DUTY TO ACCOMMODATE: BACK TO THE BASICS

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What is the Duty to Accommodate?

The duty to accommodate arises in a workplace when an employee is unable to perform the basic duties of their job due to a physical, mental or other condition that falls within a characteristic protected by *The Human Rights Code*.

Employers must make every reasonable effort to accommodate employees who fall within a protected characteristic. Employers must make efforts to accommodate employees up to the point that it imposes "undue hardship" on the employer.

Employers may be excused from the requirement to accommodate employees where undue hardship results or they are able to demonstrate that the requirements of an employee's job are *bona fide* occupational qualifications.

Human Rights Code - Discrimination and Protected Characteristics

Discrimination essentially means treating a person differently because he or she falls within a protected characteristic.

The Manitoba Human Rights Commission policies state that discrimination occurs when a distinction (whether intentional or not, but based on grounds relating to personal protected characteristics) has the effect of

(a) imposing burdens, obligations, or disadvantages on an individual or a group which are not imposed on others, or

(b) withholding or limiting access to opportunities, benefits, and advantages available to other members of society, and

the imposition of the burden or withholding of the benefit occurs in a manner which

(a) reflects the stereotypical application of presumed group or personal characteristics, or

(b) has the effect of perpetuating or promoting the view that the individual is less capable or worthy of recognition or value as a human being or as a member of society.

In defining whether discrimination has occurred, it is important to take a purposive and contextual approach to the analysis of the complaint and to ensure human rights legislation is interpreted broadly bearing in mind the purposes of the Code.

The Manitoba Human Rights Code defines discrimination as*:*

*9(1) In this Code, **"discrimination"** means*

(a) differential treatment of an individual on the basis of the individual's actual or presumed membership in or association with some class or group of persons, rather than on the basis of personal merit; or

(b) differential treatment of an individual or group on the basis of any characteristic referred to in subsection (2); or

(c) differential treatment of an individual or group on the basis of the individual's or group's actual or presumed association with another individual or group whose identity or membership is determined by any characteristic referred to in subsection (2); or

(d) failure to make reasonable accommodation for the special needs of any individual or group, if those special needs are based upon any characteristic referred to in subsection (2).

9(1.1) In this Code, "discrimination" includes any act or omission that results in discrimination within the meaning of subsection (1), regardless of

(a) the form of the act or omission; and

(b) whether the person responsible for the act or omission intended to discriminate.

9(2) The applicable characteristics for the purposes of clauses (1)(b) to (d) are

(a) ancestry, including colour and perceived race;

(b) nationality or national origin;

(c) ethnic background or origin;

(d) religion or creed, or religious belief, religious association or religious activity;

(e) age;

(f) sex, including sex-determined characteristics or circumstances, such as pregnancy, the possibility of pregnancy, or circumstances related to pregnancy;

(g) gender identity;

(h) sexual orientation;

(i) marital or family status;

(j) source of income;

(k) political belief, political association or political activity;

(l) physical or mental disability or related characteristics or circumstances, including reliance on a service animal, a wheelchair, or any other remedial appliance or device;

(m) social disadvantage

Establishing a Prima Facie Case of Discrimination

In order to establish a right to accommodation, the Union may have to establish what is referred to as a *prima facie* or "first impression" case of discrimination.

In ***Moore v. British Columbia (Education)*, 2012 SCC 61**, the Supreme Court of Canada described what is required to establish a *prima facie* case of discrimination, as follows:

> As the Tribunal properly recognized, to demonstrate *prima facie* discrimination, complainants are required to show that they have a characteristic protected from discrimination under the *Code*; that they experienced an adverse impact with respect to the service; and that the protected characteristic was a factor in the adverse impact. Once a *prima facie* case has been established, the burden shifts to the respondent to justify the conduct or practice, within the framework of the exemptions available under human rights statutes. If it cannot be justified, discrimination will be found to occur.

