Relations industrielles
Industrial Relations

The Duty to Accomodate: Its Growing Impact on the Grievance Arbitration Process

Donald D. Carter

Volume 52, numéro 1, 1997

URI : https://id.erudit.org/iderudit/051157ar
DOI : https://doi.org/10.7202/051157ar

Aller au sommaire du numéro

Éditeur(s)

Département des relations industrielles de l'Université Laval

ISSN

0034-379X (imprimé)
1703-8138 (numérique)

Découvrir la revue

Citer cet article

Carter, D. D. (1997). The Duty to Accomodate: Its Growing Impact on the Grievance Arbitration Process. *Relations industrielles / Industrial Relations*, *52*(1), 185–207. https://doi.org/10.7202/051157ar

Résumé de l'article

L'influence croissance des lois canadiennes sur les droits de la personne sur la négociation collective a été grandement discutée. Plus particulièrement, le concept de discrimination positive en est venu à dominer ces lois en imposant aux employeurs et aux syndicats le devoir d'accommoder les plaintes d'employés individuels. Parallèlement, les arbitres canadiens ont commencé à adopter cette approche d'accommodement et la jurisprudence arbitrale récente reflète une nouvelle emphase sur les droits humains. La question ici n'est plus de savoir si les arbitres peuvent appliquer ces lois, vu qu'ils en ont maintenant la responsabilité, mais s'il y a des limites institutionnelles rendant l'arbitrage un forum moins qu'idéal pour l'application de celles-ci.

Le paradigme classique de l'arbitrage de grief considère la convention collective comme une forme de législation privée régissant les conditions d'emploi des membres de l'unité de négociation. Selon ce modèle, seuls l'employeur et le syndicat ont accès à l'arbitrage pour faire appliquer la convention collective. Les deux parties paient les arbitres dont on s'attend qu'ils respectent le système de valeurs internes établi par la convention collective. Cette attente se reflète dans l'emphase mise sur la détermination des intentions des parties par le processus. On s'attend des arbitres qu'ils soient liés d'abord par le texte de la convention collective, et seulement en cas d'ambiguïté, admet-on qu'ils aillent au-delà des termes pour prendre en considération la pratique passée où l'historique de la négociation. Dans les années 70, cependant, le défaut majeur de ce paradigme classique de l'arbitrage en tant que système de justice privé a commencé à apparaître.

En effet, ce paradigme a oublié de reconnaître que l'arbitrage de grief au Canada n'est pas seulement la création de la convention collective. La législation canadienne sur la négociation collective rend ce processus obligatoire tout en interdisant les grèves et les lockouts en cours de convention. Vu que l'autorité procédurale et réparatrice des arbitres canadiens tire largement sa source de la loi plutôt que de la convention collective, on peut soutenir de façon convaincante que l'arbitrage est autant une créature de la loi que des dispositions de la convention collective. De plus, la possibilité de révision judiciaire des décisions arbitrales illustre clairement qu'il y a un substantiel élément public dans l'arbitrage de grief. Le fait est que l'arbitrage de grief est un processus hybride, contenant des éléments publics et privés.

Le coup fatal au paradigme classique est survenu au milieu des années 70. Quand la Cour suprême a établi, dans l'affaire *McLeod* c. *Egan* que les arbitres avaient la responsabilité de prendre en considération la législation externe applicable, on ne pouvait plus considérer l'arbitrage comme un processus strictement privé. Cette nouvelle exigence imposée aux arbitres s'appliquait même lorsque cette législation externe était en conflit direct avec les termes de la convention collective. Les arbitres doivent maintenant donner préséance aux valeurs externes provenant de la législation, même aux dépens du système de valeurs internes de la convention collective.

L'impact de l'affaire *McLeod* ne peut être sous-estimé. Durant les années 70, les conventions collectives ont été entourées par un ensemble grandissant de lois du travail commençant à entrer en conflit avec les systèmes de valeurs internes contenues dans les conventions. Avec la croissance de la législation sur les droits de la personne dans les années 80, cet ensemble de lois a affaibli l'effet des normes établies par les conventions collectives, les arbitres appliquant de plus en plus les dispositions législatives même lorsqu'elles étaient en conflit avec celles de la convention collective.

Cette tendance fut renforcée par ces lois qui ont expressément donné aux arbitres le pouvoir d'interpréter et d'appliquer la législation externe à la convention collective. On devait alors voir l'arbitrage d'un nouvel œil : les systèmes de valeurs internes sont devenus subordonnés aux valeurs publiques prédominantes. On doit alors maintenant, plus que jamais, considérer l'arbitrage de grief comme un processus hybride comprenant des composantes publiques et privées.

La jurisprudence arbitrale récente suggère qu'en appliquant la législation sur les droits de la personne aux conventions collectives, les arbitres sont encore influencés par le paradigme classique de l'arbitrage de grief. Ces récentes affaires démontrent une réticence évidente de la part des arbitres à donner plein effet au devoir d'accommodement afin d'éviter de déranger les dispositions de la convention collective. Cette tendance arbitrale traduit plus le rôle traditionnel de l'arbitre de se conformer au système de valeurs internes à la convention collective plutôt que cette nouvelle responsabilité d'appliquer et d'interpréter la législation externe à la convention collective.

Ma conclusion est à l'effet que malgré la responsabilité publique qui fut donnée aux arbitres, plusieurs d'entre eux continuent de se percevoir d'abord comme des juges privés. Jusqu'à ce qu'il y ait des changements dans cette perception, les arbitres seront réticents à donner pleine application au devoir d'accommodement si cela va à rencontre de l'intégrité de la convention collective.

Un changement de perception est aussi nécessaire pour que les arbitres assument leur devoir de modeler des remèdes relevant des droits de la personne et dépassant les frontières de la convention collective. Même si telle nouvelle approche est plus large, les arbitres se perçoivent souvent comme des juges privés limités à l'étendue de l'unité de négociation. Cependant, une conception plus large de l'autorité correctrice soulève le spectre d'auditions plus complexes, le nombre de personnes affectées par une décision pouvant être beaucoup plus grand. Alors, il se peut qu'il se passe encore du temps avant que les arbitres n'acceptent d'utiliser tous leurs pouvoirs lorsqu'ils appliquent le devoir d'accommodement.

Il y a donc une limite institutionnelle importante à l'application du devoir d'accommodement par les arbitres. Le vieux paradigme de l'arbitrage de grief influence encore le comportement des arbitres dans leur nouveau rôle de juge avec la responsabilité publique d'appliquer la législation sur les droits de la personne. L'influence de ce vieux paradigme signifie que les arbitres sont encore réticents à appliquer le devoir d'accommodement d'une manière qui attaquerait l'intégrité de la convention collective ou à déborder la convention collective dans l'établissement de correctifs. Cette réticence des arbitres doublée des restrictions à l'accès individuel à l'arbitrage signifie, malgré le fait que l'arbitrage est maintenant un forum nécessaire à la résolution de conflits en matière de droits de la personne, que ce n'est peut-être pas le forum idéal pour appliquer les lois canadiennes portant sur les droits de la personne.

