Is It Discriminatory to Reduce Pay for Accommodated Worker?



SITUATION

A wastewater operator suffers a seizure at work. As a result, his driver's licence is suspended for medical reasons. He's later able to return to work and can perform all his former duties except that he can't drive to job locations. He works on teams of two or more workers, however, and there are always other workers who can drive the team to job sites. The employer accommodates the operator by allowing him to perform all the same tasks he performed prior to his seizure (with the exception of driving) for a month. Invoking a provision in the collective agreement, the employer then reduces his wages to those of a labourer, claiming that, because he has no driver's licence, he should be paid a labourer's wage. That provision classifies as a labourer any worker who's required to have a driver's licence but loses that licence for any reason. The union claims the operator's wage reduction is discriminatory.

QUESTION

Did the employer commit disability discrimination by reducing the operator's wages'

A. Yes, because there was no undue hardship justifying reduced wages.

B. Yes, because the employer can’t change its position after paying the operator for a month at the higher wage.

C. No, because being able to drive was a bona fide occupational requirement.

D. No, because reducing a worker’s pay isn’t a discriminatory act.

ANSWER

A. The employer committed disability discrimination by reducing the operator’s wages because there was no evidence that it had suffered undue hardship.

EXPLANATION

This hypothetical is based on an Ontario decision in which the arbitrator ruled a worker’s pay couldn’t be reduced because his driver’s licence was suspended for medical reasons. The company policy the employer relied on in reducing the worker’s wage to those of a labourer was discriminatory because it didn’t account for individual circumstances. Employers have a duty to accommodate disabled workers to the point of undue hardship. The arbitrator explained that the worker was able to perform all the same tasks he previously did before the loss of his licence and the employer incurred no additional expense in having other workers drive the teams on which the worker participated to job locations. Therefore, the employer hadn’t suffered any undue hardship in accommodating the worker’s disability that would justify a pay reduction. So the employer’s action was discriminatory based on disability.

WHY THE WRONG ANSWERS ARE WRONG

B is wrong because the fact that the employer initially paid the operator his regular wages upon his return to work doesn’t preclude it from making an adjustment later. For example, if the employer found after that first month that it was

incurring extra expenses because it had to pay another worker to drive the operator to job sites, it might have justification for reducing his pay. That's because employers have an obligation to make reasonable accommodations for disabled workers'unless it imposes an undue hardship. Although significant monetary expenses can be an undue hardship, in this case, no such cost was incurred and there was no other evidence the employer suffered any hardship at all because the operator couldn't drive on the job.

***Insider* Says:** For more information regarding accommodation of workers after injury, see 'Accommodation v. Undue Hardship.'

C is wrong because the facts of this case don't support a finding that having a driver's licence is a bona fide occupational requirement (BFOR) for this operator. A BFOR is a standard that a worker must be able to meet, or a skill or ability that a worker must have to be able to perform the job. If a standard or a specific ability or skill is a BFOR, then an employer can argue that having to change or waive that BFOR to accommodate a disabled worker would be an undue hardship. Simply stating that the licence is a BFOR in a collective agreement or other employment document doesn't automatically render it a BFOR under the law. The employer must still provide evidence to support that claim. The facts here demonstrate that the operator didn't need a driver's licence to perform his duties. Other workers could drive him to job sites as part of the team. Thus, being able to drive wasn't a BFOR for the operator's position. So reducing his pay because his medical condition led to a suspended licence was discriminatory.

D is wrong because any act or omission by an employer that adversely affects a disabled worker with respect to his employment'including reducing his wages'and that's based, at least in part, on his disability is discriminatory. Other examples of possible discriminatory acts include:

- Suspension, lay-off or dismissal;
- Demotion or loss of opportunity for promotion;
- Transfer of duties, change of workplace location or change in work hours;
- Imposition of any discipline, reprimand or other penalty; and
- The discontinuation or elimination of the worker's job.

Here, the reduction of the operator's wages was an adverse employment action linked to his disability'that is, his medical condition, which caused his licence suspension'and thus was discriminatory.

SHOW YOUR LAWYER

In the Matter of an Arbitration between Municipality of Chatham-Kent and CUPE (Grievance of Bossence, PW-14-10), [2016] CanLII 76 (ON LA), Jan. 7, 2015