What's New in HR Law

HRTO Upholds Accommodation Process That Provides Preferential Treatment to Employees with Active WSIB Claims

September 25, 2017

BOTTOM LINE

According to a recent decision of the Human Rights Tribunal of Ontario, employers may provide preferential treatment to disabled employees with active Workplace Safety and Insurance Board claims.

The Facts: Employee suffered off-the-job disability requiring medical leave of absence; employer sought to accommodate with a permanent position only

George Carter was working in a manufacturing facility operated by Chrysler Canada Inc. ("Chrysler") when he suffered disabling conditions that required him to take a medical leave of absence. The conditions did not trigger a Workplace Safety and Insurance Board ("WSIB") claim because they did not arise from his job with Chrysler.

When Mr. Carter was capable of returning to work, he provided Chrysler with information about his abilities and medical restrictions. Chrysler began to search for a "permanent" position that was available and suitable. In the interim period, Mr. Carter was forced to remain off work.

Mr. Carter took the position that Chrysler should also have considered him for temporary positions. He also believed that Chrysler would have returned him to work sooner if his disability had been work-related; he believed that Chrysler treated employees differently if their restrictions had arisen from work-related injuries. As a result, Mr. Carter filed an application with the Human Rights Tribunal of Ontario (the "Tribunal"), alleging that Chrysler had discriminated against him on the basis of his disability.

Chrysler's Acknowledgement: More likely to offer work to workers with active WSIB claims

Chrysler acknowledged that it was more likely to offer work to workers with active WSIB claims as compared to those without active WSIB claims (which included workers like Mr. Carter whose restrictions from injuries were not work-related).

In particular, Chrysler acknowledged that it was more likely to offer "non-standard jobs" to injured workers with active WSIB claims. The "non-standard jobs" were jobs that arose temporarily or on an ad hoc basis. Examples included quality control or special inspection jobs to correct a production issue. On occasion, Chrysler also offered work that was not actually productive, but only to injured workers with an active WSIB claim.

Chrysler explained that it distinguished between disabled employees because of the WSIB's New Experimental Experience Rating ("NEER") program. Under the NEER system, the amount the employer must pay can increase significantly when a worker remains off work in receipt of WSIB benefits. As a result, employers have an incentive to return employees to work at full pay following a workplace injury. The incentive only exists, however, where the worker's claim is "active" and can affect the employer's NEER rating.

The Tribunal's Decision: The differential treatment was not discriminatory, but ultimately the employer failed to accommodate to the point of undue hardship

The Tribunal held that Chrysler's differential treatment in accommodating employees with workplace injuries and those with non-workplace injuries was not discriminatory in the circumstances.

The Tribunal explained as follows:

> [95] In this case, the respondent [Chrysler] created a process that resulted in a distinction as between disabled employees who have medical restrictions as a result of a work-related injury and who have an active WSIB claim, and other disabled employees with medical restrictions.
>
> [96] This is not a distinction that is based on a prohibited ground. While the result of the policy is that some disabled workers are treated more advantageously than others, the distinction does not arise from disability but rather from the

> operation of a statutory scheme. While the applicant has established that the respondent treats injured workers with an active WSIB claim differently than other employees with medical restrictions, he has not established that this is discriminatory under the Code.

Based on the foregoing, the Tribunal found that Chrysler did not violate the *Human Rights Code* (the "*Code*") by providing preferential treatment to employees with active WSIB claims.

However, the Tribunal emphasized that Chrysler still had an ongoing duty to accommodate Mr. Carter to the point of undue hardship. The duty to accommodate included considering whether temporary job opportunities were available and suitable. Since Chrysler had considered only permanent standard jobs in its search for accommodation, it violated the *Code*. Mr. Carter was therefore entitled to $5,000 in compensation for injury to his dignity, feelings, and self-respect.

Check the Box

By now, it is well-known that employers must accommodate disabled employees to the point of undue hardship, even if the employees' medical restrictions do not arise from a workplace injury.

To minimize the costs associated with workplace injuries, employers can implement a number of strategies.

- As demonstrated by Chrysler, one strategy is to return employees to work as soon as possible, even if this means providing them with non-productive work or other accommodation that is not required by the Code.

- The Tribunal has indicated that if an employer chooses to make these types of extraordinary forms of accommodation available to employees with active WSIB claims only, the employer will not necessarily be in violation of the Code.

Forum: Human Rights Tribunal of Ontario

Date: February 8, 2017

Citation: *Carter v. Chrysler Canada Inc.*, 2017 HRTO 168

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