Caron confirms that employers have a duty to accommodate workers with an employment injury

February 2, 2018

On February 1, 2018, the Supreme Court of Canada rendered an important decision in *Commission des normes, de l'équité, de la santé et de la sécurité du travail* ("CNESST") *v. Caron*[1] ("*Caron"*), confirming the position expressed by the Court of Appeal in 2015[2] as well as the state of the law regarding the employer's duty to accommodate where a worker has suffered an employment injury.

Quebec employers must therefore engage in the process of reasonable accommodation , in accordance with the provisions of the *Charter of Human Rights and Freedoms*[3] (the "*Charter"*) up to the point of undue hardship, whether it be in the context of a worker exercising his right to return to work or seeking suitable employment following an employment injury.

WHAT ARE THE MAIN CHANGES RESULTING FROM THE DECISION?

As drafted, the *Act respecting industrial accidents and occupational diseases*[4] (the "AIAOD") does not explicitly state that employers have a duty to accommodate a worker who has suffered an employment injury at work.

That being said, the case law on accommodation, as it has developed in recent years,imposes a duty on all employers to take the initiative to reasonably accommodate a worker who is disabled within the meaning of the *Charter,* which is clearly the case for a worker with functional limitations following an employment injury.

Prior to the Court of Appeal's decision in June 2015, the case law held that the rehabilitation measures under the AIAOD were, in and of themselves, an accommodation measure and neither the Commission de la santé et de la sécurité du travail(now the CNESST) or the Commission des lésions professionnelles (now the Tribunal administratif du travail ("TAT")) were of the view that they had the authority to impose, recommend or suggest any form of accommodation to an employer. Consequently, they refused to apply the provisions of the AIAOD in light of the *Charter*.

In order to ensure that a worker with a disability caused by an employment injury is not disadvantaged as compared with a worker with a pdisability caused by a personal condition, the Supreme Court of Canada confirmed that the implementation of the employer's duty to accommodate must go beyond merely applying the provisions of the AIAOD and that the obligations

imposed by the *Charter* must also be taken into consideration.

HOW DOES THIS AFFECT EMPLOYERS?

Caron will most likely change the way all participants (including the CNESST, employers, workers and their unions) will approach the process of finding suitable employment. For employers who have not already changed their practices following the Court of Appeal's decision, the main consequences of the Supreme Court of Canada decision can be summarized as follows:

> Employers must try to reasonably accommodate a worker whose employment injury resulted in functional limitations and cannot limit themselves to simply claiming that there is no suitable employment available within the business. The CNESST and the TAT have the power to verify whether an employer tried to find an accommodation, before or after identifying suitable employment, in the context of applying the AIAOD.
> The duty to accommodate does not require that the employer fundamentally modify a worker's employment conditions or create a customized position. However, the employer must make an actual effort to reinstate the worker in the business and, where necessary, reasonably accommodate, or even rearrange the worker's tasks so that the worker can perform his or her duties, without undue hardship.
> Since the duty to accommodate must be assessed in light of the global situation. The one or two-year period, as the case may be, during which a worker may exercise the right to return to work under s. 240 of the AIAOD is nothing more than another factor to be considered, without being determinative. According to the teachings of the Supreme Court of Canada regarding reasonable accommodation, employers cannot refuse to allow a worker to occupy suitable employment in their establishment based solely on an automatic application of s. 240, relying on the expiry of the time period within which the worker has to exercise the right to return to work. In every case, employers must instead be able to establish that they tried to accommodate the worker with functional limitations. Should the TAT conclude that an employer's claim that it has no suitable employment to offer a worker unlawfully interferes with a *Charter* right, it could exercise its remedial powers thereunder, which includes the power to impose accommodation measures on the employer or condemn it to pay the worker moral or punitive damages.

COMMENTS

The Supreme Court of Canada has clearly set out the obligations of employers under the AIAOD applied in accordance with the *Charter,* and called upon employers to revise their management practices in employment injury files.

As such, the process of finding suitable employment may become more complex and delicate for all parties involved because a full search is required. Employers should be able to establish that they actively sought a reasonable accommodation before they can claim that there is no suitable employment within their business for one of their workers with functional limitations. It will therefore be very useful, if not essential, for employers to keep a careful record of any steps taken in this regard.

Workers and their unions will also have a duty to cooperate in searching for suitable employment. If employers have a duty to accommodate, workers have a corollary duty to accept any reasonable accommodation proposed.

It will also be interesting to see how this decision will be applied by the CNESST and the TAT. Lavery will keep you informed of any significant development in this regard.

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1. 2018 SCC 3.
2. 2015 QCCA 1048.
3. CQLR, c C-12.
4. CQLR, c A-3.001.