AIRD BERLIS

The Duty to Accommodate: A Cooperative and Collaborative Process

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The obligation of employers to accommodate personal family circumstance has become an important issue as both human resources and employees face work-life balance issues. The recent decision of the Human Rights Tribunal Ontario (the "Tribunal") in *Linklater v. Essar Steel Algoma Inc.* provides some important guidelines as to the obligation of employers and, more importantly, employees when seeking such accommodation.

In *Linklater v. Essar Steel Algoma Inc.*, the Tribunal considered allegations of discrimination advanced by an employee who worked a "continental" shift schedule (four days at work, followed by four days off) when he was injured in a workplace accident which prevented him from using his right hand. The company accommodated the employee's injury with a temporary position within his restrictions. However, the change in position also required the employee to shift to a more standard five-day work week, resulting in less hours worked and less net pay. The employee had joint custody of a child following a separation, and had a set access schedule set out in a court order structured around his prior continental shift schedule.

Before the Tribunal, the employee and manager's evidence differed with respect to whether custody access and the court order had been raised by the employee when accommodation of his injury had been determined. The company was made aware of the custody order, triggering the duty to accommodate, but the employee failed to participate in meetings or advise of the conflict in scheduling. The fact that the employee had failed to pursue the process of accommodation review (a "return to work" plan) under the collective agreement likely contributed to the lack of information exchange between the parties.

The employee also alleged that he had been discriminated against based on his disability as he was earning less in the accommodated position, and on the basis of his family status because placing him on a different work schedule conflicted with a court order and did not accommodate his child custody obligations. However, the employee took the singular position that the only accommodation that would work for him was being put back on 12-hour shifts, as that is what the custody order was based on, and would not review/accept alternatives.

The Tribunal dismissed the application. In respect of the change in position to one which paid less, the Tribunal confirmed the longstanding opinion that an employer is only required to pay an employee whom it is accommodating commensurate with the compensation applicable to the actual accommodated work/duties being performed by the employee. In this case, the employee could not perform any of the jobs on the 12-hour shift that would justify the additional hours and shift premium and, accordingly, he was not entitled under the *Human Rights Code* to continue being paid as if he could. In the process of accommodation, the employer was able to adjust his hours, position and duties to meet his restrictions, and pay him according to the job/duties he was actually performing.

In respect of the claim of discrimination for family status, the Tribunal explained that the duty to accommodate must be in response to needs that are known or ought to be known by the employer, and the employee has a corresponding duty to disclose such relevant information to the employer. The Tribunal determined that the company was unaware that there was a potential conflict between the employee's modified schedule necessary to keep the employee working (accommodated) and his child custody arrangements.

This decision serves as a reminder to workplace parties that the duty to accommodate is a co-operative and collaborative process that requires the employee, who is seeking accommodation, to be upfront with

respect to his or her needs and restrictions, and to be prepared to accept alternatives, even if such changes affect overall compensation. Accommodation is not focused on employee preference, but on providing sufficient information to allow the employer to implement alternatives that work within their workplace. The employer can focus on options that have the least undue interference in the operations, but which still meet the employee's restrictions.

While this decision should provide some comfort to employers that they should not be held liable for decisions made on incomplete information that the employee failed to provide (even if their restriction may have otherwise had merit), employers should not take a "hear no evil" approach either. While human resources should still approach accommodation and family status issues, in particular, cautiously, and can only accommodate needs that are known, they still have a duty to inquire. But HR should be able to rely upon the information received, or not received as in this case. It is recommend that companies do their due diligence and:

- Ensure that HR has a clear understanding of any family status needs, particularly if a restructuring or modified work arrangement may impact regular work schedules;
- If family status issues are raised by the employee, engage the employee in a discussion of what family care alternatives they have or could have in place that would aid accommodation, while not affecting their ability to work;
- Provide assistance through an employee assistance plan and remind employees of this service;
- Remind the employee (and the union) that they have a duty cooperate in the accommodation and that the company can only consider alternatives based on the information the employee is capable of providing; and
- Document all meetings, information received, alternatives and accommodations proposed and implemented.

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