The Duty to Accomodate

Its Growing Impact on the Grievance Arbitration Process

DONALD D. CARTER

Grievance arbitrators now have a responsibility to interpret and apply human rights legislation in the course of resolving collective agreement disputes. This responsibility, however, raises the question of whether grievance arbitration is the most suitable forum for the application of human rights laws. In Canada, grievance arbitration has been a hybrid process, containing both public and private components. Recent arbitral jurisprudence, however, suggests that arbitrators see themselves as primarily private adjudicators. These cases indicate that arbitrators have been reluctant to give full scope to the duty to accommodate in order to avoid disturbing the terms of the collective agreement. This reluctance of the arbitrators to play a full role as human rights adjudicators means that, although arbitration is now a necessary forum for the resolution of human rights disputes, it is not necessarily the most ideal forum for the enforcement of Canadian human rights laws.

The growing influence of Canadian human rights laws on collective bargaining relationships is now beyond debate. In particular, the concept of constructive discrimination has come to dominate Canadian human rights law over the last few years, imposing on both employers and unions a duty to accommodate the claims of individual employees. At the same time, Canadian arbitrators have now begun to embrace this duty to accommodate and recent arbitral jurisprudence has reflected a new emphasis on human rights. The issue is no longer whether arbitrators have any business applying human rights laws but, given that arbitrators now have this responsibility, whether there are institutional limits that make arbitration less than an ideal

- CARTER, D.D., Faculty of Law, Queen's University, Kingston, Ontario.

forum for the application of these laws. This paper attempts to identify these institutional limits in order to provide a framework for the analysis of the emerging arbitral jurisprudence dealing with the application of the duty to accommodate.[1]

THE DECLINE OF ARBITRATION AS A SYSTEM OF PRIVATE ORDERING

Forty years ago the intrusion into the collective agreement of an external concept recognizing the rights of the individual employee would have been unthinkable. At that time the collective agreement and grievance arbitration were regarded as the principal components of a system of private ordering controlled by unions and employers. The collective agreement established a system of private norms to govern a particular workplace relationship, and grievance arbitration constituted a form of private adjudication to ensure the application of these norms in a manner consistent with the intention of the parties.

Of paramount importance in this paradigm was the internal value system of the parties articulated by the language of the collective agreement. This internal value system, being the product of collective bargaining, reflected collective rights rather than individual rights. The norms established by the collective agreement were to apply equally to all employees, and individual deals between employer and employee were forbidden unless expressly authorized by the collective agreement or made with the approval of the bargaining agent. The terms of the collective agreement, therefore, generally established both the floor and the ceiling for the terms and conditions of employment for the individual employees in the bargaining unit. Under this legal regime any special treatment for individual employees, because of its potential to erode the collective values established in the collective agreement, required the consent of the union.

This classic paradigm of grievance arbitration treated the collective agreement as a form of private legislation regulating the terms of employment of bargaining unit members. In this model, only the union and employer had access to arbitration to enforce the terms of the collective agreement. Arbitrators were paid by these two parties and, as private adjudicators, were expected to respect the internal value system established by the collective agreement. This expectation was reflected by the emphasis that the process

1. An earlier version of this paper was first presented at the 17th Annual Labour Arbitration Institute, held in Vancouver, B.C., on June 9, 1995. The proceedings of this seminar "Labour Arbitration – 1995" have been published by The Continuing Legal Education Society of British Columbia.

placed on determining the intentions of the parties. Arbitrators were expected to look first to the language of the collective agreement and only in the case of ambiguity venture beyond that language to take into account past practice or negotiating history. By the 1970s, however, this classic paradigm of arbitration as a private system of ordering had begun to show its most significant flaw: the failure to recognize that grievance arbitration in Canada is not just the creation of the collective agreement.

Canadian collective bargaining legislation makes the grievance arbitration process mandatory at the same time as it imposes a prohibition on strikes and lockouts during the term of the collective agreement. Since the procedural and remedial authority of Canadian arbitrators is largely found in collective bargaining legislation rather than in the collective agreement, it can be convincingly argued that arbitration is just as much a creature of legislation as it is of the terms of the collective agreement. Moreover, the availability of judicial review of arbitration awards makes it clear that there has always been a substantial public element to grievance arbitration. The fact is that grievance arbitration is a hybrid process, containing both private and public elements.

The fatal blow to the classic paradigm of arbitration came in the mid-1970s. Once the Supreme Court of Canada in *McLeod v. Egan*[2] made it clear that arbitrators had a responsibility to consider applicable external legislation, arbitration could no longer be viewed as just an instrument of private ordering. Moreover, this new requirement for arbitrators to consider external legislation applied even in those cases where that external legislation was in direct conflict with the language of the collective agreement. Arbitrators henceforth had to give precedence to the external values found in public legislation even when to do so would be at the expense of the internal value system found in the collective agreement.

The impact of *McLeod v. Egan* on the arbitration process cannot be overstated. By the 1970s, collective agreements were being surrounded by an expanding web of employment legislation that was beginning to conflict with the internal value systems articulated in those agreements. With the growth of human rights legislation in the 1980s, this web of external legislation has become even tighter, further weakening the force of the internal norms established by collective agreements as arbitrators increasingly gave effect to legislation when it came into conflict with the terms of the collective agreement.[3] This development was further reinforced by collective bargaining legislation that expressly conferred upon arbitrators the power to interpret and apply legislation external to the collective agreement. This

2. (1974), 46 D.L.R. (3d) 150 (S.C.C.).

3. See *Labour Relations Code*, S.B.C. 1992, c. 82, s. 89(g).

encroachment of external legislation on what had once been regarded as a system of private ordering meant that arbitration had to be viewed in a new light as the internal value systems established in collective agreements became subordinated to overriding public values. Even more than ever, grievance arbitration had to be regarded as a hybrid process, containing both significant private and public components.

CONSTRUCTIVE DISCRIMINATION AND THE DUTY TO ACCOMMODATE

Human rights legislation has had a more noticeable impact on the internal value systems of collective agreements than any other type of legislation. Nowhere is this more evident than when it comes to the related concepts of constructive discrimination and the duty to accommodate. After the Supreme Court of Canada's decision in *O'Malley v. Simpsons-Sears Ltd.*,[4] it became apparent that actual intent to discriminate need not be a necessary element of illegal discrimination. The emphasis had shifted from "intention" to "effect". Ordinary workplace rules, even those honestly made for good business reasons, could still amount to improper discrimination because of their disproportionately adverse impact on the individual employee.

