



Supreme Court of Canada (SCC) Has Ruled Quebec Employers have a Duty under the Province's Workers Compensation Legislation to Reasonably Accommodate Those injured In the Workplace – Even Though that Duty Not Expressly Mandated by the Workers Compensation Statute

By: Gary Majesky, *WSIB Consultant & Executive Board Member*



On February 1, 2018 the Supreme Court of Canada issued its long awaited decision in connection to an appeal from the Court of Appeal for Quebec.

The issue in this Supreme Court case is whether the employer's duty to reasonably accommodate someone with a disability, a core and transcendent human rights principle, applies to workers disabled at their workplace.

The appeal involved the disability rights of an injured worker (victim of employment injury), who requested that the Quebec workers compensation board (CSST), and his employer, had a duty to accommodate him pursuant to the Quebec Charter of Rights and Freedoms (the "Charter"). Injured workers in Quebec, as in Ontario, are protected by provincial human rights legislation, however, an employer's duty to accommodate an injured worker with a disability is not expressly imposed by the provincial workers compensation legislative scheme.

Both Quebec and Ontario share the same problem, as do other provincial jurisdictions, because the provincial workers compensation scheme contains no specific language around "duty-to-accommodate": nor do they enforce the duty to accommodate provisions found in their respective provincial human rights legislation. In their Reasons for Judgement, the Majority of the Court held:

Like all Quebec legislation, the Act should be interpreted in conformity with the Quebec Charter. The duty to reasonably accommodate disabled employees is a fundamental tenet of Canadian and, more particularly Quebec labour law. Since a core principle of the Charter is the duty to accommodate, it follows that this duty applies when interpreting and applying the provisions of Quebec's injured worker legislation. There is no reason to deprive someone who becomes disabled as a result of an injury at work of principles available to all disabled persons, namely, the right to be reasonably accommodated. An injured worker's rights and entitlements under the Act must therefore be interpreted and implemented in accordance with the employer's duty to accommodate an employee disabled by a workplace injury. An examination of the Act's goals and policies as well as the entitlements it sets out – such as reinstatement, equivalent, or suitable employment – reflect a statutory scheme that clearly anticipates that reasonable steps will be taken to assist the disabled worker in being able to work if possible ...

Implementing this duty in light of the Charter does not disrupt the carefully calibrated duties and relationships that are set out in the [workers compensation] Act. It merely requires a more robust approach to the implementation of the rights of disabled workers by the CSST and CLP, and by necessary implication, the employer. It ultimately means that the CSST [Quebec workers compensation board] and the CLP [Quebec Labour Tribunal] have the exclusive remedial authority to impose measures on the employer to do whatever is reasonably possible to accommodate the disabled worker's individual injury.

In Ontario, we have the same problem as in Quebec, because the WSIB pays lip service to human rights principles, and in particular, the duty to accommodate. However, the WSIB does not exercise their jurisdiction, nor compel an accident employer to accommodate injured workers short of an undue hardship. In essence, the WSIB asserts they are not the court of competent jurisdiction with respect to reasonable accommodation of a disabled injured worker. In the event of a dispute, injured workers are told they can file an application at the Ontario Human Rights Tribunal and seek justice from the wise men, and women, up the street.

This contradiction is frustrating because return to work is a tenant and codified in the Ontario *Workplace Safety and Insurance Act*, and Board Policy, yet the WSIB will not force accident employers to fulfill their human rights obligation to accommodate a disabled injured worker.

That does not mean Ontario employers do not provide suitable or modified work to injured workers, but they do so for an entirely different reason. Employers are less motivated by a duty to accommodate, instead, their behaviour is driven by the WSIB experience rating system, and claim costs. Once employers are outside their WSIB cost window, the employment relationship usually ends with the issuance of an ROE stating "shortage of work."

Legal representatives across Ontario anxiously awaited the release of the Supreme Court decision, which opens the door to new legal arguments we will be raising at the WSIB that accident employers have a duty to reasonably accommodate disabled injured workers. I anticipate the WSIB will likely resist and find some reason to stall and maintain the status quo, however, the worker community will be pushing the WSIB to seize its jurisdiction so an injured workers human rights as disabled person are enforced, subject to the undue hardship standard developed at the Ontario Human Rights Tribunal.



The Supreme Court decision has put the WSIB on notice that accident employers have a duty to accommodate injured workers. This will likely involve appeals, but at some point we anticipate the Tribunal, and the WSIB, will recognize their jurisdiction around an accident employer's duty to accommodate an injured worker. Nor should this be too complex and undertaking, because the WSIB, and Tribunal, have ample experience administering the re-employment provisions of the Workplace Safety & Insurance Act.

Update Non-Economic Loss Awards (NEL)

My January article alerted members that the WSIB has revised its policy and will no longer offset NEL awards for pre-existing conditions. NEL awards are permanent impairment awards for either a physical and/or mental injury. This move was prompted by a strong worker rep lobby, class action lawsuit, and a Toronto Star investigation.

Over the past month, I have received numerous calls and emails from members asking what's going on because they are puzzled, and don't know what it means. The simple answer, WSIB improperly, and illegally, offset NEL awards because of pre-existing conditions when injured workers originally received a NEL award.

Injured workers who received reduced NEL awards are now receiving cheques in the mail, and a letter of explanation WHY this is happening. My advice, deposit the cheque in the bank. And when the WSIB decision letter arrives, don't fall for the explanation that *"As part of the WSIB's commitment to excellence, we are always checking to make sure that we apply our policies consistently and fairly"*.

Trust me, they didn't wake-up in a cold sweat, and decide to be charitable. The change came about because we collectively in the worker community fought and didn't relent until the WSIB retreated.

Gary Majesky

WSIB Consultant
Direct Line (416) 510-5251
gary_wsib@ibew353.org



Alcoholics Anonymous

**A closed AA service meeting will be held
at 1381 Lawrence Ave. E. at 8pm every
Friday night.**

Good Friday

The Statutory Holiday will be observed
on Friday, March 30, 2018.

If your employer asks you to work on
this day, you must be paid **double
time** for working on this holiday!

Pension Gifts

The following pensioners are invited to the South
Unit Membership meeting at the Union Office,
1377 Lawrence Avenue East, Toronto on
March 8, 2018 at 7:00 p.m. to receive their pension gifts:

**Thomas Bell, Dominic Gitto, Jerzy Kot, Joe
Levy, Frank Osborne and Eric Tomberg.**

IBEW Local 353 "Design a Sticker" Contest

Attention: To All Members with an Artistic Flair

Local 353 is looking for new and innovative designs for stickers and is looking to get you, the members, involved.

Put your talents to work and design an IBEW Local 353 sticker that will blow our socks off.

The contest runs from February 1, 2018 to May 1, 2018. Send your submissions to
recordingsecretary@lu353.ca and include your name, card number, phone number and email address.