The Manitoba Human Rights Commission case ***Horrocks v. Northern Regional Health Authority*, 2015 MHRBAD 3** (which has been judicially reviewed and then subject to an appeal from that review on other grounds: ***Northern Regional Health Authority v Manitoba Human Rights Commission et al*, 2017 MBCA 98** and ***Northern Regional Health Authority v. Horrocks* 2021 SCC 42**), Adjudicator Sherri Walsh confirmed the manner in which *prima facie* discrimination is established:

> **130** The Complainant has the onus, therefore, of establishing a *prima facie* case of discrimination. A *prima facie* case is one which covers the allegations made and which, if they are believed, would be complete and sufficient to justify a decision in favour of the Complainant, absent an answer from the Respondent. (*Ontario*

(Human Rights Commission) v Simpsons-Sears Ltd. [1985] 2 SCR 536 at para 28, 52 OR (2d) 799) (available on CanLII) [*Simpsons-Sears*].)

131 In this case, as adjudicator Harrison stated in *KK v GS, (cob Hair Passion)* [2013] M.H.R.B.A.D. 102 at para 147, 2013 CanLII 3982 [*Hair Passion*]:

> To establish a prima facie case of discrimination, the Complainant must prove, on a balance of probabilities, that she had a disability at the relevant time, that her employment was adversely affected in some way, and that her disability was one of the factors which motivated the decision or action that adversely affected her employment. Her disability need not be the sole or even the primary reason that her employment was adversely affected; it is sufficient if her disability was one of the factors that influenced the decision or action.

Most recently, in ***Stewart v. Elk Valley Coal Corp.*, 2017 SCC 30**, the majority of the Supreme Court unequivocally confirmed the three-part test in ***Moore*** for establishing a case of discrimination (paras. 24 and 26).

Definition of a Disability

First, it should be noted that the duty to accommodate is not restricted to accommodating employees with mental or physical disabilities. The duty to accommodate extends to accommodating employees who fall within other protected characteristics such as their political belief, religion, marital status, family status, sex, sexual orientation, and age.

However, for practical purposes, the majority of cases that involve the duty to accommodate relate to employees who have some form of disability.

Disability is not defined by *The Human Rights Code* of Manitoba. However, "disability" has been broadly interpreted by arbitrators and various Human Rights Commissions. The Supreme Court of Canada has taken a broad approach to defining disability. The purpose of taking such a broad approach is to ensure that the fundamental objectives of human rights legislation are met.

Further, human rights legislation in most provinces in Canada prohibit discrimination based on the mere perception of a disability. As such, employees do not have to show an actual inability to perform duties associated with their position as a pre-requisite of making a complaint based on discrimination.

For example, in *Johnson v. D & B Traffic Control*, 2010 BCHRT 287, the BC Human Rights Tribunal ruled in favour of an employee who complained that he was denied work by his employer due to the employer's perception of a disability, in that case obesity. The complainant worked as a flagger. The tribunal found that although obesity could constitute

a disability, the employee did not actually have a disability. However, the tribunal found that it was the owner's understanding that that the complainant could not work longer shifts as they required long periods of standing. According to the tribunal, this *perception* was at least a factor in the decision not to offer the complainant work, resulting in discrimination. What is to be avoided is a "stereotypical view" of disability; that is, the assumption that the presence of a particular characteristic prevents the employee from participating in employment.

Discrimination on the basis of a physical or mental condition will be considered discrimination on the basis of a disability where

(a) an individual's condition (past or present) or

(b) the perception of an individual's condition (past or present) or

(c) the actual or perceived possibility that an individual may develop a condition in the future

results in a substantial or significant loss or limit on that individual's opportunities to take part in life's important functions or activities on an equal level with others.