The impact of this concept of constructive discrimination on the unionized workplace has been profound. If one looks closely at any collective agreement, it is all too easy to identify provisions that might have an adverse impact on certain employees or groups of employees protected by human rights legislation. Seniority clauses, work scheduling provisions, holiday provisions, and Sunday premium provisions come quickly to mind, but many more collective agreement provisions could also be challenged because of their unequal impact on certain employees. The concept of constructive discrimination, therefore, has cast a long shadow over all collective agreements.

Just how long is this shadow? Constructive discrimination does not create absolute liability, but it does shift the burden on the party justifying a rule or a practice to establish that the person adversely affected by that rule or practice could not be accommodated without undue hardship. This duty to accommodate obviously takes its meaning from the context of the workplace, allowing for some consideration of the internal value system established by the norms of the collective agreement. Nevertheless, these norms will only prevail where it can be established that to deviate from

4. (1986), 86 C.L.L.C. para. 17,002 (S.C.C.).

them would cause great disruption to the running of the workplace.[5] The effect is clearly to subordinate the internal private value system of the collective agreement to the external values of our present human rights regime. These public values now require, not just similar treatment in the application of the collective agreement, but in the case of certain employees special treatment in order to comply with the duty to accommodate.

The duty to accommodate has become the preeminent human rights concept of the 1990s. Even though a majority of the Supreme Court of Canada has indicated that the duty to accommodate is confined to cases of adverse effect discrimination and does not extend as far as direct discrimination,[6] this distinction may be more apparent than real. If the distinction between direct discrimination and adverse effect discrimination depends on the difference between a rule that on its face clearly contravenes human rights legislation and an apparently neutral rule that has an adverse impact on individual employees, it is likely that most workplace rules could easily be characterized as being in the latter category. The fact is that blatantly discriminatory workplace rules are relatively uncommon and, even where a rule arguably discriminates on its face, an adjudicator will likely avoid making such a harsh judgment where it can also be characterized as merely constructive discrimination. Recent jurisprudence suggests that adjudicators are often prepared to treat rules that discriminate on their face as still being a form of adverse effect discrimination because of their disproportionate impact upon certain individuals protected by human rights legislation.[7] Indeed, a good argument can be made that, since all forms of direct discrimination have an adverse impact on the very groups that are protected by these statutes, adverse effect discrimination is only a more subtle variation of direct discrimination.

If direct discrimination and adverse effect discrimination are really just two sides of the same coin, it is difficult to see why the duty to accommodate should not apply in both cases. Not surprisingly, despite the distinction drawn by the Supreme Court of Canada between direct discrimination and

5. In *Syndicat de l'enseignement de Champlain v. Commission scolaire régionale de Chambly* (1994), 94 C.L.L.C. para. 17,023 the Supreme Court of Canada made it clear that, while collective agreement norms could not absolve either the employer or the union from the duty to accommodate, they still were "relevant in assessing the degree of hardship which may be occasioned by interference with its terms". According to the Court, a substantial departure from the normal operation of collective agreement norms might constitute undue interference in the operation of an employer's business.

6. *Alberta Human Rights Commission v. Central Alberta Dairy Pool* (1990), 90 C.L.L.C. para. 17,025 (S.C.C.).

7. For example, see *Re Ontario Nurses' Association and Etobicoke General Hospital* (1993), 14 O.R. (3d) 40 (Ont. Div. Ct.).

adverse effect discrimination, there is an increasing tendency for the duty to accommodate to come into play when determining whether a work rule that discriminates directly can still be justified as a bona fide occupational requirement. The question in these cases is whether such a rule could ever be considered a bona fide occupational requirement if it cannot be established that accommodating individuals from the application of such blatant discrimination would result in undue hardship in the administration of the workplace.[8] What appears to be happening is that the duty to accommodate is now emerging as the central issue in most cases involving claims of improper discrimination in the administration of the collective agreement.

IMPLICATIONS OF THE DUTY TO ACCOMMODATE FOR TRADE UNIONS

The growing importance of the duty to accommodate has important implications for trade unions as well as employers. Under Canadian collective bargaining laws, the union as exclusive bargaining agent is given a monopoly to negotiate the terms of a collective agreements with the employer and then to administer this agreement jointly with the employer. The individual employee is given no independent standing in either the negotiation or the administration of the collective agreement and can only assert a claim through the union. The control asserted by the union over access to this process puts in issue the union's responsibility where either the terms of the collective agreement or the application of these terms come into conflict with human rights laws.

This issue has now been definitively resolved by the Supreme Court of Canada in *Central Okanagan School District No. 32 v. Renaud.*[9] In this case, the Court considered a work schedule in a collective agreement that required a Friday evening shift. The complainant, a Seventh-Day Adventist, was bound by this schedule as were all other members of the bargaining unit. In the complainant's case, however, this scheduling requirement conflicted with his religion's prohibition against working on a Sabbath, from sundown Friday to sundown Saturday. The only practical accommodation of this conflict involved the creation of a special Sunday to Thursday shift for the complainant. The union, however, refused to allow this deviation from the collective agreement and threatened to file a policy grievance if the employer proceeded unilaterally to implement this special schedule for the complainant. The employer decided not to proceed with this accommodation and the complainant was subsequently discharged for refusing to complete his regular Friday shift.

8. For example, see *T.C.C. Bottling Ltd.* (1993), 32 L.A.C. (4th) 73 (Christie) at p. 88.

9. (1992), 92 C.L.L.C. para. 17,032 (S.C.C.).

Like *O'Malley v. Simpsons-Sears*, *Renaud* raised the issue of whether human rights laws required an alteration of the work schedule to accommodate a religious minority. The difference in *Renaud*, however, was that the issue arose in a unionized work environment where it was the union rather than the employer that was resisting accommodation. What is interesting about *Renaud* is that both the union and the employer were held responsible for failing to accommodate the individual employee. In the view of the Court, since both the union and the employer had a part in establishing the work schedule in the collective agreement, both were responsible for remedying its adverse effects on the complainant. Instead of accommodating the individual employee, the union had contributed to the continuation of the discrimination by refusing the accommodation suggested by the employer as had the employer by giving in to the union and not implementing the accommodation in the face of the union's opposition.

In *Renaud* the Supreme Court of Canada made it clear that the duty to accommodate only arises if a union is a party to discrimination, either because of its role in negotiating the collective agreement or its role in administering the collective agreement. In the first situation, the Court made it clear that the union is jointly responsible for all provisions of the collective agreement even though only some of these provisions might be of particular benefit to the union. According to the Court, the operative assumption was that "all provisions are formulated jointly by the parties and that they bear responsibility equally for their effect on employees". As for the administration of the collective agreement, the Court made it clear that even where a union has not participated in the initial formulation or application of a work rule that has an adverse impact on an individual employee, it still could be liable in those situations where it invokes the collective agreement to impede the reasonable efforts of the employer to accommodate in those situations where reasonable accommodation is possible with the cooperation of the union. This second branch of union liability for constructive discrimination rests on the assumption that unions as exclusive bargaining agents do play an important role in the running of the workplace during the currency of a collective agreement.

