



Posted on: May 1, 2009

## **EMPLOYER'S DUTY TO ACCOMMODATE AN EMPLOYEE'S DISABILITY: WHEN DOES IT END?**

### **Presented to Continuing Legal Education BC**

**May 2009**

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#### I. INTRODUCTION

Keep in mind that the duty to accommodate can arise within the context of a complaint under human rights legislation or in a wrongful dismissal action for breach of contract. The failure to accommodate a disability under human rights legislation can render a dismissal discriminatory, which gives rise to specific statutory remedies. The failure to accommodate a disability within the context of an employment contract can render a dismissal wrongful, and give rise to a claim for damages.

This paper is focused on the duty to accommodate as it arises within the context of individual employment contracts. In particular, the focus is on trying to understand the scope and extent of the duty, and when it comes to an end.

The duty to accommodate continues so long as the employment relationship continues. When that relationship breaks down, an employee who feels that an employer hasn't sufficiently accommodated the employee's disability, may argue that the effect of the failure to accommodate, amounts to a constructive dismissal. The employer, on the other hand, may argue that there is nothing further which can be done to accommodate the illness or disability and the employment relationship has come to an end because the contract has been frustrated.

Of course, the consequence to an employer of a constructive dismissal is an obligation to pay damages in lieu of notice of termination of employment. If a frustration of contract can be established, however, then the employer has no further financial obligation to the employee under the employment contract; the relationship has simply come to an end, through no fault of either party.



Recently the Supreme Court of Canada has clarified how far an employer must go to accommodate an employee's disability. In *Hydro-Québec v. SCPF-FTQ*, [2008] S.C.J. No. 44, the Supreme Court of Canada has clarified that an employer does not have a duty to change working conditions in a fundamental way to accommodate an employee, but does have a duty, if it can do so without undue hardship, to arrange the employee's workplace or duties in a manner that will enable the employee to do his or her work.

## II. CONSTRUCTIVE DISMISSAL

While this paper will not attempt to canvass the law on constructive dismissal in detail, a brief summary is necessary to understand how the issue can arise when the duty to accommodate is raised in the context of a wrongful dismissal action.

The law on constructive dismissal was addressed by the Supreme Court of Canada in *Farber v. Royal Trust Company* (1997), 145 D.L.R. (4th) 1 (S.C.C.). The court identified a number of criteria as being determinative of whether or not an employee has been dismissed. The common law test most often cited from *Farber* is taken from an article written by Justice Sherstobitoff of the Saskatchewan Court of Appeal, as referred to at paragraph 34 of *Farber*:

A constructive dismissal occurs when an employer makes a unilateral and fundamental change to a term or condition of an employment contract without providing reasonable notice of that change to the employee. Such action amounts to a repudiation of the contract of employment by the employer whether or not he intended to continue the employment relationship. Therefore, the employee can treat the contract as wrongfully terminated and resign which, in turn, gives rise to an obligation on the employer's part to provide damages in lieu of reasonable notice.

At common law, the concept of constructive dismissal is based upon ordinary principles of contract law and the doctrine of repudiation of contracts: *Farber* at paragraph 33.

### A. *Conduct Amounting to Repudiation*

In *Stein v. British Columbia (Housing Management Commission)* (1992), 65 B.C.L.R. (2d) 181 (C.A.), Southin J.A. said:

I begin with the proposition that an employer has a right to determine how his business shall be conducted. He may lay down any procedures he thinks advisable so long as they are neither contrary to law nor dishonest nor dangerous to the health of the employees and are within the ambit of the job for which any particular employee was hired. It is not for the employee nor for the court to consider the wisdom of the procedures. The employer is the boss and it is an essential implied term of every employment contract that,



subject to the limitations I have expressed, the employee must obey the orders given to him. (emphasis added)

In *Rowbotham v. Addison*, [2000] B.C.J. No. 250 (S.C.), the plaintiff had gone off on disability leave and upon her return she was informed that her position was no longer available. The alternate work offered to her was a demotion. The court found that the plaintiff had been constructively dismissed. At paragraph 42, the court accepted the following statement with respect to the law of constructive dismissal as taken from Harris on Wrongful Dismissal:

In order for the employee to treat the contract as at an end, there must be a “repudiation by [the employer] of the essential obligations imposed on him by the contract”. Repudiation in this context is governed by the basic rules of contract.