However, "normal ailments" are not usually included in the term disability. Commonplace and temporary conditions that last for a short period of time, or which have no ongoing or long-term effects, and which have a minor impact on an individual's opportunities to participate in life's important functions or society in general on an equal level with others are not considered disabilities under the Code. For example, a person who has the flu or a common cold would not typically be considered as disabled for purposes of making a complaint of discrimination. However, there is no hard and fast rule in this regard. For example, it is possible that a person could be suffering from a recognized disability such as H.I.V./AIDS which may increase an employee's susceptibility to getting common illnesses. In that case, the disability is the underlying condition which causes the minor ailment. Therefore, it is possible that a complaint of discrimination could arise.

Another example of an affliction that constituted "disability" was an employee's need to undergo dental surgery. This was the case in *Winpak Ltd. v. CEP, Local 830*, [2006] M.G.A.D. No. 41 (Wood). The employee was party to a Last Chance Agreement, but exceeded the allowable absences due to a surgery removing his remaining teeth. The employer thus terminated the grievor, pursuant to the Last Chance Agreement. The arbitrator found that the condition of the grievor's teeth constituted a disability for the purposes of Human Rights Legislation; it was permanent, severe and persistent, and was not an ailment suffered by most people from time to time, and interfered with his daily life. Given that his absences were due to disability, the termination of his employment was without just cause.

The latter cases can be contrasted with the decision in *Wheatley v. Emergency Health Services Commission*, 2009 BCHRT 106. This is a BC case where a paramedic refused to shave due to a skin condition, and therefore was unable to wear protective equipment as required by his employer (namely, a respiratory mask). Here, the arbitrator found that while human rights legislation is to be interpreted broadly, disability under the legislation has limits. According to expert evidence and as found by the tribunal, the complainant suffered from the common ailment of razor burn, which did not attract the protection of human rights legislation. The tribunal clarified its reasons, stating that it was not meant to say that a skin condition could not be a disability. However, the circumstances of the complainant's affliction did not bring it within a protected characteristic.

In addition, protected characteristics are not restricted to the express characteristics listed in the Code. "Analogous grounds" are also protected where they serve as a basis for stereotypical decisions made not on the basis of merit but on the basis of a personal characteristic that can only be changed at an unacceptable cost to personal identity. To summarize, *The Human Rights Code* should be interpreted in a manner which best advances the broad purpose of human rights which is to remedy or prevent discrimination against groups suffering social, economic, political or legal disadvantage in our society.

Case law has defined disability as "an illness, injury or disfigurement that creates physical or mental impairment and thereby interferes with a person's physical, psychological and/or social functioning".

A disability may be temporary or permanent. In addition to obvious physical impairments (such as temporary or permanent physical injuries which impair one's ability to do their job) disability has been defined to include medical conditions such as having HIV or AIDS, heart conditions and hypertension and obesity. The definition of disability also includes "invisible" conditions such as depression, anxiety, panic attacks, speech impediments, and colour blindness.

Finally, an area of human rights law that continues to expand and is being seen on an increasingly frequent basis is disability related to addictions, in particular, addictions to alcohol, drugs and gambling.

What does the Duty to Accommodate Involve?

Once a disability or other protected characteristic has been established, an employer must make all reasonable efforts to the point of undue hardship to accommodate the employee's status.

Employers must consider all other reasonable alternatives where an employee is unable to perform some or all of their duties normally associated with their position. Employers must go through four steps:

1. Determine whether the employee can perform their regular duties;

2. If not, determine whether the employee can perform their existing job in a modified form or after “re-bundling” various duties associated with their position;

3. If not, employers must determine whether the employee can perform a different job;

4. If not, the employer must determine whether the employee can perform a different job which is modified or “re-bundled” to meet the employee’s needs.

Other factors for consideration will include the *procedure* taken by the employer to search for and consider options for accommodation as well as the *substance* of the accommodation. Procedurally, an adjudicator may consider:

(a) The various approaches to accommodation that have been investigated;

(b) If an employee could be accommodated without undue hardship then why accommodation did not occur;

(c) Whether the employee was given the opportunity to participate in the accommodation process;

(d) Whether all parties (including unions and other employees) have fulfilled their personal roles in the accommodation process.

