

Small employers, big duties

Case involving pregnant police officer shows smaller firms have the same obligations to accommodate employees as larger ones

By **Lauren Sukerman**

When an employee has a legitimate special need, such as a disability or something protected under human rights legislation, the employer has a duty to accommodate that employee within its workplace. That fact is well settled in law.

The employer's duty to accommodate continues to the point of undue hardship. However, what is not so well settled in law is the meaning of undue hardship. In practice the concept is determined on a case-by-case basis with reference to the nature, capacity and financial means of the employer.

But what is clear, as demonstrated by a recent decision out of Nova Scotia, is that small employers have the same duty as large firms when it comes to accommodating staff. That case involved a small town police service that refused to accommodate a pregnant officer.

Pregnancy falls under human rights legislation when a woman faces adverse treatment in her employment as a result of her pregnancy. The law clearly states that no person shall, in respect of employment, discriminate on the basis of sex. Pregnancy and the possibility of pregnancy are included in the meaning of sex, in the context of discrimination.

In the 2004 decision by the board of inquiry it was held that accommodating a pregnant employee in a manner that would be "out of the ordinary, awkward

and inconvenient" as well as potentially dangerous to the public, did not sufficiently demonstrate that the accommodation would result in undue hardship. As a result, the board made a finding of discrimination and awarded compensation for lost wages. In addition, the board ordered the complainant be con-

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sidered for the next available position of employment and that the employer develop a workplace policy to deal with pregnant employees.

The complaint concerned a police officer named Patricia Saunders. Saunders had originally received her training as an RCMP officer and was employed by the RCMP detachment in Burnaby, B.C. Following a year of service with the Burnaby force, Saunders moved to Nova Scotia and secured a position with the Town of Kentville Police Services in July 1999.

Two months after commencing her employment in Kentville, Saunders became pregnant. She notified the chief of police and requested to be put on light duties. Her request was in accordance with her experience at the RCMP where pregnant officers regularly received light duties during their pregnancy. If light duties were unavailable in that officer's particular detachment, she would be temporarily relocated to a larger centre.

Although the small-town force had never dealt with pregnant police officers in the past, it, and specifically the police chief, agreed Saunders should not con-

tinue with her regular duties while pregnant. Accordingly, the police service began to search for light duties to assign to her. The board found it to be "clear from the evidence that the chief was genuinely engaged in finding work to which Ms. Saunders could be assigned in the office during her pregnancy.... The chief made good faith efforts to find light duties."

In a similar quest for light duties, Saunders provided the chief with a list of functions she could perform in the office. The list was provided to her by her union.

The chief advised that all of the suggestions described functions that were already held by other people and that he did not have discretion to create a new

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position (such authority lay with the board of police commissioners). Moreover, the budget-making process took at least six months.

The chief told Saunders there were simply no light duties available for her. With no light duties available, Saunders told the police service she would not be returning to work after Dec. 17, 1999 (although her maternity leave would not have begun until May 2000).

Until the date of her departure, for approximately one month, Saunders was assigned photocopy tasks for a large investigation. After that she was given general office duties, such as answering the phone and taking statements. Normally, the chief's secretary or the day shift personnel performed these tasks.

Kentville's police service is a small

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unit that consists of four platoons with three officers per platoon. The operation of the service is governed by the *Nova Scotia Police Act*, which stipulates a minimum of two officers on duty at all times. In his testimony, the chief explained that the service's practice is to have three officers on duty in a platoon.

The chief admitted that on occasion, as a result of sick days, holidays and court duty, a two-person platoon is tolerated for short periods of time. However, if the situation persists, problems such as bad morale, gaps in service, increased risk to platoon members and increased risk to the general public might occur. In addition, having less than three officers on duty in a platoon is a violation of the police service's collective agreement.

Nevertheless, the board held that, since a two-person platoon was tolerated in the past, it could have been tolerated for the length of her pregnancy without

presenting undue hardship to the police service. In addition, the board found that the police service did not adequately search for light duties despite its recognition of "good faith efforts."

In coming to its conclusion the board relied on decisions from the British Columbia Human Rights Tribunal (*Sidhu v. Broadway Gallery*) and the Alberta Human Rights Board (*Woo v. Fort McMurray Catholic School Board of Education*.) In *Sidhu*, a pregnant employee of a tree nursery requested to be kept away from chemicals applied to trees. The employer, who operated a very small workplace, offered to re-assign her to a reduced part-time position in the show gallery.

The tribunal held that, despite the small workplace, the employer failed to take all reasonable steps to adequately accommodate the employee short of undue hardship. Similarly, in *Woo*, where an employee was terminated due to "maternity reasons," the board held that accommodation short of undue hard-

ship could include inconvenience, disruption and expense.

Accordingly, in an effort to uphold the duty and ensure that employees are properly and adequately accommodated, the point of undue hardship may prove to be more onerous to smaller employers than larger firms.

This is as a result of the duty being sustained to an equivalent measure, despite the relative size or financial means of the employer. ■



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