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An important decision of the Court of Appeal of Quebec changes the way the employer's duty to accommodate applies to employment injuries

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On June 15th, the Court of Appeal of Quebec, in *Commission de la santé et de la sécurité du travail* v. *Caron*,[1] issued an important judgment that changes the law governing an employers' duty to accommodate employment injuries.

The Court in *Caron* held that it needed to intervene to harmonize the *Act Respecting Industrial Accidents and Occupational Diseases* (AIAOD)[2] with recent Supreme Court of Canada jurisprudence regarding the reasonable accommodation of people with disabilities.[3] Based on its analysis, the Court of Appeal held that where a worker is asserting his right to return to work and is seeking suitable employment, the employer must undertake an accommodation exercise consistent with the *Charter of Human Rights and Freedoms*[4] (the Quebec Charter), up to the point of undue hardship.

This decision marks a change in the law given that, up until now, the rehabilitation measures in the AIAOD were themselves considered to be accommodations. Under the pre-*Caron* case law, the Commission de la santé et de la sécurité du travail (CSST) and the Commission des lésions professionnelles (CLP)[5] did not have the power to impose, recommend or suggest any kind of accommodation,[6] and therefore these bodies generally refused to apply the provisions of the AIAOD in light of the Quebec Charter's provisions.[7].

THE COURT OF APPEAL'S DECISION IN *CARON*

This decision is likely to change the exercise that all stakeholders, including the CSST, employers, workers and, where applicable, their unions, must engage in when determining whether suitable employment exists. The noteworthy excerpts can be summarized as follows:

> At present, the AIAOD does not contain any measures of accommodation, and does not require that employers find suitable employment for a worker suffering from an employment injury.
> Parallel jurisprudence on the duty to accommodate requires employers to take the initiative and to find an acceptable accommodation for a worker who is disabled within the meaning of the Quebec Charter. A worker who continues to have functional limitations after an employment injury is clearly disabled in that sense.
> To avoid placing a worker disabled by an employment injury at a disadvantage when compared with workers whose disabilities result from a personal condition, the exercise that the employer must engage in to accommodate the worker must go beyond the mere application of the AIAOD's provisions.
> Therefore, employers will now have to find an acceptable solution to accommodate workers whose employment injuries have caused functional limitations, and can no longer simply assert that there is no suitable employment available in their business.

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As part of the enforcement of the AIAOD's provisions, the CSST and CLP have the power to evaluate whether the employer has engaged in the accommodation exercise, either before or after a suitable employment is identified.

The accommodation process in which the employer must engage does not require that it changes the worker's working conditions in a fundamental way; however, the employer must take part in the effort to reintegrate the worker in its business and, if possible, must seek a reasonable accommodation, even if that means restructuring the worker's duties to enable him or her to work, unless this would cause undue hardship.

Finally, since the duty to accommodate must form part of a comprehensive assessment of the situation, the one- or two-year period during which a worker can exercise his right to return to work under section 240 of the AIAOD is now, at best, just one factor to consider but which will not be decisive. Under the principles of accommodation enunciated by the Supreme Court of Canada, an employer can no longer prevent a worker from withholding suitable employment in its business based on a mechanistic application of that provision which relies on the expiry of the one- or two-year period in which the worker can exercise his or her right to return to work. Instead, in all cases, employers will have to show that they attempted to accommodate the disabled worker.

If the CLP finds that the employer's assertion that there is no suitable employment for a particular worker results from a violation of a Quebec Charter right, it can exercise the remedial powers granted by the Quebec Charter.

COMMENTS

In our view, this Court of Appeal's decision will be of utmost importance to Quebec employers, because it will likely force them to change the way they manage employment injury cases. For the same reasons, the process of seeking suitable employment could become more complex and delicate than it already is. In every instance, employers will now have to show that they actively sought a reasonable accommodation before they can take the position that they have no suitable job for an injured worker. It will now be helpful, and perhaps even essential, to document such efforts carefully.

As for workers and their unions, they will now have to cooperate in the process of seeking suitable employment. Indeed, while employers have a duty to accommodate, workers have a corollary obligation to accept the proposed accommodation, if it is reasonable.

It will also be interesting to see how the CSST and CLP apply this Court of Appeal decision.

Finally, the upcoming decisions of the Court of Appeal in two pending cases are worth watching,[8] because the Court in Caron clearly stated that it might revisit the related issue of grievance arbitrators' jurisdiction over workers' rights under a collective agreement following a workplace accident.[9]

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1. 2015 QCCA 1048.
2. CQLR, c A-3.001.
3. See especially *Hydro-Québec* v *Syndicat des employé-e-s de techniques professionnelles et de bureau d'Hydro-Québec, section locale 2000*, [2008] 2 SCR 561, and *McGill University Health Centre (Montreal General Hospital)* v *Syndicat des employés de l'Hôpital général de Montréal*, [2007] 1 SCR 161.
4. CQLR c C-12.
5. Pursuant to the *Act to group the Commission de l'équité salariale*, the *Commission des normes du travail and the Commission de la santé et de la sécurité du travail and to establish the Administrative Labour Tribunal,* SQ 2015, c 15, as of January 1, 2016, these bodies will henceforth be called the "Commission des normes, de l'équité, de la santé et de la sécurité du travail" and the "Administrative Labour Tribunal".
6. See, for example, *Mueller Canada Inc.* v *Ouellette*, [2004] RJQ 1397 (CA) at para 60; *Gauthier* v *Commission scolaire Marguerite-Bourgeois*, 2007 QCCA 1433 at para 68.
7. See, for example, *Caron* and *Centre Miriam*, 2012 QCCLP 3625 and *Tremblay* and *Automobiles Chicoutimi (1986) Inc.*, 2015 QCCLP 2278.
8. *Syndicat du préhospitalier (FSSS-CSN)* v *Fortier*, 2013 QCCS 2480 (SC) and *McGill University Non-Academic Certified Association (MUNACA)* v *Bergeron*, 2013 QCCS 1175 (SC).
9. *Caron*, at paras 47 and 91.

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