Assigning Work to Disabled Employees Across Collective Bargaining Lines

KATIE OVIATT

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An employer's obligation to accommodate its injured workers is a significant obligation. So too is its obligation to uphold the provisions of the collective agreements to which it is a party. Increasingly, we are seeing circumstances where these two obligations come into conflict. Such conflict arises where the injured worker cannot be accommodated within his or her original union and the employer accommodates the injured worker into another union, [the Recipient Union], overriding the seniority rights and posting provisions of that union.

It is not uncommon for a Recipient Union to feel that it is a "dumping ground" for disabled workers, to the prejudice of their members. Nevertheless, where accommodation within the disabled employee's pre-injury bargaining unit is not possible, employers have an obligation to take steps to consider accommodation into other bargaining units, despite grievances filed as a result of that accommodation. Unions also have an obligation to assist in the accommodation process and to accommodate injured workers where necessary.

The key is that the accommodation of an injured worker across bargaining unit lines must be reasonably necessary. Employers need to be cautious before overriding seniority and posting rights in a collective agreement in order to accommodate an injured worker. That is, before accommodating a worker across bargaining unit lines, an employer must establish that no reasonable accommodation within the employee's original bargaining unit are possible.

A conclusion that the individual cannot perform all the functions of his or her pre-injury position will not be sufficient. After determining that the employee can no longer perform all of the duties of his or her original position, the employer must consider modifying the employee's pre-injury work duties to accommodate the injury within the employee's original position. This process is often referred to as "re-bundling".

At this stage, the employer must show that the employee's pre-injury position cannot be re-bundled without undue hardship. Inconvenience to the employer's operations will not be sufficient to establish undue hardship. However, the employer is not required to create a superfluous position or to bump another employee in order to accommodate a disabled employee within his or her pre-injury bargaining unit.

A decision of Arbitrator Ponak is instructive on this point. In *Calgary District Hospital Group v. U.N.A, Local 121-R.* (1994), 41 L.A.C. (4th) 319 (Ponak) a nurse had permanent restrictions that limited her ability to lift and transfer patients. The employer took the position that it was unable to place her in any other nursing position. The arbitrator allowed the grievance and observed that although the hospital considered whether the grievor could fill existing positions at the hospital as they were, it failed to consider re-bundling options.

If re-bundling the employee's original position cannot be done without undue hardship, the employer must then consider whether the employee can perform

2000, 10235 - 101 Street
Edmonton, AB T5J 3G1
PH: 780.423.3003

400 The Lougheed Building
604 1 Street SW
Calgary, AB T2P 1M7
PH: 403.260.8500

201, 5120 - 49th Street
Yellowknife, NT X1A 1P8
PH: 867.920.4542

www.fieldlaw.com

other positions within the employee's pre-injury bargaining unit on an unmodified or modified basis. Again, this will be subject to the undue hardship standard. At this point it is unnecessary to consider positions that are unequal to the injured person's pre-injury position.

If re-bundling the employee's pre-injury job is not possible and other positions within the bargaining unit are not suitable, the employer should then consider appropriate positions in another bargaining unit. At that point, the employer should consult the potential Recipient Union. Some collective agreements provide for a procedure in such circumstances. Such consultation is not simply a process of informing the union that its rights under the collective agreement are being overridden, but is rather a meaningful discussion in which the recipient union may contribute to how the individual is placed.

The employer should ensure that the Recipient Union is fully informed of its re-bundling attempts in the pre-injury bargaining unit and provide it with sufficient medical information respecting the employee's physical limitations to permit it to engage in a meaningful discussion about accommodation within the new bargaining unit.

If the Recipient Union does not cooperate in the accommodation process in a manner that adequately protects the disabled worker's human rights, the employer should proceed with the accommodation in any event. In *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970 the employer approached the union about disrupting the scheduling provisions of their collective agreement to accommodate an employee. The union refused to consent and the employer did not accommodate the individual, fearing a grievance from the union. The Supreme Court of Canada held both the union and the employer liable for failing to accommodate an employee but concluded that the primary responsibility was on the employer to ensure that the individual's human rights were met. The employer in that case had a duty to accommodate the individual even in the face of a grievance from the union.