee who is able to work can do so"; and
- "persons who are otherwise fit to work are not unfairly excluded where working conditions can be adjusted without undue hardship".

That said, Madam Justice Deschamps unequivocally stated that "*the purpose of the duty to accommodate is not to completely alter the essence of the contract of employment*, that is, the employee's duty to perform work in exchange for remuneration" [emphasis added].

Madam Justice Deschamps described the parameters of the employer's duty to accommodate in cases of chronic, non-culpable absenteeism:

"The test is not whether it was impossible for the employer to accommodate the employee's characteristics. *The employer does not have a duty to change working conditions in a fundamental way, but does have a duty, if it can do so without undue hardship, to arrange the employee's workplace or duties to enable the employee to do his or her work.*

... If a business can, without undue hardship, offer the employee a variable work schedule or lighten his or her duties – or even authorize staff transfers – to ensure that the employee can do his or her work, it must do so to accommodate the employee ...

*[I]n a case involving chronic absenteeism, if the employer shows that, despite measures taken to accommodate the employee, the employee will be unable to resume his or her work in the reasonably foreseeable future, the employer will have discharged its burden of proof and established undue hardship.*

Thus, the test for undue hardship is not total unfitness for work in the foreseeable future. *If the characteristics of an illness are such that the proper operation of the business is hampered excessively or if an employee with such an illness remains unable to work for the reasonably foreseeable future even though the employer has tried to accommodate him or her, the employer will have satisfied the test.* In these circumstances, the impact of the standard will be legitimate and the dismissal will be deemed to be non-discriminatory.”

[Emphasis added.]

**B. What is the relevant time for determining whether an employer has fulfilled its duty to accommodate?**

Madam Justice Deschamps held that the Court of Appeal erred in limiting assessment of the duty to accommodate to “the time the decision to terminate the employment was made”.

The judge said that in the Supreme Court of Canada’s decision in *McGill University Health Centre (Montreal General Hospital) v. Syndicat des employés de l’Hôpital*

*général de Montréal*, [2007] 1 S.C.R. 161, the Court “opted to assess the duty to accommodate globally in a way that took into account the entire time the employee was absent”.

When considering the appropriateness of “[a] decision to dismiss an employee because the employee will be unable to work in the reasonably foreseeable future”, it is, in other words, necessary to assess “the entire situation” and all of the circumstances, and to avoid applying “a compartmentalized approach”.

Turning her mind to the case before her, Madam Justice Deschamps said:

“Where, as here, the employee has been absent in the past due to illness, the employer has accommodated the employee for several years and the doctors are not optimistic regarding the possibility of improved attendance, *neither the employer nor the employee may disregard the past in assessing undue hardship.*

... [M.L.’s] personal file, including the record of her past absences, was ... entirely relevant for the purpose of putting the experts’ prognosis ... into context.”

[Emphasis added.]

## Conclusion

The Supreme Court of Canada has now reconciled “the rules protecting employees in the event of non-culpable absenteeism” with “the rules governing contracts of employment”.



The Court has recognized in no uncertain terms that while “employers must respect employees’ fundamental rights”, there remains, at the end of the day, “the rule that employees must do their work”.

An employer is not precluded from dismissing an employee from employment “where the employee is no longer able to fulfil the basic obligations associated with the employment relationship for the

foreseeable future”. Under such circumstances, the duty to accommodate has been exhausted.

The Court has made it abundantly clear that, in cases of chronic, non-culpable absenteeism, there is a reasonable and common sense limit to the employer’s duty to accommodate. This, needless to say, is a welcome development for employers across the country.

*If you have questions regarding the issues raised in this newsletter and how they may affect you or your company, please do not hesitate to contact any lawyer at our firm.*

*Lawyer contact information can be obtained by contacting us at (604) 806-0922 or visiting our website at [www.ropergreyell.com](http://www.ropergreyell.com).*

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