How onerous is this duty upon unions to accommodate the interests of individual employees? The Court has clearly stated in *Renaud* that a union "shares a joint responsibility with the employer to seek to accommodate the employee". This duty to accommodate may require a union to agree to particular measures inconsistent with the collective agreement even though the employer has not exhausted every alternative method of accommodation. No longer can the union simply insist on maintaining the integrity of the collective agreement in the face of an employer proposal to accommodate an employee by waiving the strict application of the collective agreement.

On the other hand, the Court also made it clear that the union's duty to accommodate did not require it to agree to measures that would "substitute discrimination against other employees for the discrimination suffered by the complainant".

INSTITUTIONAL LIMITS OF GRIEVANCE ARBITRATION AS A FORUM FOR THE RESOLUTION OF HUMAN RIGHTS DISPUTES

The emergence of grievance arbitration as a primary forum for the adjudication of human rights disputes raises important questions as to whether it is the most appropriate forum for the application of human rights concepts such as the duty to accommodate. It can be argued that, during this period of shrinking public resources, it makes good sense to turn to arbitration to resolve those human rights disputes arising from the unionized workplace. Indeed, in Ontario, the resources of the Human Rights Commission are so stretched that complainants face significant delays in the processing of their complaints. Not surprisingly, in that jurisdiction, an increasing number of human rights complaints arising in the unionized sector are now being resolved at arbitration.

This arbitral case law reveals two distinct routes by which human rights issues are being brought before arbitrators. One route is where the union asserts the human rights argument in the course of pursuing a grievance on behalf of an individual employee. Here the union is clearly using human rights laws to enlarge the rights of the individual employee under the collective agreement. A classic example is where a "deemed termination provision" is alleged to discriminate improperly against a disabled employee. In these cases, arbitrators have applied human rights laws to negate the automatic effect of such provisions despite the clear language of the collective agreement authorizing a termination of employment.[10]

A second route for human rights to penetrate the arbitration process is where a union is grieving an employer's attempts to comply with human rights laws, arguing that such actions are inconsistent with the terms of the collective agreement.[11] These cases raise the issue of whether an employer can encroach on the collective agreement in its attempts to accommodate the individual employee, bringing into consideration the extent to which the union shares with the employer a duty to accommodate the individual employee. As we know from the *Renaud* case, the union's duty to accommodate may require it to agree to waive the strict application of the terms of the collective agreement, even though the employer has not exhausted

10. See *Corporation of the City of Stratford* (1991), 13 L.A.C. (4th) 1 (Marszewski).

11. See *Riverdale Hospital* (1995), 41 L.A.C. (4th) 24 (Knopf).

every alternative method of accommodation. Arbitrators are now being confronted with this difficult task of balancing the hardship to the employer against the hardship to the union and to the other members of the bargaining unit when determining whether the collective agreement should be modified to accommodate an individual employee.

The increasing application of human rights laws by arbitrators, although relieving human rights commissions of some of their heavy caseload, raises the question of whether arbitration is the most suitable forum for the resolution of human rights complaints. One concern is that, since access to arbitration is controlled by the union and the employer, there may still be many human rights matters that arise in the unionized workplace that will never reach arbitration. Is it likely that either a union or employer would ever challenge a well-established seniority system even though a good argument can be made that it discriminates against certain minorities who are the most recent entrants to the workforce? A second concern is that the remedial powers of the arbitrator are not sufficiently broad to fashion an appropriate remedy for a violation of human rights laws. Is it possible for an arbitrator to fashion a remedy that has an impact beyond the collective agreement that the arbitrator is charged with interpreting?

The fact is that grievance arbitration in Canada is still very much a hybrid process, exhibiting both private and public components. Arbitrators may now have an obligation to interpret and apply legislation, but they are still chosen and paid by private parties with the expectation that they will stay within the boundaries of the collective agreement under which they have been appointed. As an institution, grievance arbitration is quite different than public adjudicators who are paid by the state to interpret and enforce public policy as set out in a particular statute. To some extent, what we have done by making arbitration a primary forum for the application of human rights laws is to hand over to a hybrid process the responsibility to resolve human rights issues arising from the unionized workplace. This transfer of jurisdiction has occurred, however, with very little debate as to the suitability of having arbitrators serve as a primary forum for the resolution of important public policy issues instead of leaving these issues to a purely public forum.

ANALYSIS OF RECENT CASE LAW

Recent arbitral case law dealing with the duty to accommodate gives us some idea of how well arbitrators are doing in this task of applying human rights law. The cases to be considered have all been decided during the past two years and most involve the issue of accommodating a disabled employee. These cases shed further light on the extent to which

arbitrators have imposed upon employers a duty to accommodate and whether in applying the duty to accommodate arbitrators will look beyond the collective agreement to fashion a remedy consistent with human rights legislation. The analysis of this latter issue leads to the larger, institutional question of whether arbitration is always a suitable forum for the resolution of human rights issues.

Extent of the Employer's Duty to Accommodate

In *Canada Post (Milligan)*[12] the issue was the extent to which the employer's duty to accommodate required it to find alternative work for the grievor who had become disabled by a heart condition. The grievor, because of this condition, could no longer perform his duties as a letter carrier working out of the Waterloo, Ontario, postal station. The union argued that the grievor should have been reassigned to a clerical position in the Central Redirection Centre in the neighbouring municipality of Kitchener. In response the employer argued that the grievor's lifting limitation disqualified him from even this clerical position and furthermore the duty to accommodate only extended to assignments within the local area of Waterloo where the grievor had been working.

The arbitrator read the language of the collective agreement as requiring the employer to make every reasonable effort to find a vacant position for disabled employees. In doing so it had an obligation to take reasonable measures to modify the lifting requirement so that the grievor could be accommodated in the clerical position. In this case, because a suitable clerical position within reasonable geographic proximity to the grievor's former work location had become available, the employer was held to have breached the collective agreement by not placing the grievor in that position. The arbitrator directed the employer to compensate the grievor for lost wages and benefits and made it clear that the grievor was entitled to be reinstated in any suitable position within the scope of the collective agreement. This decision, although clearly the product of a very particular collective agreement, still illustrates the point that arbitrators are now beginning to impose on employers a significant burden to accommodate disabled employees.