... if the change effected is minor, or if the change reflects a proper interpretation of an existing provision of the employment contract, the employee may not consider such a change to be an act of repudiation. However if a particularly important term is unilaterally altered, the employee may have his or her remedy.

An employee who alleges constructive dismissal from employment resulting from a breach of an essential term of the employment contract has the onus of proving that breach on a balance of probabilities ... . The test is an objective one ... .

So when might a failure to change an employee’s job description to accommodate a disability constitute a repudiation of the employment contract by the employer? Some cases are very unsympathetic to employees. For example, in *Fisher v. Eastern Bakeries Ltd.*, [1986] N.S.J. No. 257 (S.C.), affirmed [1987] N.S.J. No. 83 (C.A.), the plaintiff did not utilize his long term disability (LTD) policy, however, he did resign from his position at work as a result of stressful working conditions. He alleged that because his work was focussed on one particular task within his job description he had been constructively dismissed. The court held that he had not been dismissed and that the way the responsibilities were apportioned was a result of the needs of the business. At page 4, the court noted:

I can find no support for the general proposition that there is a legal burden on an employer to change an employee’s job to suit his peculiar or particular health requirements. That is quite a different question than changing the terms and conditions to the detriment of the employee. (emphasis added)

B. *The Need for Acceptance of a Repudiation*

“An unaccepted repudiation is a thing writ in water and of no value to anybody: it confers no legal rights of any sort or kind”: per Lord Asquith in *Howard v. Pickford Tool Co. Ltd.*, [1951] 1 K.B. 417 (C.A.) at 421.





In *Canada Egg Products, Limited v. Canadian Doughnut Co. Limited*, [1955] S.C.R. 398 (S.C.C.), Locke J. states at pages 412 and 413:

There is no evidence to suggest that the election of the respondent to treat the contract as at an end was communicated to the appellant otherwise than by the delivery of the Statement of Claim in the action.

...

It is, of course, true that no legal consequences result from a simple declaration by a party to a contract that it does not intend to carry out his part of it. When, however, such a declaration is made, the other contracting party may either insist on holding his co-contractor to the bargain or elect to treat the contract as at an end and claim damages for its breach, even though the time for performance has not arrived.

Where the promisee elects to treat the contract as at an end or, as it is sometimes described, to rescind the contract, his election is not complete until it is communicated to the other party, and this must be done within a reasonable time.

...

While an election to treat a contract as at an end is not complete until notice of such election is given to the other party and until such notification the latter is entitled to treat the contract as subsisting and insist upon carrying out its terms, no particular manner of communicating such election is required.

(emphasis added).

A continued refusal by one party to perform a contract on terms previously agreed can amount to an act of repudiation if that refusal is not retracted before the other party gives notice of acceptance of the repudiation: *Canada Egg Products* at p. 406.

To summarize, in order for the employee to establish that he/she was constructively dismissed the employee will need to prove:

- (a) conduct by the employer amounting to a repudiation of the employment contract; and
- (b) the employee's acceptance of that repudiation and the communication of that acceptance to the employer, before the employer's act of repudiation has been withdrawn.

### III. FRUSTRATION OF EMPLOYMENT CONTRACTS

When an employee alleges that an employer has failed to take adequate steps to accommodate the



employee's illness or disability, the employer may try to argue that no further accommodation is required on its part because the employee has become permanently incapacitated and the employment contract has been frustrated. Frustration of contract operates as a complete defence to a wrongful dismissal (breach of contract) claim.

An illness or disability which permanently incapacitates an employee from performing his or her duties under an employment contract has the effect of frustrating the contract and bringing it to an end: *Dartmouth Ferry Commission v. Marks* (1904), 34 S.C.R. 366 at 373-375.

If a contract is frustrated, then it is brought to an end by operation of law and the parties are discharged from further performance. If, without the fault of either party, the circumstances in which an employment contract was expected to be performed have changed so radically that performance would be impossible, or at least something fundamentally different than was initially contemplated, then the contract is said to be frustrated: *Wightman Estate v. 2774046 Canada Inc.*, [2006] B.C.J. No. 2164 (Q.L.) (B.C.C.A.) at paragraph 1.

The doctrine of frustration of contract does not apply to a collective agreement because there is no individual contract of employment between the greivor and the employer that can be frustrated: *McGavin Toastmaster Ltd. v. Ainscough* (1975), 54 D.L.R. (3d) 1 (S.C.C.).

