

## Feature

## Dismissing Employees with Disabilities for Poor Performance

*How far must the employer go to accommodate?*

Employers have the right to dismiss employees for many reasons, provided employers comply with the Employment Standards Act, 2000 and common law reasonable notice requirements. However, employers cannot dismiss employees for reasons that violate the Human Rights Code, R.S.O. 1990, c. H. 19 [the "Code"]. For example, an employer may dismiss an employee for poor performance. However, dismissal for poor performance may violate the Code if an employee's performance is poor as a result of a disability.

This issue was the subject of the recent Ontario labour arbitration decision in *Toronto Community Housing Corp. v. Canadian Union of Public Employees, Local 416 (Toronto Civic Employees' Union) (Knight Grievance)*, [2013] O.L.A.A. No. 344 [the "Knight Grievance"]. While made in the context of labour arbitration, the Knight Grievance has broad application as a result of the comments made regarding the obligations of employers when dismissing employees with disabilities for poor performance.

The Knight Grievance involved an employee with a physical disability who was dismissed in 2010 for poor performance. The employee had worked for the employer since 1991 as a cleaner and caretaker, and for many of those years had been provided with modified duties as a result of her declining physical health. By 2006, the employee's health had deteriorated to the point that she was no longer able to perform her duties as a cleaner, regardless of the accommodations provided by the employer.

As a result, the employer provided the employee with a position in its call centre which involved monitoring the alarm signals of the buildings managed by the employer. The employee worked in this position for three months during which time she was trained through job-shadowing. The employee then commenced a two-year leave of absence due to an injury.

The employee returned to work with the employer in 2009 and commenced retraining for the call centre position. Following the completion of training, it quickly became clear that the employee did not possess the required skill and ability for the position. The employer searched for but was unable to find a suitable alternative position for the employee. As a result, the employer dismissed the employee.

The union grieved that the employer had not met its duty to accommodate the employee. This was because there was no quantifiable evidence to suggest that the employee could not be trained further to become successful in an alternate available position and also the employer had not met with the employee to discuss alternative available positions. The union sought an order directing the employer to meet with the employee whenever an alternative position that complied with the employee's restrictions became available and to discuss with the employee whether such positions were suitable.



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The arbitrator accepted the employer's evidence that the employer had considered all positions that were suitable for the employee. The arbitrator found that it was reasonable for the employer to conclude, based on the employee's past performance, that the employee did not have the skill and ability required to perform certain positions. The arbitrator also found that the employer had provided more training than required to the employee, and that it was reasonable for the employer to conclude that additional training would not bring the employee's skill and ability to the required level.

Taking into account all of the employer's efforts to accommodate the employee, the arbitrator held that the employer had fulfilled its duty to accommodate to the point of undue hardship, and that the employee's rights under the Code had not been violated.

In making this finding, the arbitrator relied on the Supreme Court of Canada's decision in *Hydro-Quebec v. Syndicat des employees de techniques professionnelles et de bureau d'Hydro-Quebec, section locale 2000 (SCFP\_FTQ)*, [2008] 2 S.C.R. 561, in which it was stated that "...accommodation is not about ensuring the individual remains in the workplace, but rather to ensure the disability is not a basis to exclude the individual."

The Knight Grievance demonstrates that employers can dismiss employees with disabilities for poor performance without violating the Code. It also demonstrates that prior to a dismissal, employers must ensure that they have met the duty to accommodate employees with disabilities. To meet the duty to accommodate, employers must occasionally go to what may seem like great lengths to accommodate an employee with a disability. However, the Knight Grievance confirms that after meeting the duty to accommodate, employers do not have a duty to continue to employ employees with poor performance, whether those employees have disabilities or otherwise.

In addition, the Knight Grievance demonstrates that employers are permitted to exercise some discretion in determining whether the duty to accommodate has been met. Employers are permitted to make reasonable conclusions in determining whether additional accommodation is required by, for example, providing training above and beyond what is reasonably sufficient. In addition, employers are permitted to make reasonable conclusions regarding whether an employee with a disability has the required skill and ability to perform the position and whether the position complies with the employee's restrictions.

The Knight Grievance reassures employers that the general right to dismiss employees for poor performance still stands, provided all obligations under the Code are met. If an accommodated employee's performance is unsatisfactory and no other accommodation is possible without undue hardship to the employer, the employer has the right to dismiss the employee.

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