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L.L.P. Attorneys

Newsletter

Labour and Employment Law

March 2018

M^tre Christopher Deehy, CIRC

This newsletter was written in collaboration with Stéphanie Marcotte, articling student.

The Supreme Court confirms that the duty to accommodate applies even when an employee is injured at work

In Quebec, like all of the Canadian provinces, the *Act Respecting Industrial Accidents and Occupational Diseases*[1] (the "**ARIAOD**") creates a regime that protects and supports employees who become disabled on account of injuries suffered on account of work[2]. The purpose of the Act is to ensure that employees who are victims of work-related accidents are not treated unjustly on account of their disability and imposes a duty on the employer to reinstate the employee in his preinjury employment or in an equivalent position when the employee is fit to return to work. Furthermore, the Act allows an employee who remains incapable of resuming his preinjury employment on account of employment injury to be offered the first alternative "suitable employment" that becomes available in his employer's establishment.

In parallel to this regime, the *Charter of Human Rights and Freedoms* (the "**Quebec Charter**"), by virtue of the right to equality, imposes upon the employer a duty to take all reasonable measures in order to allow the employee to return to work up to the point of undue hardship. The purpose of the duty to accommodate is to ensure that persons who are otherwise fit to work are not unfairly excluded where working conditions can be adjusted without undue hardship for the employer and therefore allow the employee who is fit to work to do so.

The matter *Québec (Commission des normes, de l'équité, de la santé et de la sécurité du travail)* vs *Caron*

In its judgment rendered on February 1, 2018, the Supreme Court of Canada reviewed the question of whether the duty to accommodate as provided by the Quebec Charter applies to an employee in addition to the protection provided for by the ARIAOD. In other words, the Court had to decide whether the employer's duty to reasonably accommodate someone with a disability, a core and transcendent human rights principle, applies to workers disabled on account of a work-related injury.

In this specific instance, a special educator injured his left elbow in the course of his duties and was obliged to accept a temporary position. Several years later, the position was abolished. Consequently, his employer terminated his employment on the grounds that it was not possible for the employee to return to his preinjury position of educator nor was he able to assume an alternative suitable position because no such position existed at the time.

Wishing to take matters further with the same employer, the employee claimed that his employer had failed to act in compliance with its duty to accommodate as provided by the Quebec Charter with respect to discrimination. The CSST (now the "**CNESST**"), the government agency charged with the application of the ARIAOD at the time, claimed that the duty of accommodation created under the Quebec Charter does not apply to the ARIAOD.

Called upon to decide whether the Court of Appeal of Quebec was well-founded in dismissing this claim, the Supreme Court based itself on the compatibility of the objectives that are pursued by each of these legislative instruments and then concluded that the employer is called upon to determine whether a "suitable employment" can be offered to an employee who is the victim of a work-related accident must respect the duty of reasonable accommodation that the Quebec Charter imposes upon it.

In this respect, the Court expressed itself in the following terms:

> *"As this review shows, the objectives of Quebec's injured worker scheme overlap with those of the Quebec Charter.*
>
> *[…]*
>
> *The injured worker scheme sets out various types of accommodation, such as reinstatement, equivalent employment, or failing that, the most suitable employment possible. The fact that the scheme sets out some type of accommodation does not negate the broader, general accommodation required by the Quebec Charter."*

In fact, in the eyes of the Court, interpreting and implementing the ARIAOD in a given case in accordance with the principles of reasonable accommodate is, in fact, consistent with the scheme's effort to enable the worker to return to work.

From the foregoing, it is now clearly established that employers operating in Quebec have a duty of reasonable accommodation with respect to an employee who is victim of a "professional lesion" in the course of his functions and that the employer will be obliged to normally offer him alternate employment if reinstatement in his pre-lesional employment is not possible. However, employers are also obliged to undertake measures of reasonable accommodation in order to offer such employee suitable alternate employment up to the point of undue hardship.

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1. RLRQ, ch.A-3.001.
2. *Québec (Commission des normes, de l'équité, de la santé et de la sécurité du travail)* vs *Caron*, 2018 CSC 3, par. 19.

For more information, contact one of the team members:

Christopher Deehy, CIRC
514 925-6353
christopher.deehy@lrmm.com