

# Labour, Employment and Human Rights Law Bulletin

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## The Hydro-Quebec Case: An Important Update On The Duty To Accommodate

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On July 17, 2008, the Supreme Court of Canada issued an important ruling on the employer's duty to accommodate employees who suffer from a handicap or disability within the meaning of the *Quebec Charter of Human Rights and Freedoms* (the "Charter") and similar human rights legislation. The ruling in *Hydro-Québec v. Syndicat des employés de techniques professionnelles et de bureaux d'Hydro-Québec, section locale 2000 (SCFP-FTQ)* (the "Union") effectively puts an end to a dispute arising out of the dismissal for innocent absenteeism of an employee with a variety of health problems and a long pattern of absenteeism.

In this decision, the Supreme Court overturns the Quebec Court of Appeal, provides an important update on the content of the duty to accommodate and clarifies its earlier case law on the matter. The Court answers a number of questions that had given rise to different approaches among grievance arbitrators, human rights tribunals and other decision making authorities. The case is also a good practical illustration of a situation where an employer has fully

discharged its burden to provide reasonable accommodation to an employee unable to work on a regular and predictable basis.

### The Specific Circumstances

Hydro-Québec terminated an employee - a sales clerk - with 24 years of service. In its letter of dismissal, Hydro-Quebec raised her excessive rate of absenteeism and, according to the opinion of its experts, her likely inability to ever work on a regular and reasonable basis. (Two psychiatrists had indeed confirmed to Hydro-Québec that it could expect that the employee would continue to experience attendance problems.)

A seven and a half year period was examined, throughout which, the employee missed 960 working days (an average of 128 working days each year) and was plagued by numerous different health problems such as difficult recoveries from a number of surgeries, tendonitis, bursitis, epicondylitis, a drug overdose and a major depression. During the same period, the employee was relocated from one place of business to another when her

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position was abolished, she was temporarily assigned twice to different jobs and was in conflict with her superiors and colleagues. Shortly before her termination, she was formally diagnosed as having a mixed personality disorder with “borderline” character traits.

At the time of her dismissal, the employee had not reported to work for nearly six months, she was late in sending her medical certificates and was communicating with the employer through her daughter. The Union filed a grievance pursuant to the Collective Agreement challenging the dismissal on the ground that it was discriminatory under the *Charter* and that Hydro-Québec had not fully satisfied its duty to accommodate.

The grievance arbitrator dismissed the grievance. He found that the only way to accommodate the employee, in light of her medical condition and personal characteristics, was to reinvent for her on a periodical basis a new working environment with a different immediate superior, and different colleagues. In the arbitrator’s view, it was unreasonable to impose such a hardship on Hydro-Québec. The arbitrator also pointed out that certain stress factors likely to have an impact on the employee, such as her family life, were outside the control of the employer.

The Union’s application of the Superior Court to quash the arbitration award was refused. However, the Court of Appeal unanimously upheld the Union’s appeal and annulled the arbitrator’s decision.

### **The Court of Appeal is Overturned**

The Quebec Court of Appeal found that Hydro-Québec had not fully met its obligation to offer reasonable accommodation to the employee. While acknowledging that Hydro-Québec was acting in good faith, had shown great patience and even “remarkable tolerance” toward the

employee, the Court of Appeal ruled nonetheless that the employer had not established that the ultimate accommodation had been attempted.

According to the Court of Appeal, it was essential for Hydro-Québec to demonstrate that it was “impossible” to deal with the employee’s characteristics in light of the earlier Supreme Court decision of 1999 in *Meiorin*<sup>1</sup>. Evidence did not indicate that the employee suffered from a total disability that made her permanently unfit for work.

The Court of Appeal emphasized the fact that at the time of termination, Hydro-Québec was only aware of the borderline personality disorder diagnosis for a few months and that all previous absences could therefore not be taken into account in determining whether there had been sufficient attempts to accommodate the employee by reason of this particular affliction.