In order to assess whether an employment contract has been frustrated as a result of the illness or disability of an employee, a number of factors must be considered. In *Yeager v. R.J. Hastings Agencies Ltd.*, [1984] B.C.J. No. 2722 (S.C.), the court relied on the guidelines set out in the English case of *Marshall v. Harland & Wolff Ltd.*, [1972] 2 All E.R. 715. At paragraph 86 of *Yeager*, the following passage is quoted from *Marshall*:

The tribunal must ask itself: was the employee's incapacity, looked at before the purported dismissal, of such a nature, or did it appear likely to continue for such a period, that further performance of his obligations in the future would either be impossible or would be a thing radically different from that undertaken by him and agreed to be accepted by the employer under the agreed terms of his employment? In considering the answer to this question, the tribunal should take account of:

- (a) The terms of the contract, including the provisions as to sickness pay - The whole basis of weekly employment may be destroyed more quickly than that of monthly employment and that in turn more quickly than annual employment. When the contract provides for sick pay, it is plain that the contract cannot be frustrated so long as the employee returns to work, or appears likely to return to work, within the period during which sick pay is payable.



But the converse is not necessarily true, for the right to sick pay may expire before the incapacity has gone on, or appears likely to go on, for so long as to make a return to work impossible or radically different from the obligations undertaken under the contract of employment.

(b) How long the employment was likely to last in the absence of sickness - The relationship is less likely to survive if the employment was inherently temporary in its nature or for the duration of a particular job, than if it was expected to be long term or even lifelong.

(c) The nature of the employment - Where the employee is one of many in the same category, the relationship is more likely to survive the period of incapacity than if he occupies a key post which must be filled and filled on a permanent basis if his absence is prolonged.

(d) The nature of the illness or injury and how long it has already continued and the prospects of recovery - The greater the degree of incapacity and the longer the period over which it has persisted and is likely to persist, the more likely it is that the relationship has been destroyed.

(e) The period of past employment - A relationship which is of long standing is not so easily destroyed as one which has but a short history. This is good sense and, we think, no less good law, even if it involves some implied and scarcely detectable change in the contract of employment year by year as the duration of the relationship lengthens. The legal basis is that over a long period of service the parties must be assumed to have contemplated a longer period or periods of sickness than over a shorter period.

These factors are interrelated and cumulative, but are not necessarily exhaustive of those which have to be taken into account. ... Any other factors which bear on this issue must also be considered.

(emphasis added)

Within the context of the test for frustration, two subsidiary issues have often been the subject of litigation. The first question has been what types and lengths of illnesses or disabilities support a finding of frustration. The second question has been when can an employer treat the contract as frustrated and replace the employee in order to meet the needs of the business. The discussion of these two issues in the case law is often linked together.

In *Fazekas v. Ault Foods Ltd.*, [1989] O.J. No. 913 (Ont. H.C.), the employee claimed he was constructively dismissed from his employment. The employer defended the action by arguing the employment contract was frustrated. The job of the employee required "a lot of lifting and bending" and the plaintiff was suffering from a "chronic back ailment". The plaintiff initially relied on his short term disability policy and subsequently relied on his long term disability policy until the qualifying definition to receive benefits for a



“disability” changed from performing “your occupation” to performing “any occupation”. The plaintiff was provided with alternate employment with the employer as, according to his doctor’s report, he was not capable of performing his initial duties. In discussing the effect of the plaintiff’s disability policy, the court stated at page 5:

I am satisfied that the modern law of frustration would not say that a contract of employment cannot be frustrated because of ill-health and consequently inability of the employee to perform his duties where the background is that the employer and employee have entered into a contract that contains certain provisions as to what will happen in the event of his illness. The better view, in my opinion, and which I believe, arises from the cases, is that the period that has been allowed for by way of short-term or long-term disability postpones the time at which the contract can be said to have been frustrated. I am more confident in that connection that the period of short-term disability has that effect, and I do not have to actually decide that point here because the disability here covers all the possible time-periods and I expressly reserve that to another time when it might be relevant ... .

The court in *Fazekas* also noted at page 6:

It was submitted that there had been no notice as to the termination of the employment. It is clear to me on the authorities that where frustration is found, it terminates the contract automatically. The party need not do anything to terminate the contract. ...

There was also canvassed at trial the question of whether the continuation of certain benefits for the plaintiff, by the defendant, the offering of jobs to the plaintiff by the defendant, amounted to any sort of novation or new contract to hold a job open for, or to find a job for the plaintiff. I would be most reluctant to affix a generous employer who had not actually agreed to hire or re-employ an employee, with an obligation to do so because he had made ex gratia payments or continued to be civil to or concerned about a former employee.