Regarding the substance of an accommodation, accommodation may include:

(a) Making structural changes to buildings or facilities and work stations to accommodate people with physical disabilities;

(b) Altering existing practices or procedures;

(c) Providing protective clothing or equipment;

(d) Re-assigning an employee to an alternate work assignment better suited to their qualifications (see paragraphs 1 to 4 above);

(e) Allowing for flexible work and leave schedules (especially in the case of employees with fatigue illnesses or who require accommodation because of their family status);

(f) Permitting absences from the workplace because of physical or mental conditions (up to the point such absences would cause undue hardship).

Once an employee has established they have a condition that requires accommodation, the onus then shifts to the employer to prove it has made every reasonable effort to accommodate the employee's disability up to the point of undue hardship.

In order for an employer to meet the onus, it must provide actual evidence that undue hardship exists rather than simply relying on anecdotal or impressionistic assumptions.

In an accommodation analysis, it is the employer' onus to show that it has explored all employment options, as opposed to an onus on the employee to show that there is work available. In *Boehringer Ingelheim (Canada) Ltd. v. Kerr,* 2011 BCCA 266, the BC Court of Appeal found that as soon as an employee, who was previously disabled, subjectively believes he or she has the ability to return to work and there is some evidence that the employee is capable or working (in that case from the insurer), the employer must make inquiries into the possibility of accommodation. The employer argued that it was up to the employee to provide objective evidence of her ability to work before she could establish *prima facie* discrimination. The Court rejected this argument, finding that the stereotyping of the employee and the failure to investigate, as required by the duty to accommodate, led to discrimination.

The duty to accommodate requires a global assessment of the circumstances, and is an ongoing duty. Thus, up-to-date medical information becomes important in the accommodation analysis, particularly where an employer takes the position that it has exhausted its duty to accommodate an employee on sick leave and intends to terminate employment. While the older medical information may have supported placing the employee on leave, up-to-date information might reveal options for accommodation, which would support the position that the duty to accommodate is not exhausted and that the employment relationship should not be terminated. (For example, see *CEP Local 410 v. Aliant Telecom Inc.*, [2010] C.L.A.D. No. 422 (Oakley)

However, once an employee establishes that they are in need of appropriate accommodation, it is the employer who gets to decide what that accommodation will be. Accommodation does not have to be absolute or "perfect" rather, it must be reasonable. It may be that there is more than one alternative available, and the employer has the right to choose which accommodation it shall offer. An employee who has declined a reasonable offer may be barred from pressing a complaint. For example, in *Waddle v. Canadian Pacific Railway*, 2017 CHRT 24 (CanLII), 2017 C.H.R.D. No. 24 (QL) an arbitrator found an accommodation option that maintained the employee's income level and enabled him to remain in his preferred location was reasonable, even though the employer switched the grievor's shifts from 5 shifts per week to 3 shifts per week.

What is Undue Hardship?

Case law has developed a non-exhaustive list of factors which are relevant to determining whether undue hardship exists. Those are:

1. Impact on a collective agreement;
2. Safety;
3. Financial costs;
4. The size of the employer's operation; and
5. Interchangeability of the workforce and facilities.

The factors are not exhaustive and not all factors come into play on every case. Further, inconvenience or minor interference is not sufficient for an employer to claim undue hardship.

Also, an employee seeking accommodation, his or her union and perhaps other employees must also participate in the accommodation process and, perhaps, suffer some inconvenience and/or interference with their personal rights. For example, the arbitrator in *Chatham-Kent Professional Firefighters' Assn. v. Chatham-Kent (Municipality) 2012 CarswellOnt 7942*, agreed that seniority rights may have to give way to the duty to accommodate, and upheld the employer's decision to award a vacancy to an employee requiring accommodation rather than the most senior employee.