In its July 17, 2008 ruling, the Supreme Court of Canada intervenes and overturns the Court of Appeal on the ground that it committed two errors of law on the following issues:

- (a) The appropriate reference period to assess whether the duty to accommodate has been met in a situation of excessive non-culpable absenteeism; and
- (b) The “impossibility” requirement as expressed by the Supreme Court in 1999 in the *Meiorin* decision.

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<sup>1</sup> *Colombie-Britannique (Public Service Employee Relations Commission) c. BCGSEU*, [1999] 3 S.C.R. 3

In addition, the Supreme Court provides an important update on the duty placed on employers to accommodate employees who are unable, because of physical or mental health problems, to regularly report to work in a normal fashion pursuant to their contract of employment.

### **The Time Frame to Assess the Duty to Accommodate**

The duty to accommodate must be assessed globally in a situation of chronic absenteeism - not only at the time of termination. The Supreme Court gives little weight to the fact that Hydro-Québec only became aware of the specific personality disorder of the employee relatively shortly prior to her termination of employment. It found that it was perfectly legitimate to take all previous absences of the employee into account and that, in any event, a complete study of the record of absences was necessary to properly evaluate the experts' opinion as to the prognosis for the future. Even if the employer is not aware of the nature of the handicap or disability of the employee, the tolerance of past absences may already constitute a large measure of accommodation of the handicap or disability.

The Supreme Court cites Hydro-Québec's attempts at other forms of accommodation in favour of the employee such as new assignments, changes to her work station and adjustment to her hours of work. Considering that an employer in such circumstances bases its decision on the employee's inability to regularly perform his or her duties within a reasonable time frame, the duty to accommodate must be assessed for the entire period during which the employee was regularly absent from work.

Accordingly, it was wrong to exclude the great majority of authorized absences and the other efforts made during the many years preceding

the dismissal in determining whether Hydro-Québec had satisfied its obligation to accommodate.

### **The Impossibility Requirement**

In the *Meiorin* decision of 1999, the Supreme Court made observations on the duty to accommodate that led many to believe that the employer had the burden to establish that it was "impossible" to accommodate an employee protected by human rights legislation. In the present case, the Québec Court of Appeal relied on these passages of the *Meiorin* case to conclude that Hydro-Québec had not succeeded in convincing it that it was "impossible" to further deal with the absences and other problems relating to the disability of the employee.

In this regard, the Supreme Court revisits the *Meiorin* decision and clarifies its previous statements. It is a well-established principle of law that the duty to accommodate applies up to the point of *undue hardship*. According to the Supreme Court, the disputed passages in *Meiorin* do not mean anything else. The impossibility requirement must be placed in its proper context, which is that it must be impossible for the employer to accommodate without undue hardship. There is no absolute freestanding "impossibility" requirement.

However, the Supreme Court provides further analysis and deals specifically with situations involving dismissal for non-culpable absenteeism: where an employer has, for many years, engaged in reasonable accommodation of an employee and the employee remains incapable of regularly reporting to work in the predictable future, the point of undue hardship has been reached and the employer has satisfied its obligation.

## Conclusion

In the *Hydro-Québec* ruling, the Supreme Court of Canada appropriately reconciles the fundamental rights of employees under the *Charter* (or equivalent human rights legislation) and the rights of an employer under the contract of employment. This is a welcome update since the legal concept of reasonable accommodation, at times, took unexpected turns in the course of its evolution; it was becoming more and more difficult to conclude that an employer had discharged its burden.

This decision clearly states that the duty to accommodate does not distort the contract of employment and in particular, the employee's duty to perform his or her tasks through regular work attendance. The employer does not have the burden to establish that it is absolutely impossible to accommodate the employee or that the employee is totally disabled on a permanent basis. Also, the Court affirms that the employer does not have to fundamentally alter existing conditions of employment in the workplace.

Nonetheless, the very facts of the *Hydro-Québec* case indicate that the duty to accommodate is not to be taken lightly. The employer engaged in a series of reasonable accommodation measures for many years prior to termination of employment.

Finally, it should be kept in mind that the duty to accommodate remains an individualized duty and that employers must always take into account the particular circumstances and specific characteristics of each situation.

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