I find that there was not any sort of novation that reintroduced an enforceable contractual nexus after the contract with respect to prior employment was terminated by frustration. In my view the defendant has been successful in its contention that the agreement was frustrated and on that ground alone this action should be dismissed.

In *Burgess v. Central Trust Co.*, [1988] N.B.J. No. 124 (N.B.Q.B.), the plaintiff was an assistant lending officer for Central Trust Co. In 1984 she began taking absences from work. Eventually she applied for and received disability benefits and she was then off work until 1987 when her long term disability payments ended. The plaintiff had received a letter from the defendant in 1985 stating that if she was absent for more



than 10 days in the next year she would be terminated. However, the evidence of the employer was that this letter was only referring to absences for which no proper reason could be provided. As a result, when the plaintiff stated that she had been advised by her doctor not to return to work, the company accepted this as a valid reason and did not terminate the employee; however, the employee assumed that she was terminated based on the earlier letter from her employer.

Central Trust Co. had only three lending officer positions and one branch in the city in which the plaintiff lived. There was a strain on the lending department to accommodate the dispersed work of the plaintiff. As a result, the employer informed the plaintiff that they would be able to keep her current position open for her until January 10, 1986 and a teller's position open until April 15, 1986. The plaintiff then wrote to Central Trust Co. and informed them that she would like to return to her position as a lending officer on March 3, 1986. The employer replied that they could not hold her position for this long because a replacement was required before RRSP season, however, she could assume a teller position at her lending assistant salary with Central Trust Co. on March 3.

The court in *Burgess* noted that one test for whether an illness or disability has persisted so long that the employer can end the employment relationship is: Can the employer reasonably be expected to await the employee's return any longer? (*Burgess* at page 6). The court, considering this test, determined that the contract was frustrated because it was a busy time of year for the employer and the employee by her own statements in applying for disability was not able to perform the job. Higgins J. stated: "This is not a case of temporary illness but the combination of an unreasonably lengthy absence in a key employment position" (*Burgess* at page 7).

The length of time the illness or disability continues is an important factor. In *Antonacci v. Great Atlantic & Pacific Company*, [2000] L.C.C. No. 2801, the Ontario Court of Appeal unanimously upheld the trial Judge's statement that "with respect to employee illness or incapacity, modern courts have not treated illness *per se* as a frustrating event; rather, they have looked at the length of the illness in relation to both the terms and duration of the employment contract": para. 10.

In *Demuyneck v. Agentis Information Services Inc.*, [2003] B.C.J. No. 113 (S.C.), the plaintiff had been off work for approximately one and a half years. She had fully utilised all her available disability benefits. The court relied on the test in *Yeager* and accepted the reasoning from *White v. F. W. Woolworth Co.* (1996), 22 C.C.E.L. (2d) 110 (Nfld. S.C. Appeal Division) where after 18-24 months of disability an employee was considered to be beyond the period of a "temporary" disability. The court concluded that after the plaintiff's 20 month leave from work, "the 'further performance' of the employee's obligations under the contract of employment [were] either 'impossible' or 'radically different' from those contemplated by the 'agreed terms





of employment” (*Demuyck* at para. 33).

The case law demonstrates that two years is considered to be a “lengthy” period for an employer to wait for an employee to return to work after an illness. If an employee continues to be incapable of performing his or her job after this time, a determination that the contract has been frustrated is likely (*Demuyck*) unless the employee is receiving disability benefits under an LTD policy provided pursuant to the employment contract (*Fazekas*).

Where the employment contract provides for disability benefits, the time period covered by these benefits is generally seen by the courts as extending the time period an employer must wait before being able to claim that the employment relationship has been frustrated (*Fazekas*). The simple fact that an employment contract provides insurance for payment of long-term disability benefits to a totally disabled employee for the remainder of his working life does not, however, mean that such an employment contract can never be frustrated by the disabling sickness of an employee: *Wightman Estate v. 2774046 Canada Inc.*, [2006] B.C.J. No. 2164 (Q.L.) (C.A.).

In *McAlpine v. Econotech Services Ltd.* (2004), 25 B.C.L.R. (4th) 102 (C.A.), an employee suffering from a mental disability claimed that her employer’s efforts to accommodate that disability were insufficient, and that she was constructively dismissed as a result. The employer, on the other hand, argued it had done all that could be reasonably expected of it to accommodate the disability and the employment agreement had been frustrated by reason of the disability.

