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THE DUTY TO ACCOMMODATE IN EMPLOYMENT

Kevin D. MacNeill

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Comprehensive, understandable and relevant across Canada, this work helps legal practitioners and human resources professionals grapple with a complicated array of accommodation issues in this rapidly developing area of law. This work pinpoints areas of concern and provides a thorough examination of all the information on accommodation you need in human rights and workers' compensation law including: the concept of "undue hardship"; the responsibilities of employers, employees and trade unions in the process of fashioning accommodations; and the impact of the duty to accommodate on historical workplace rules. As well, this work includes extensive reference to case law from both the unionized and non-unionized sectors.

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Highlights:

In *Syndicat de l'enseignement des Deux-Rives v. Commission scolaire des Navigateurs (Guylaine Deschênes)*, 2018 QCTA 191, 2018 CarswellQue 5174, an arbitrator determined that an employer had no duty to accommodate an employee with a disability by offering her the right to be absent one day per week. In this case, the employee, who suffered from follicular lymphoma, was partially incapable of fulfilling her usual duties but the collective agreement did not establish a partial disability plan. The arbitrator ruled that the salary insurance plan that was entirely assumed by the employer and which did not recognize partial disability was not deemed discriminatory. Therefore, the employer did not have a duty to accommodate the employee and was justified in refusing that she return to work only four days a week. The evidence did not show that the employer acted unreasonably or in bad faith.

An older Quebec decision has recently come to our attention that may be useful in the present context of legalized marijuana. In *Pratt & Whitney v. TCA-Québec, section locale 510 (grief syndical)*, D.T.E. 2009T-374, AZ-50547551, a Quebec arbitrator found that a smoking policy which prohibited employees from smoking on the factory's grounds properly accommodated employees with nicotine addiction since accommodation measures were integrated directly in the policy. Indeed, the policy provided support, treatment, and measures adapted to any employee's specific needs. The arbitrator noted that severely disabled employees could still require personalized accommodation, but this would have to be determined on an individual basis. The arbitrator wrote that the general accommodation suggested by the union (i.e. allowing employees to smoke outside, on the company's grounds) did not aim to alleviate a disability: it was meant to offset a reasonable standard, while fostering the continuation or the worsening of a disability. It would also ignore the fact that not all smokers have the same degree of nicotine addiction.

In *Kindersley (Town) and CUPE, Local 2740 (Desjarlais), Re* (2018), 291 L.A.C. (4th) 18, 135 C.L.A.S 128 (Sask. Arb.), an arbitrator upheld the dismissal of an employee who was found to be smoking marijuana at work. The employee had a medical prescription to vape marijuana for medical purposes during the work day so long as he was not operating a Zamboni, forklift or lawn mower for 20 to 30 minutes after vaporization. The employer was aware of this medical recommendation and accommodated the employee's use of marijuana during working hours. Nevertheless, the employee was found vaping marijuana while operating one of the employer's vehicles. Failure to abide by the agreed upon accommodation was conduct warranting discipline.

In *Canadian National Railway Company v. Teamsters Canada Rail Conference*, 2018 CarswellAlta 1033, an employee was reinstated after being terminated for non-culpable innocent absenteeism where the employer did not attempt to discuss the employee's medical status prior to terminating his employment. On judicial review, the Alberta Court of Queen's Bench held that it was a reasonable finding of the arbitrator that the employer should speak with the union and the employee prior to effecting a termination for innocent absenteeism.