The extent of this duty has been considered in other recent arbitration awards. In *Calgary District Hospital Group*[13] the arbitration board considered the case of a nurse who wished to return to work following a work-related injury. It was agreed that, because of the grievor's inability to lift and transfer patients following the injury, she was unable to perform the

12. (1994), 38 L.A.C. (4th) 1 (M. Picher).

13. (1995), 41 L.A.C. (4th) 319 (Ponak).

duties of her former nursing position. The union, however, argued that the employer had failed to examine all nursing positions to determine if there was some way in which the grievor could be accommodated.

The board found that, even though the grievor could not perform the duties of her former position – or any other nursing position as it currently existed – the employer was still obligated to investigate whether any existing job could be modified to accommodate the grievor. In the words of the board, "[t]he duty to accommodate obligates the employer to diligently examine the possibility of adapting the work place in order to enable the Grievor to work...". The board directed the employer to "conduct a thorough examination of its work place in order to ascertain how, without incurring undue hardship, it can adapt or modify a nursing job (or jobs) so that the Grievor's physical disability can be accommodated". This decision clearly indicates that the duty to accommodate requires more of the employer than simply investigating whether any existing job might be suitable for a disabled grievor. Like *Canada Post*, this case makes it clear that the duty to accommodate now requires the employer to consider the feasibility of modifying existing jobs to accommodate the disabled employee.

Accommodation Most Beneficial to Employee

This obligation to modify the existing organization and assignment of work also appears to require the employer to make a reasonable effort to fashion an accommodation most beneficial to the disabled employee. In *Riverdale Hospital*[14] an arbitration board was faced with the situation where a disabled employee had been accommodated by being transferred out of a full-time bargaining unit to a part-time job that did not fall within any other bargaining unit. The collective agreement prohibited the employer from permanently transferring an employee out of the bargaining unit without the consent of the employee. The board held that this provision, read in light of the duty to accommodate set out in the Ontario's human rights legislation, prevented the employer from transferring the disabled employee out of the bargaining unit unless the employer could establish that accommodating the employee within the bargaining would result in undue hardship.

On the facts in this case the board concluded that, although the employer had provided a short-term accommodation for the grievor, it had not considered the alternatives for accommodating the grievor on a long-term basis within the bargaining unit. The board further held that, even though the grievor might not be working full-time hours, it was still possible to interpret the collective agreement in a manner that would not result in her

14. See footnote 11, *supra*.

losing bargaining unit status, since other employees off work because of illness and not working at all could still retain bargaining unit status. This interpretation, in the board's view, would not create undue hardship for the employer and would avoid penalizing the employee by a loss of status as a bargaining unit employee. The board ordered that the grievor be reinstated in the bargaining unit with an appropriate adjustment of seniority. It did not order any compensation for loss of hours of work, however, holding that the assignment of hours of work was still within the employer's prerogative.

Another recent case re-emphasizes the point that employers are required to look first to the accommodation most beneficial to the disabled employee. In *Hamilton Street Railway*[15] the arbitrator considered the demotion of a disabled employee. A grievor who had been employed as a bus driver was placed in a job outside the bargaining unit as a security guard because of numerous absences caused by a back injury. The arbitrator held that the grievor's work injury was the proximate cause of her demotion and that there was not "sufficient objective evidence" that accommodation as a bus driver would cause undue hardship to the employer. In the arbitrator's view, what was lacking was objective medical evidence on the issue of whether the absenteeism problem would continue in the future. The grievor was reinstated as a bus driver subject to a medical confirmation of her ability to perform that job.

A more recent case, *Metropolitan Toronto Reference Library Board*,[16] interpreted the duty to accommodate as requiring the employer to provide training to an employee upon returning from long-term disability leave. In this case the employee, a computer operations technician, had been absent from work for close to three years because of chronic fatigue syndrome. During his absence, new computer equipment was introduced and other employees in the department were given training for this new equipment. The grievor did not receive the training and was therefore put at a disadvantage in applying for a vacant position in the Computer Operations Department once he returned to work. In these circumstances the arbitrator directed the employer to provide the grievor with training similar to that provided earlier to the other employees.

Modification of the Collective Agreement

To what extent does the duty to accommodate require a modification of the collective agreement? In *Boise Cascade Canada*[17] the employer awarded a vacant position to a disabled employee with less seniority than

15. (1995), 41 L.A.C. (4th) 1 (R. Levinson).

16. (1995), 46 L.A.C. (4th) 155 (Burkett).

17. (1995), 41 L.A.C. (4th) 291 (Palmer).

the grievor. The arbitrator read the "Standards for Assessing Undue Hardship" established by the Ontario Human Rights Commission as imposing upon the union a joint obligation to accommodate only where the terms of the collective agreement were being used by the union to justify improper discrimination. In the arbitrator's view, the seniority provision in the collective agreement was not being used in this manner since it did not disqualify the disabled employee from the position because of his physical disability, but rather on the basis of relative seniority. In this case the arbitrator held that the employer carried the full burden of accommodation and that it should have modified the job previously performed by the disabled employee rather than awarding him the vacancy in violation of the terms of the collective agreement.

This decision makes sense on its particular facts since it did appear as though modification of the job could have occurred without undue hardship to the employer. The decision is more troubling, however, because of the suggestion that a seniority provision does not contain the potential to discriminate constructively against individuals or groups protected by human rights legislation. The arbitrator concluded that the disabled employee failed to get the job under the terms of the collective agreement because of his relative seniority and not because of his physical disability. The arbitrator then went on to suggest that, since there was no "logical nexus" between the seniority provision and the type of discrimination in issue, an arbitrator should take its non-discriminatory effect into account when determining whether the union had any joint obligation to accommodate the disabled employee.

The problem with this approach is that seniority, while a concept neutral on its face, does carry with it the potential for constructive discrimination. Following *Renaud*, union reliance on such provisions could give rise to a joint responsibility to accommodate those employees protected by human rights legislation. While it may have been more reasonable for the employer to provide the accommodation, since *Renaud* clearly states that accommodation does not extend as far as to "substitute discrimination against other employees for the discrimination suffered by the complainant", the arbitrator should have at least canvassed the possibility of the union waiving the application of the seniority provision. This case does suggest that arbitrators may still be too deferential to the language of the collective agreement when dealing with human rights issues and reluctant to impose the kind of joint responsibility to accommodate that was contemplated in *Renaud*.

