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DUTY TO ACCOMMODATE: IF ONLY WE KNEW BACK THEN WHAT WE KNOW NOW. ACTUALLY, WE DID AND THE COMPLAINT SHOULD HAVE BEEN DISMISSED A LONG TIME AGO.

— By Brian Johnston, Q.C., and Michelle Black of Stewart McKelvey.

> IBM moved to have this complaint dismissed at a preliminary stage because of the Commission's delay in bringing the complaint forward for many years after it was first brought to IBM's attention. I had reason in dealing with that motion to review the correspondence at the early stages of the complaint, and in particular the responses to the complaint provided by IBM's corporate counsel. I was impressed then by these responses . . . I can still go back to the responses and see in them a complete answer. The responses were factual and complete . . . I regret that after so many years and the expenditure of so much, [IBM] counsel's responses were not accepted by the Commission then and the complaint dismissed.
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> *LeFrense v IBM Canada Ltd*, 2015 CanLII 1720 (NS HRC)

In a decision recently released, Nova Scotia Human Rights Board of Inquiry Chair Walter Thompson, Q.C., held that IBM had accommodated former employee Roger LeFrense to the point of undue hardship and dismissed his claim which had been filed more than 8 years previously.

Background

Roger LeFrense worked at IBM as a Systems Service Representative ("SSR"), meaning that he, along with a small team of fellow SSRs, had to respond to IBM customer demands at any time of the day or night. The SSRs shared a schedule of on-call shifts and could reasonably expect to be called out to work anywhere within a large geographical area of Nova Scotia.

When Mr. LeFrense was diagnosed with sleep apnea in April 2004, he requested that he not be required to work the on-call and night shifts. He was given a temporary reprieve but told that on-call shifts were part of the job. Mr. LeFrense subsequently went off on sick leave — first for the apnea and then for a couple of unrelated surgeries. His doctor cleared him to return for work close to a year later but there were restrictions on the hours he could work and the times he could work them. Specifically, his doctor said that he could not drive at night and could not work on-call shifts.

IBM worked with Manulife, its claims adjudicator and rehabilitation advisor, to create an accommodation of the regular SSR duties that would respect Mr. LeFrense's medical restrictions while still balancing those restrictions with the needs of IBM and the other SSRs on the team. The proposal required that Mr. LeFrense would work regular 8 hour days Monday–Friday as well as a maximum of two Saturdays per month and the occasional 9-hour day (if he needed to stay longer to finish a task).

This proposal was sent in September 2005 to Mr. LeFrense's doctor who "initially had a positive reaction" but, after consultation with Mr. LeFrense, crossed out "two Saturdays", replacing it with "one Saturday" and added that there should be no night driving. IBM was not able to accommodate this type of arrangement and, at the time, did not have any other positions to offer Mr. LeFrense. It was not until June 2006 that IBM, by moving an employee out of a parts specialist role, was able to accommodate Mr. LeFrense by offering this alternative to his SSR position.

The parts specialist position was a 9–5 job which, because it had less stress and demands than the SSR position, also paid a reduced salary. At the return to work meeting where the parts position was proposed to Mr. LeFrense, he asked one question — was the salary negotiable? Upon being told it was not, he nonetheless accepted the position and worked there successfully for several years with no on-call shifts and no night driving. Despite his apparent satisfaction with the new arrangement, Mr. LeFrense filed a human rights complaint, saying he had been discriminated against on the basis of his disability and that he should be awarded damages for lost salary. Mr. LeFrense claimed that a fellow SSR had been given accommodation for a medical condition and that he, Mr. LeFrense, just wanted the same treatment.

The Decision

The hearing took place over 9 days beginning February 3, 2014 and concluding December 4, 2014. Testimony from two of Mr. LeFrense's former managers, a former SSR, an IBM human resources manager and others made it clear that IBM did what it could to accommodate Mr. LeFrense.

When Mr. LeFrense said he could not work his next on-call shift back in 2004, he was given the time off (meaning that another SSR had to take the shift) and when he presented his doctor's note saying that he could not work until his sleep apnea was further delineated, IBM helped facilitate the short- and then long-term disability process. Mr. LeFrense was maintained on disability (paid for by IBM) while IBM looked for another position for him. When a position was eventually found that met Mr. LeFrense's needs, IBM held a meeting and gave Mr. LeFrense an opportunity to discuss the proposed job. Other than asking about the salary, Mr. LeFrense had no comments, and he certainly did not indicate his plan to accept the job but, at the same time, proceed with a discrimination claim.

