Recent Case Reinforces Worker Duty to Cooperate in Accommodation Process

By Andr Champagne of Emond Harnden- A recent arbitral decision highlights the duty of an employee to cooperate with the employer in determining appropriate accommodation. In Star Choice Television Network Inc. v. Tatulea (February 2012), the arbitrator dismissed the employee's claim of wrongful dismissal under the Canada Labour Code (the 'Code') after finding that the employee refused to return to work in spite of the reasonable accommodation offered by the employer. The decision also reinforces the ability of an employer to discontinue employment where the employee is incapable of discharging their employment responsibilities in a consistent and adequate manner.

In Star Choice the employee commenced his employment as a customer service agent in April of 2008. Early in his employment he was reprimanded twice for lack of professionalism. In November of 2009 the employee started to absent himself from work and requested leave with pay. He claimed to have neck pain and cervical strain.

His doctor, a general practitioner, recommended a leave of three weeks. Shortly after the leave, the employee filed a claim with the Commission de la sant et de la s curit au travail. This claim was denied on the basis that the employee did not fall but rather that his neck and cervical pain were

due to improper posture at his work station. In February of 2010, the employee filed a claim for Short Term Disability (STD). Star Choice denied the claim but offered accommodation on two occasions in January and February of 2010.

The employee's doctor recommended a subsequent leave from February 16, 2010 to March 8, 2010. In March of that year, Star Choice advised the employee that if he did not cooperate with the attempts to facilitate a return to work, his employment would be terminated. As a result, at the request of Star Choice, the employee saw a physician who diagnosed the employee with fibromyalgia, a syndrome in which the individual has long-term, body-wide, chronic pain. The employee also submitted to an examination at a back institute. The physiotherapist conducting the examination testified that throughout the examination the employee refused to follow her instructions and would not cooperate.

Following these examinations, Star Choice recommended a six week program of accommodation to facilitate a successful return to work. The program included physio and occupational therapy as well as reduced and modified hours of work. The employee attended the first day and left, claiming that he did not want to be treated by the doctor who prepared the plan. In addition to his refusal to adhere to the program, the employee ceased regular communications with the employer.

On May 13, 2010, the employee was asked to return to the back institute and to meet with Human Resources to discuss the program to facilitate his return to work. The employee flatly refused both requests. On May 14, 2010, the employee was again requested to call in to work to discuss his return. The employee took no action and on May 26, 2010, the employer terminated the employment. The employee commenced a wrongful dismissal complaint under Part III of the Canada Labour Code.

THE ARBITRATOR'S DECISION

Based on the evidence at the hearing, the arbitrator found that throughout the relevant time, the employer made numerous requests to the employee to attend meetings to discuss a return to work. The arbitrator also found that Star Choice offered the employee help and accommodation repeatedly throughout a period of approximately six months. In particular, the employer referred the employee to therapists who prepared the program to facilitate a return to work on a progressive basis. Despite these several attempts by the employer the employee refused to attend the program or meetings. The arbitrator also found that the employee was informed very clearly on more than one occasion that unless he met with the employer, his employment could be terminated. In spite of this, the employee continued to refuse to communicate or meet with his employer.

The employee testified that his refusal in this regard was a result of extreme stress. The arbitrator rejected this attempt by the employee to mitigate his actions. In the arbitrator's view, it was clear that the employer was willing and trying to help the employee, but these efforts were rejected and ignored. He stated:

All in all, I cannot and do not give any credence to the Complainant's alleged reasons for refusing to meet with the Employer and to return to work after being offered accommodation.

The arbitrator was also sceptical of the employee's medical evidence. He noted that the employee provided no evidence as to the duration of the treatment which was offered by the employee's own physician (who operated his own therapeutic clinic). Instead, he accepted the evidence of the therapists at the back institute who testified that the employee did not cooperate and did not wish to undergo treatment.

The arbitrator went on to consider the actions of the employer and found that it had met its duty to investigate and offer

accommodation measures. Although the employer tried to originate a solution, the employee refused to meet his obligation to assist and cooperate:

As decided in Dunlop v. Alter Monetta Corp., he [the employee] had to do his part as well. He could have made suggestions, but he did not. He simply ignored the Employer. The Complainant chose on his own not to return to work despite the accommodation that can be qualified as reasonable'

The arbitrator went on to dismiss the complaint stating:

I am of the opinion that a) the termination of the Complainant's employment did not violate the Code, b) the Complainant had no valid reason not to cooperate, communicate and meet with the Employer, c) the Employer suggested an accommodation that was reasonable and d) the Employer had just reasons to terminate the Complainant.

In our view

The Star Choice decision is positive for employers and instructive for employees. It highlights the fact that employees also have obligations in the accommodation process. The first obligation is that they be reasonable when considering accommodation measures to respond to their needs. Employees are not permitted to demand unreasonable or impractical measures. Similarly, they cannot reject reasonable accommodation measures if such measures respond to their particular needs. Employees seeking accommodation must also play an integral role in the overall accommodation process. They must meet and communicate with the employer to discuss proposed accommodation measures. This provides the employee with an opportunity to make suggestions and to ultimately inform the measures that are implemented. As the Star Choice decision shows, a complete abandonment of this duty by the employee will often be enough to absolve the employer of its duty to accommodate.

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