The employee was a long-term management employee who went on sick leave and began to receive long-term disability benefits after she was diagnosed with depression. Following a two-year absence from work, her disability insurance carrier ceased payment of long-term disability benefits. She asked her employer if she could begin a gradual return to work program by taking on some part-time work at home. The employer participated in the plan in the hope that its management employee would eventually be able to return to full-time work. After several months, the employer concluded that the employee would not be able to return to her full-time management position and stopped sending work to the employee. The employee argued that she had been constructively dismissed and sued her employer for breach of contract. The employer defended the claim by arguing that the employment agreement had been frustrated as a result of the employee’s inability to return to her full-time management responsibilities.

In the trial decision, [2003] B.C.J. No. 831 (S.C.), the trial Judge concluded that the employee did not have the right to dictate to her employer, new or changed terms of her employment contract, or to require her employer to create a new position for her. The trial Judge found that the employee’s illness prevented her



from being able to return to her management position and concluded that the contract had been frustrated by her illness.

The employee appealed. Saunders, J.A. framed the issue on appeal at paragraph 2:

At the heart of these submissions on appeal and at trial is the contention that Econotech was required, by statute or contract, to do more than it did to accommodate Ms. McAlpine in her return to work and that its failure to do so amounted to a constructive dismissal.

A unanimous panel of the B.C. Court of Appeal dismissed the employee's appeal and upheld the trial Judge's ruling that the gradual return to work program was not a term of the employment contract. The notion of a gradual return to work for the employee was raised by the disability benefits insurer, Manulife. Under Manulife's long-term disability benefits coverage, Manulife would provide benefits for two years to a person disabled from his or her own employment, and thereafter only if the person was disabled from all employment. As the two years neared its end, Manulife asked the employer to agree to a "return-to-work plan". The employer, Econotech, went along with the request of Manulife and the employee began to perform part-time work at home. Once that return-to-work plan was in place, Manulife discontinued all benefit payments to the employee on the basis that she was no longer disabled from "all employment". The employer, Econotech, was left to deal with the employee on its own. Eventually, the Plaintiff reached a plateau and "she remained wholly unable to perform major portions of her job description, including supervision of her department and customer contact and development". (at para. 10)

The employee argued that her contract contained a gradual return-to-work provision either based on an express agreement which modified her original employment contract or by necessary inference or application of legal obligations arising from the *Human Rights Code*, R.S.B.C. 1996, c. 210. In particular, she relied upon section 13(1) of the *Code* which prohibits anyone from refusing to continue to employ a person on the basis of a physical or mental disability. The Court of Appeal, however, could not find a breach of that statutory obligation because it could not be said that the employee had been denied an opportunity of a gradual return-to-work. The Court of Appeal rejected the employee's suggestion that the employer was required to continue to provide either part-time or full-time work for those specific tasks which the employee believed she could perform.

The Court of Appeal concluded that the notion of an employer's duty to accommodate an employee's return to work did not extend to a contractual obligation requiring an employer to amend a job description by deleting a component which is significant both in time and responsibility, such as the managerial duties of the employee in this case (*McAlpine* at para. 28).



The simple fact that an employment contract provides insurance for payment of long-term disability benefits to a totally disabled employee for the remainder of his working life does not mean that such an employment contract can never be frustrated by the disabling sickness of an employee. In cases where the medical evidence establishes an inability to perform any job with the employer, notwithstanding any amount of accommodation, employers are entitled to discharge the employee for frustration of the employment contract: *Wightman Estate v. 2774046 Canada Inc.*, [2006] B.C.J. No. 2164 (Q.L.) (B.C.C.A.). In that case, the employee had been totally disabled for 21 months and had “uncertain at best” prospects for recovery. The Court of Appeal upheld the trial Judge’s finding that the employment contract had been frustrated because “the length of Mr. Wightman’s incapacity, the increasing degree of his incapacity to work, and the likelihood that the incapacity would continue for a further lengthy period of time, support the conclusion that, before the time when he was dismissed, Mr. Wightman was permanently disabled”: para. 19.