A recent decision of Ontario's Grievance Settlement Board,[18] however, indicates that collective agreement provisions are not sacrosanct when it is

18. *Re Ministry of Health and OPSEU (Pazuk)*, summarized in Lancaster Labour Law Reports, Charter Cases/Human Rights Reporter (1994), Vol. 10, No. 5, 1.

the union that is seeking their modification in order to accommodate a grievor. In this case, the collective agreement expressly provided that, for the purpose of determining entitlement to severance pay, an employee's continuous service was not to include any period when an employee was receiving long-term disability benefits. The grievor had been on long-term disability for close to ten years and claimed credit for this time in the calculation of severance entitlement. The collective agreement provision was found to discriminate on the basis of handicap contrary to Ontario's human rights legislation, and the employer was directed to amend its severance pay calculation for the grievor. What is most interesting about this case is that, because the union had attempted to bring the collective agreement in line with the legislation and the employer had resisted these attempts, the arbitrator was not prepared to hold the union jointly liable for the grievor's loss even though the union was initially a party to the offending provision.

Limits Upon Accommodation

Recent arbitral case law suggests that arbitrators are prepared to recognize that there are clear limits upon the employer's duty to accommodate the disabled employee. In *Better Beef*[19] the arbitrator was faced with the situation of a grievor who had been terminated following an absence from work for 15 months because of a work injury. The sole issue before the arbitrator was whether the employer had met the duty to accommodate imposed by Ontario's human rights legislation since the collective agreement clearly contemplated termination of employment after such an extended absence. The evidence indicated that the employer had offered various bargaining unit positions to the grievor following her injury, but that none of them were suitable for the grievor because of the repetitive, physical nature of these jobs. The employer also considered offering her a position as a security guard but then decided that this job should be performed by supervisory personnel outside the bargaining unit.

The arbitrator held that these efforts to accommodate the grievor did meet the obligation imposed by human rights legislation. In reaching this conclusion on the facts, the arbitrator made some interesting observations about the extent of the duty to accommodate. Even though the point was not fully argued, the arbitrator cast doubt on the proposition that the duty to accommodate required a unionized employer to find a position outside the bargaining unit in order to accommodate a disabled member of the bargaining unit. Second, the arbitrator concluded that the duty to accommodate did not require an employer to create a new position for a disabled grievor. On the other hand, the arbitrator was prepared to acknowledge

19. (1995), 42 L.A.C. (4th) 244 (Welling).

that the duty to accommodate might prevail over existing seniority rights in a job posting situation, although he also made it clear that the application of this duty to the unionized workplace did not extend so far as to require the displacement of a job incumbent.

A similar conclusion was reached in the earlier *Panabrasive*[20] case. There a grievor, who had suffered a work injury while employed as a millwright, was seeking to return to work as a laboratory technician. The duty to accommodate, according to the arbitrator, did not even come into play in this case since there had been no discrimination, either direct or constructive, in the application of the collective agreement because the position sought by the grievor was simply not available. This reasoning is certainly open to criticism since, under human rights law, a determination of whether the refusal to employ a disabled employee amounts to discrimination necessarily involves the issue of whether an employer has met the duty to accommodate. In this type of case, the alleged discrimination is the refusal of employment to the disabled employee and the employer's defence is that all reasonable efforts have been made to accommodate that employee.

This arbitration award has now been quashed on judicial review.[21] The court held that the arbitrator's inquiry had been too narrowly focussed on the issue of whether the position of laboratory technician was available. Instead the arbitrator should have considered all jobs that the grievor was capable of performing in determining whether the grievor had suffered from either direct or constructive discrimination. The court's decision suggests that arbitrators now have a clear obligation to give full effect to human rights laws despite the fact that it may conflict with their role as private adjudicator.

A recent Manitoba case sheds further light on the extent to which an employer is expected to modify work assignments to accommodate a disabled employee.[22] In this case the employer, the Manitoba government, had actually developed a modified position for the grievor but a restructuring of the workplace left the position with insufficient job content to remain viable. The grievor offered to work four days a week rather than five, but the employer rejected this proposal and placed the grievor on layoff. The arbitrator concluded that, even with a four day week, there would not be sufficient work in the job to justify the grievor's continued employment. The

20. (1994), 38 L.A.C. (4th) 434 (Clement).

21. *United Steelworkers of America, Local 8777 v. Panabrasive Inc. and Clement* (1995), 95 C.L.L.C. para. 230-016 (Ont. Ct., Gen. Div.).

22. *Manitoba Government Employees' Union and Province of Manitoba*, summarized in Lancaster Labour Law Reports, Labour Arbitration News (1994), Vol. 30, No. 11/12, 3.

arbitrator concluded that the duty to accommodate did not require an employer to continue employment where there was a substantial shortfall in the work content of a job.

The employer's duty to accommodate may be limited in another respect. In *Versa Services*[23] the union argued that, despite clear wording in the collective agreement to the contrary, the employer was obliged by human rights laws to pay the cost of health and welfare benefits for employees on long-term disability because otherwise these employees would pay more for these benefits than active employees. The arbitrator, however, took the view that the appropriate comparison was not with active employees but with other employees who were absent from work for a similar length of time for reasons other than disability. Equal treatment, according to the arbitrator, has a different meaning when it came to the application of compensation under the collective agreement than when the issue was participation in the workforce. In the latter situation an employer might be obligated to take special measures to accommodate a disabled employee, but this did not mean that the employer had to provide preferred treatment to such employees when it came to matters of compensation. The arbitrator concluded that, since no other employees had benefits provided during prolonged absences, employees on long-term disability could not complain of improper discrimination when they received similar treatment.

Arbitrators have also placed limits on the union's duty to accommodate. In *Greater Niagara General Hospital*[24] a disabled employee was transferred from the service bargaining unit to the clerical bargaining unit. Separate seniority lists had been established for the two bargaining units but the employer took the position that the employee should carry her service unit seniority with her to the clerical unit. The union was prepared to recognize this seniority only for the collection of benefits and not for the purpose of allocating employment opportunities within the bargaining unit.

The arbitration board held that the union's duty to accommodate did not require it to sacrifice the seniority rights of other employees. Since the full recognition of the disabled employee's seniority would affect the job security of other employees in the bargaining unit, the duty to accommodate did not require the union to waive those provisions of the collective agreement dealing with the accumulation of seniority. What we see in this case is a board of arbitration clearly giving priority to the internal value system of the collective agreement by placing an important limitation on the duty to accommodate.

23. (1994), 39 L.A.C. (4th) 196 (R. Brown).

24. (1995), 47 L.A.C. (4th) 366 (Brant).

The Extent of Arbitral Remedial Authority

A central issue in the application of the duty to accommodate by arbitrators is whether arbitral remedial power can extend beyond the boundaries of the collective agreement. In *Better Beef* discussed above, the arbitrator expressed doubts as to whether the application of the duty to accommodate in the unionized workplace could stretch so far as to require the employer to offer a disabled employee a position falling outside that employee's bargaining unit. These doubts, in my view, reflect the traditional view of arbitration as a form of private adjudication restricted to the application of the internal values set out in the collective agreement. Under this model of arbitration the collective agreement itself sets the boundaries of the arbitrator's remedial jurisdiction. The problem with this approach, however, is that it fails to take into account the public responsibility of the arbitrator to give full application to our human rights laws. Having given arbitrators this jurisdiction to interpret and apply human rights legislation, does it now make sense to argue that the remedial jurisdiction of the arbitrator is less broad than that of publicly appointed human rights adjudicators?