For a claim of discrimination to succeed, a complainant must first prove that there was *prima facie* discrimination, after which the onus shifts to the respondent to prove that it accommodated the complainant to the point of undue hardship. In this case, the Chair debated whether there was any actual discrimination to begin with:

> As Justice L'Heureux-Dube says, discrimination is arbitrary and based on preconceived ideas concerning personal characteristics which do not really affect a person's ability to do a job. There is none of that in this case. Everything in this process is inconsistent with the arbitrary nature of discrimination.

Nonetheless, Chair Thompson recognized the low threshold for *prima facie* discrimination and went on to consider whether IBM had accommodated Mr. LeFrense to the point of undue hardship. He found that the complainant, by virtue of his disability, was no longer able to fulfill the basic obligations associated with the employment relationship for the foreseeable future, relying upon the Supreme Court of Canada decision in *Hydro-Quebec*. Important in the Board Chair's decision was the employment context; the complainant worked in a team environment where team members shared overtime, on-call and outside normal business hours responsibilities. The Board Chair was satisfied that, at some point, a team member's absence would become unmanageable and would impose undue hardship on other team members as well as the employer, IBM.

Ultimately, Chair Thompson found that IBM "proceeded throughout in a systematic, measured and thoughtful way through the processes of this large and well established organization" and that he could "find no fault" in the process IBM undertook. Regarding the fellow SSR (Lew Smith) whom Mr. LeFrense claimed had been provided the same accommodation that he was seeking, the Chair stated:

> Circumstances alter cases . . . Simply because something was worked out for one person does not set a precedent for everyone else, but in any event, I am satisfied that the circumstances of Mr. Smith's participation in the team, even after his heart attack, were different than Mr. LeFrense's needs. Mr. Smith worked extra time. Mr. LeFrense's needs demanded no on-call work, that he work nine to five and limited any extra hours to one or two Saturdays per month with little or no night driving. There is no evidence that he could have put in the extra hours at the times Mr. Smith apparently did, even if indeed they were not "on-call".

In discussing the fact that Mr. LeFrense, through his doctor, changed the September 2005 return to work proposal, the Chair stated:

> [a]t some point . . . we have to defer to an employer's good faith efforts to accommodate an employee and manage the work place. We do not, I think, want to put ourselves in a position where we are second guessing management's reasonable and good faith decisions on accommodation, nor do we want to put ourselves in a position where we are fiddling with a return to work plan, saying that one is acceptable, but another with a minor variation is not.

The Board Chair also identified the matter as being more of a workplace dispute than a proper human rights complaint.

What This Means for Employers

The accommodation process must involve communication among all interested parties. If the person to be accommodated rejects the proposed accommodation, it is expected that there will be some further dialogue until, ideally, the parties can arrive at a satisfactory arrangement. However, this does not mean that the employee should "fiddle" with a proposed plan until it is entirely to his liking. The job is the job and the extent to which the employer can alter the job to suit the employee's restrictions is limited. The employee cannot wait around for what he thinks is the perfect accommodation and then, barring that perfect accommodation, resort to the "hammer of the human rights complaint process".

What is particularly interesting about this decision is that, in the Chair's opinion, this matter should never have progressed to a Board of Inquiry. In 2006, when IBM first received correspondence from the Human Rights Commission indicating that it was investigating a possible case of discrimination, IBM responded quickly and thoroughly. It produced the relevant documents it had available, explained the process it underwent, and was clear about both how it accommodated Mr. LeFrense and why it could accommodate him no further. Chair Thompson said:

> Without rhetoric, [IBM] persuasively established that IBM had worked Mr. LeFrense's disability seriously, concluded that it could not manage his demands, and found him another position.

Even though IBM's thorough responses did not result in a dismissal of the claim when it first arose (as the Chair suggested should have happened), the Chair's comments about how IBM "persuasively" provided a response during the Commission's investigation suggests that the initial way in which an employer responds to a complaint is important. Having the documentation available and ready to submit, as well as a narrative from the employer's perspective, could (and should) go a long way towards advancing the employer's position.

CASE QUOTABLE

> In my view, legitimate business reasons constitute a requirement for a finding that an administrative suspension based on an implied authority to suspend is not wrongful. Other than in the context of a disciplinary suspension, an employer does not, as a matter of law, have an implied authority to suspend an employee without such reasons. Legitimate business reasons must always be shown, although the nature or the importance of those reasons will vary with the circumstances of the suspension.
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> *Potter v. New Brunswick Legal Aid Services Commission*, 2015 SCC 10, at para. 98. (See page 628.)