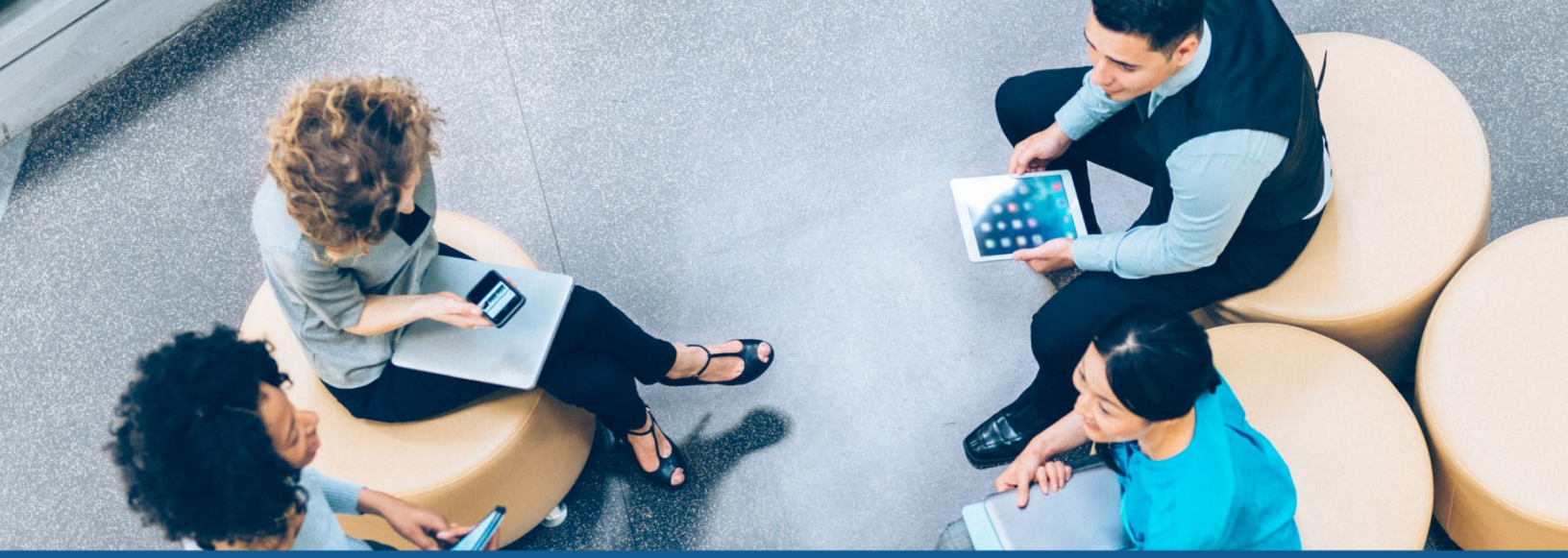

What's New in HR Law

Arbitrator Finds "Age-Related Risk to COVID-19" to Be Insufficient Grounds for WFH Accommodation

May 24, 2023 | By **Hossein Moghtaderi**

Bottom Line

In *Ottawa Catholic School Board v. Ontario Public Service Employees Union, Local 423*, 2023 CanLII 33027 (ON LA), Arbitrator Parmar determined that an employer (the "School Board") did not contravene the Ontario *Human Rights Code* (the "*Code*") when it refused to grant an older employee's request to work from home based on an "age-related risk to COVID-19." The Arbitrator dismissed the Union's grievance on a preliminary basis after finding that the Union did not establish a *prima facie* case of discrimination based on an agreed statement of facts.

Background

The Grievor was a long-term employee of the School Board and worked as a Second Language Instructor. She was 71 years old when the grievance was filed.

As a result of the COVID-19 pandemic, the Minister of Education ordered all public schools to close for in-person learning effective March 14, 2020. In August 2020, the School Board issued a return-to-school plan, which included a return to in-person learning by September 14, 2020, subject to any changes during the COVID-19 pandemic.

The Grievor requested accommodation in respect of the return to in-person learning, seeking permission to continue working remotely. Her request noted her age and the fact that "a family member was diagnosed with stage 4 cancer in early July" as reasons for the requested accommodation.

The School Board requested additional medical information from the Grievor, including a questionnaire for the Grievor's doctor to complete. The doctor provided a note stating "age related risk to COVID-19" in support of the Grievor's request and noted that "consideration should be given to reduce her risk of exposure above and beyond that of the general population." In response to a specific question contained in the medical questionnaire, the doctor confirmed that the Grievor could attend the workplace without risk if the School Board continued to implement social distancing guidelines along with the additional measures and controls it had put in place. Lastly, the doctor noted that the Grievor was "considered to be in an at risk group for complications should she get COVID-19".

On the basis of the information received and to accommodate the Grievor's request, the School Board modified the Grievor's assignment, such that the Grievor would teach virtually but from her home school location. As a result, the Grievor would still be required to attend her school, but the students would participate in her class virtually so as to limit her in-person interaction.

The Decision

Arbitrator Parmar's analysis in this preliminary decision focused on whether the Union had established a *prima facie* case of discrimination so as to engage the protections in the *Code*. The decision closely reviewed the evidence provided by the parties and particularly focused on the doctor's note and completed questionnaire.

Arbitrator Parmar concluded that despite the medical report's reference to "age related risk to COVID-19", the totality of the medical questionnaire did not establish an objective medical need to continue working from home. Moreover, the doctor's statement that "consideration" should be given to the Grievor to reduce her risk of exposure did not establish a *Code*-based need when read alongside the other medical information provided by the doctor.

Arbitrator Parmar found that the School Board had properly conducted an individualized assessment of the Grievor's circumstances, including the detailed medical questionnaire, before suggesting the accommodation option. In her view, this process was consistent with the Ontario Human Rights Commission's *Policy on discrimination against older people because of age* and should form the basis of any analysis about the propriety of an accommodation plan or the presence of a disadvantage.

In dismissing the grievance, the Arbitrator found that the evidence did not establish that the Grievor suffered a disadvantage in her employment and the Union had failed to discharge its onus of establishing a *prima facie* case of discrimination.

Check the Box

The uncertainties caused by the COVID-19 pandemic continue to impact workplaces, particularly as many employers continue to invite or mandate employees back to the workplace. When considering accommodation requests in the context of a return to the physical workplace, employers should conduct an individualized assessment of the employee's circumstances, such as obtaining additional medical information. This will increase the chances of a successful accommodation plan, if required. Employers should avoid a one-size-fits-all approach to workplace accommodation as such approaches are often futile and could result in liability.

Moreover, this case serves as an important reminder that while the presence of a *Code* -protected characteristic is a prerequisite for a *prima facie* discrimination claim, the union or employee still bears the onus of establishing an adverse impact in employment relating to that characteristic.

Need More Information?

For more information or assistance with accommodation requests or plans, contact Hossein Moghtaderi at hmoghtaderi@filion.on.ca or your regular lawyer at the firm.

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