Whether an illness or disability is temporary or permanent, is a critical factor in the analysis. Generally speaking, a temporary illness or disability will not frustrate an employment contract. In *Sandhu v. North Star Mills Ltd.*, [2007] B.C.J. No. 1797 (Q.L.) (S.C.), an employer refused to allow an employee to return to work after being away for 16 months recovering from soft tissue injuries sustained in a car accident. The employer had hired someone else to take the injured employee’s position and argued that the prolonged absence from work had frustrated the employment contract. Mr. Justice Joyce rejected the employer’s argument because “the nature of the illness was such that recovery could be expected. This was not a situation where the employee had contracted an incurable disease or suffered a debilitating illness that would progressively worsen. He sustained soft tissue injuries in a car accident and it was reasonable to expect he would recover in time”.

#### IV. LIMITS ON THE DUTY TO ACCOMMODATE

*So how far must an employer go to accommodate an employee’s disability or illness before the employer can say it has done all that it is required to do, the employee is permanently incapacitated and the employment contract has been frustrated? Even though the case didn’t deal with a frustration of contract defence in a wrongful dismissal case, the answer lies in the recent Supreme Court of Canada decision in *Hydro-Québec v. SCFP-FTQ*, [2008] S.C.J. No. 44. The *Hydro-Québec* decision arose from a grievance filed under a collective agreement; there was no individual contract of employment and, therefore, no argument that an employment contract had been frustrated.*

*In *Hydro-Québec*, the complainant, a Hydro-Québec employee, had a number of physical and mental problems which had resulted in her frequent absences from work over a seven year period. During this period, Hydro-Québec had made numerous adjustments to the complainant’s working conditions to*



accommodate her physical and mental conditions. Despite having no obligation to do so, Hydro-Québec even went so far as to assign the complainant to a new position when her original position was abolished following an administrative reorganization.

On July 19, 2001, Hydro-Québec made the decision to dismiss the complainant citing the complainant's record of absenteeism, the inability of the complainant to work on a regular and reasonable basis and the expectation that there would be no improvement in her work attendance. The complainant had been absent from work for a period of over six months prior to her dismissal.

The complainant filed a grievance, alleging that her dismissal was not justified. The arbitrator dismissed the grievance. The arbitrator ruled that Hydro-Québec had met its duty to accommodate. Furthermore, the termination was justified as at the time Hydro-Québec made the decision to terminate, the complainant was unable to work steadily and regularly for the reasonably foreseeable future. The Superior Court upheld the arbitrator's decision.

The complainant appealed the matter to the Court of Appeal where it was held that the arbitrator had misapplied the approach set out in *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 2 S.C.R. 3 ("Meiorin"). The Court of Appeal overturned the arbitrator's decision and concluded that Hydro-Québec had failed to prove that it was "impossible" to accommodate the complainant's disabilities. The Court of Appeal further noted that the duty to accommodate must be assessed at the time the decision to terminate the employee was made. Hydro-Québec appealed the decision to the Supreme Court of Canada.

In a unanimous decision, the Supreme Court of Canada allowed the appeal and set aside the Court of Appeal decision. The Supreme Court of Canada addressed two main issues in its analysis: the interpretation and application of the undue hardship standard; and the relevant time at which the duty to accommodate is to be assessed.

The Supreme Court of Canada clarified the standard for undue hardship, in particular, the interpretation of the word "impossible" in the third step of the Meiorin test for the duty to accommodate. At paragraph 54 of Meiorin, the standard is set out as follows:

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. 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)*

*In the Hydro-Québec decision, the Supreme Court of Canada explained that the Meiorin approach had been misinterpreted. It clarified that “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”. (at para. 12). This essentially means that:*

*... the employer must accommodate the employee in a way that, while not causing the employer undue hardship, will ensure that the employee can work. 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. (at para. 14).*

*The Supreme Court of Canada also 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” (at para. 15). As such, “[t]he 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” (at para. 16).*

*The Supreme Court of Canada concluded at paragraph 18 that:*

*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.*

*On the second issue of the relevant time at which the duty to accommodate is to be assessed, the Supreme Court of Canada affirmed its prior 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, and held at paragraph 21 that:*



RICHARDS  
BUELL  
SUTTON

*Established in 1871*

A decision to dismiss an employee because the employee will be unable to work in the reasonably foreseeable future must necessarily be based on an assessment of the entire situation. 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.

Overall, in the *Hydro-Québec* decision, while the Supreme Court of Canada may not have changed the law on an employer's duty to accommodate, it did clarify the duty and the standard to be applied in regards to undue hardship, particularly the interpretation of the term "impossible" in the Meiorin approach.

Employers-Duty-to-Accommodate-an-Employees-Disability

