

LEGAL UPDATE

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RIGHTS AND THE ACCOMMODATION PROCESS

Telus Communications Inc. v Telecommunications Workers' Union, 2017 BCCA 100 is an appeal of a British Columbia Supreme Court order quashing the decision of an arbitrator that upheld the union's grievance that it had the right to receive notice, information and consultation from the employer where an employee covered by the collective agreement makes a request for accommodation to address a medical disability.

BACKGROUND AT ARBITRATION

The arbitrator upheld a grievance where the union claimed it had the right to receive notice from the employer of all requests made by employees covered by the collective agreement for accommodations to address a medical disability. The collective agreement between the parties did not contain a provision expressly recognizing the right asserted by the union to notice, information and consultation. It was argued by the employer that the proposed right was contrary to past practice, inconsistent with a term in the collective agreement allowing it to

transfer employees for reasons of accommodation, inharmonious with the bargaining history in which the union had been unsuccessful at the bargaining table in achieving a term that would have provided the very right asserted in the grievance, and not a consequence of the union's exclusive bargaining authority. The arbitrator accepted the union's submissions and held for the union on the basis the certificate of bargaining authority gave the union the right to engage in all requests for accommodation for a medical disability.

ON JUDICIAL REVIEW

The BC Supreme Court quashed the arbitral award. The employer did not dispute that an accommodation requiring an adjustment to a negotiated term of the collective agreement and cases where the employee asked for union representation were circumstances in which the union was entitled to participate in the accommodation process. However, the employer noted that many of the employee requests for accommodation such as requests for ergonomic

chairs, lighting adjustments, and adjustments to work locations could be resolved without any change to a negotiated term of the collective agreement or without any impact on other employees and did not require the involvement of the union.

The union argued that its rights as exclusive bargaining agent meant that the employer lost the right to negotiate different conditions of employment with individual employees covered by

the certification and that it was improper for the employer to communicate directly with union members without including the union. The union also argued that it should participate in all accommodation requests as the collective agreement incorporated the Canadian Human Rights Code and

that this would trigger the union's obligation to participate in the accommodation process. The BC Supreme Court concluded that the certificate of bargaining authority did not give the union the rights it claimed and set aside the arbitrator's decision finding it to be unreasonable.

THE APPEAL DECISION

The union appealed to the BC Court of Appeal. The BC Court of Appeal upheld the BC Supreme Court's decision. The BC Court of Appeal agreed that the union did not have an inherent right to be present during all employer and employee accommodation meetings in the absence of a negotiated general right. The BC Court of Appeal confirmed that there is no general obligation on the employer to involve the union in the search for accommodation and, in this

case, the union's duty only arises when its involvement is required to make accommodation possible and when no reasonable alternative resolution has been found.

The BC Court of Appeal dismissed the union's appeal and upheld the BC Supreme Court's order to quash the arbitrator's decision.

WHAT THIS MEANS FOR EMPLOYERS

This decision makes it clear that unions do not have an absolute right, independent of an express term in the collective agreement, to receive notice, information and consultation from the employer of all accommodation requests from employees covered by the collective agreement. The employer's right to manage its business includes the right to deal directly with accommodation requests unless the accommodation requires an adjustment to a negotiated term of the collective agreement, where the union's involvement and cooperation is necessary to effect a reasonable accommodation, or where an employee asks for union representation.

There are also circumstances where union involvement is advantageous to the employer. The union can often assist in moving the accommodation process along if the requesting employee has trouble communicating directly with the employer or where other union members have questions or concerns.

QUESTIONS?

If you have any comments or questions about this update please contact Karen Jewell, Division Manager of Information, Compensation and Advisory Services at 604-432-6228 or by email at karen.jewell@metrovancover.org.

SOURCES

Telus Communications Inc. v. Telecommunications Workers' Union, 2017 BCCA 100 (CanLII), <<http://canlii.ca/t/gxrk5>>, retrieved on 2017-06-14.