A recent arbitration award indicates that at least one arbitrator has been prepared to go beyond the confines of the collective agreement when applying human rights laws. In *Municipality of Metropolitan Toronto*[25] the arbitrator was faced with a preliminary objection from the employer that the grievor could not grieve a failure to award him a non-bargaining unit position. The grievor suffered from a chronic back problem that was not work-related and not covered by workers' compensation. While absent from his job in the employer's works department, the grievor received disability payments until it was determined that he could perform other work. The grievor then applied for a job in the human resources department that fell outside the bargaining unit. Even though the grievor was qualified for this job, the employer recalled another employee with less seniority to fill the position. The arbitrator held in his preliminary ruling that the power given to arbitrators to interpret and apply human rights legislation included the authority either to award a disabled grievor an excluded position or to order compensation for the failure to accommodate the grievor in this position.

This decision is the logical extension of a public policy that clearly provides arbitrators with the authority to both interpret and apply human rights laws. The primary obligation for arbitrators is now to apply these laws rather than to remain within the internal value system found in the collective agreement. This important change in the role of the grievance arbitrator means that, in giving full force and effect to statutory human rights obligations

25. (1994), 35 L.A.C. (4th) 357 (Fisher).

such as the duty to accommodate, the arbitrator may well have to look beyond the boundaries of the grievor's bargaining unit to the employer's entire workforce. This workforce could include not just positions falling outside any bargaining unit but also positions falling within different bargaining units. In this latter situation the industrial relations equation becomes even more complex, raising issues such as whether a disabled grievor could carry seniority rights to another bargaining unit.[26]

Another variation of this issue is the transfer to a bargaining unit job of a disabled employee previously employed outside any bargaining unit in order to accommodate that employee. In this situation does the duty to accommodate require an arbitrator to ignore the well-established arbitral jurisprudence concerning seniority credit for employment outside the bargaining unit? Arbitrators still appear to be reluctant to give full scope to the duty to accommodate because of its impact on the internal value system of the collective agreement even though it is now very clear that this duty is overriding. The problem is that, having been schooled in the old model of arbitration as a system of private ordering, arbitrators have been slow to assume a new role as human rights adjudicators.

The possibility that arbitral authority to apply human rights laws now extends beyond the boundaries of the collective agreement has important procedural implications. The range of persons possibly affected by the outcome of an arbitration award becomes significantly greater if arbitral remedial power is extended in this manner. Two recent decisions of Ontario's Grievance Settlement Board illustrate this point. In both cases the Board was faced with grievances alleging sexual harassment. In one case, the Board made it clear that its remedial jurisdiction allowed it to direct the employer to take disciplinary measures against management involved in harassment, including transfer and discharge.[27] In the second case, the Board ruled that non-bargaining unit employees who were named in the union's allegations of sexual harassment were entitled to third party status at the hearing to defend themselves against these allegations.[28] These two cases clearly indicate that, once arbitrators assume the role of human rights adjudicators, the hearing process itself becomes further complicated by an expansion of the number of affected parties.

---

26. See footnote 25, *supra*.

27. *The Crown in Right of Ontario (Ministry of Correctional Services)* (1995), 42 L.A.C. (4th) 342 (Dissinayake).

28. *The Crown in Right of Ontario (Ministry of Transportation)* (1995), 43 L.A.C. (4th) 1 (Kaplan).

CONCLUSIONS

What does this recent arbitral jurisprudence tell us about the limitations of grievance arbitration as a forum for the application of the duty to accommodate? First, it should be evident that the duty to accommodate only becomes an issue at arbitration when it is raised by either the union or the employer. In the case of the union, this duty is likely to be used to justify an enlargement of existing collective agreement rights, whereas in the case of the employer the duty is likely to be used to justify a deviation from its obligations under the collective agreement. Individual employees, although the beneficiary of this duty, have no independent access to grievance arbitration and cannot assert this duty in their own right. Grievance arbitration, therefore, does not provide a forum for the resolution of all human rights issues arising from the application of a collective agreement. Only those human rights arguments embraced by either the union or employer will find their way to an arbitrator and only where these two parties decide to take their dispute as far as arbitration.

Recent case law suggests that, even where the duty to accommodate is considered by arbitrators, they are still more likely to use it to qualify management rights than to erode the terms of the collective agreement. What we see is arbitrators placing a heavier burden on the employer to accommodate by requiring accommodation most beneficial to a disabled employee and, despite the decision of the Supreme Court of Canada in *Renaud*, being reluctant to sanction accommodation that impairs either the collective agreement rights of the grievor or the collective agreement rights of some other bargaining unit employee. I do not in any way suggest that this difference indicates an anti-employer bias on the part of arbitrators. Rather, it indicates an obvious arbitral reluctance to interfere with the language of the collective agreement. In fact, when it comes to compensation under the collective agreement we saw one arbitrator showing the same reluctance to expand the terms of compensation under the collective agreement for the benefit of a disabled employee.

This arbitral tendency to avoid disturbing the terms of the collective agreement is more consistent with the traditional role of the arbitrator to remain true to the internal value system articulated in the collective agreement than with the newer responsibility to interpret and apply legislation external to the collective agreement. My conclusion is that, despite being given the public responsibility of applying human rights legislation, many arbitrators continue to see themselves as being primarily private adjudicators. Until there is a change in this perception, arbitrators will continue to be reluctant to give full scope to the application of the duty to accommodate if it is at the expense of the integrity of the collective agreement.

A change in perception is also required for arbitrators to assume the task of fashioning a human rights remedy extending beyond the boundaries of the collective agreement. Even though a sound argument can be made that their public responsibility to apply human rights laws now dictates a broader approach, arbitrators still frequently see themselves as private adjudicators with their remedial authority confined to the scope of the bargaining unit. Widening remedial authority, moreover, raises the spectre of more complex hearings as the range of persons affected by the award could significantly increase. These considerations suggest that it may be some time before arbitrators embrace a full remedial power when applying the duty to accommodate.

This analysis has attempted to demonstrate that there is an important institutional limit on the application of the duty to accommodate by arbitrators. The old paradigm of grievance arbitration as an integral component of a system of private ordering is still influencing how arbitrators perform their new role as adjudicators with a public responsibility to apply human rights laws. The influence of this old paradigm has meant that arbitrators are still reluctant to apply the duty to accommodate in a manner that would impair the integrity of the collective agreement or to assert remedial authority beyond the confines of the collective agreement. This reluctance of arbitrators to play a full role as human rights adjudicators, and the restrictions on individual access to the arbitration process, mean that, although arbitration is now a necessary forum for the resolution of human rights disputes, it is not necessarily the ideal forum for the enforcement of Canadian human rights laws.

RÉSUMÉ

Le devoir d'accommodement et la procédure d'arbitrage de grief

L'influence croissance des lois canadiennes sur les droits de la personne sur la négociation collective a été grandement discutée. Plus particulièrement, le concept de discrimination positive en est venu à dominer ces lois en imposant aux employeurs et aux syndicats le devoir d'accommoder les plaintes d'employés individuels. Parallèlement, les arbitres canadiens ont commencé à adopter cette approche d'accommodement et la jurisprudence arbitrale récente reflète une nouvelle emphase sur les droits humains. La question ici n'est plus de savoir si les arbitres peuvent appliquer ces lois, vu qu'ils en ont maintenant la responsabilité, mais s'il y a des limites

institutionnelles rendant l'arbitrage un forum moins qu'idéal pour l'application de celles-ci.

Le paradigme classique de l'arbitrage de grief considère la convention collective comme une forme de législation privée régissant les conditions d'emploi des membres de l'unité de négociation. Selon ce modèle, seuls l'employeur et le syndicat ont accès à l'arbitrage pour faire appliquer la convention collective. Les deux parties paient les arbitres dont on s'attend qu'ils respectent le système de valeurs internes établi par la convention collective. Cette attente se reflète dans l'emphase mise sur la détermination des intentions des parties par le processus. On s'attend des arbitres qu'ils soient liés d'abord par le texte de la convention collective, et seulement en cas d'ambiguïté, admet-on qu'ils aillent au-delà des termes pour prendre en considération la pratique passée où l'historique de la négociation. Dans les années 70, cependant, le défaut majeur de ce paradigme classique de l'arbitrage en tant que système de justice privé a commencé à apparaître.

En effet, ce paradigme a oublié de reconnaître que l'arbitrage de grief au Canada n'est pas seulement la création de la convention collective. La législation canadienne sur la négociation collective rend ce processus obligatoire tout en interdisant les grèves et les lockouts en cours de convention. Vu que l'autorité procédurale et réparatrice des arbitres canadiens tire largement sa source de la loi plutôt que de la convention collective, on peut soutenir de façon convainquante que l'arbitrage est autant une créature de la loi que des dispositions de la convention collective. De plus, la possibilité de révision judiciaire des décisions arbitrales illustre clairement qu'il y a un substantiel élément public dans l'arbitrage de grief. Le fait est que l'arbitrage de grief est un processus hybride, contenant des éléments publics et privés.

Le coup fatal au paradigme classique est survenu au milieu des années 70. Quand la Cour suprême a établi, dans l'affaire *McLeod* c. *Egan* que les arbitres avaient la responsabilité de prendre en considération la législation externe applicable, on ne pouvait plus considérer l'arbitrage comme un processus strictement privé. Cette nouvelle exigence imposée aux arbitres s'appliquait même lorsque cette législation externe était en conflit direct avec les termes de la convention collective. Les arbitres doivent maintenant donner préséance aux valeurs externes provenant de la législation, même aux dépens du système de valeurs internes de la convention collective.

L'impact de l'affaire *McLeod* ne peut être sous-estimé. Durant les années 70, les conventions collectives ont été entourées par un ensemble grandissant de lois du travail commençant à entrer en conflit avec les systèmes de valeurs internes contenues dans les conventions. Avec la croissance de la législation sur les droits de la personne dans les années 80, cet ensemble de lois a affaibli l'effet des normes établies par les conventions

collectives, les arbitres appliquant de plus en plus les dispositions législatives même lorsqu'elles étaient en conflit avec celles de la convention collective.

Cette tendance fut renforcée par ces lois qui ont expressément donné aux arbitres le pouvoir d'interpréter et d'appliquer la législation externe à la convention collective. On devait alors voir l'arbitrage d'un nouvel œil : les systèmes de valeurs internes sont devenus subordonnés aux valeurs publiques prédominantes. On doit alors maintenant, plus que jamais, considérer l'arbitrage de grief comme un processus hybride comprenant des composantes publiques et privées.

La jurisprudence arbitrale récente suggère qu'en appliquant la législation sur les droits de la personne aux conventions collectives, les arbitres sont encore influencés par le paradigme classique de l'arbitrage de grief. Ces récentes affaires démontrent une réticence évidente de la part des arbitres à donner plein effet au devoir d'accommodement afin d'éviter de déranger les dispositions de la convention collective. Cette tendance arbitrale traduit plus le rôle traditionnel de l'arbitre de se conformer au système de valeurs internes à la convention collective plutôt que cette nouvelle responsabilité d'appliquer et d'interpréter la législation externe à la convention collective.

Ma conclusion est à l'effet que malgré la responsabilité publique qui fut donnée aux arbitres, plusieurs d'entre eux continuent de se percevoir d'abord comme des juges privés. Jusqu'à ce qu'il y ait des changements dans cette perception, les arbitres seront réticents à donner pleine application au devoir d'accommodement si cela va à l'encontre de l'intégrité de la convention collective.

Un changement de perception est aussi nécessaire pour que les arbitres assument leur devoir de modeler des remèdes relevant des droits de la personne et dépassant les frontières de la convention collective. Même si telle nouvelle approche est plus large, les arbitres se perçoivent souvent comme des juges privés limités à l'étendue de l'unité de négociation. Cependant, une conception plus large de l'autorité correctrice soulève le spectre d'auditions plus complexes, le nombre de personnes affectées par une décision pouvant être beaucoup plus grand. Alors, il se peut qu'il se passe encore du temps avant que les arbitres n'acceptent d'utiliser tous leurs pouvoirs lorsqu'ils appliquent le devoir d'accommodement.

Il y a donc une limite institutionnelle importante à l'application du devoir d'accommodement par les arbitres. Le vieux paradigme de l'arbitrage de grief influence encore le comportement des arbitres dans leur nouveau rôle de juge avec la responsabilité publique d'appliquer la législation sur les droits de la personne. L'influence de ce vieux paradigme signifie que les arbitres sont encore réticents à appliquer le devoir d'accommodement

d'une manière qui attaquerait l'intégrité de la convention collective ou à déborder la convention collective dans l'établissement de correctifs. Cette réticence des arbitres doublée des restrictions à l'accès individuel à l'arbitrage signifie, malgré le fait que l'arbitrage est maintenant un forum nécessaire à la résolution de conflits en matière de droits de la personne, que ce n'est peut-être pas le forum idéal pour appliquer les lois canadiennes portant sur les droits de la personne.

The Journal of Industrial Relations

December 1996
Volume 38 Number 4 ISSN 0022–1856