It is important to keep in mind that the duty to accommodate is not limitless and even when an employee has a legitimate disability that prevents them from performing some or all of their duties, an employer may not be required to accommodate the employee in certain circumstances. For example, this frequently arises in situations involving employees and innocent absenteeism. Innocent absenteeism relates to situations where employees are habitually absent from work due to his or her medical condition. While employees suffering from innocent absenteeism may indeed have disabilities which require (at least originally) accommodation, employers may ultimately be excused from continuing to accommodate an employee's condition where the employee is unable to meet their employment obligations, is unable to offer any medical evidence that they will be able to maintain regular attendance in the future and where other efforts to accommodate would cause undue hardship.

If an employee fails to participate in the accommodation process, his or her complaint of discrimination might be defeated. In the Ontario case *Barber v. York Region District School Board* (Ontario Human Rights Tribunal, January 28, 2011), a teacher was terminated following her refusal to provide requested medical information that substantiated her absence as well as the need for continued accommodation. An employer is not required to tolerate ongoing unsubstantiated absences from work, and if an employer terminates employment in such circumstances it might be difficult to successfully argue that the employer failed to accommodate the employee's illness or disability.

Belleville General Hospital v. S.E.I.U., Local 183 1993 CarswellOnt 1289,was a case in which a disabled employee had *not* met the duty to come forward and identify her needs, with particularly harsh consequences. Over the course of some nine years of poor

attendance, the grievor consistently denied that she suffered from an ongoing medical problem which would impede regular attendance in the future. When the employer finally dismissed her, the union argued that the employer had failed to accommodate her. The arbitrator held that, before the employer's duty of accommodation can arise, it is incumbent on the employee to identify his or her medical problems, and to indicate to the employer the nature of the accommodation which may be required. The grievor not having done that, the employer was not obligated to extend accommodation at the point of discharge.

The obligations of an employer to accommodate an employee are not limitless and may depend on whether a *bona fide* and reasonable occupational requirement or qualification exists. Once a rule or policy or obligation imposed by an employer respecting employees' duties has been demonstrated to discriminate against the employee, an employer may be excused on the basis of a *bona fide* occupational requirement if they can demonstrate:

1. The standard, policy or rule is rationally connected to performance of the job;

2. The employer adopted the rule, standard or policy in an honest and good faith belief that it was necessary to fulfill a legitimate work-related purpose;

3. The policy, standard or rule is reasonably necessary to accomplish the legitimate work-related purpose. This requires the employer to demonstrate that it is impossible to accommodate an employee without imposing undue hardship on the employer.

Very common accommodations are time off, modified duties and modified hours. However, novel items arise as accommodation needs evolve. For example, in *Thunder Bay Catholic District School Board v. Ontario English Catholic Teachers' Assn.*, [2011] O.L.A.A. No. 300 (Luborsky), an Ontario arbitrator found that it was discriminatory for an employer's policy to preclude subsidization of the employee's digital hearing aids, where that employee suffered from progressive hearing loss. The arbitrator indicated that the decision did not stand for the principle that an employer must pay for all personal assistive devices. However, if other methods of accommodating the employee are insufficient and personal assistive devices are an available accommodative option, the "obligation to consider that option might arise".

My Collective Agreement is Silent, Does *The Human Rights Code* Apply to My Workplace?

All employers in Manitoba, regardless of whether they are subject to provincial or federal labour legislation, must comply with the duty to accommodate employees. Section 14 of *The Manitoba Human Rights Code* states:

14(1) No person shall discriminate with respect to any aspect of an employment or occupation, unless the discrimination is based upon bona fide and reasonable requirements or qualifications for the employment or occupation.

14(2) In subsection (1) "any aspect of an employment or occupation" includes:

(a) the opportunity to participate, or continue to participate, in the employment or occupation;

(b) the customs, practices and conditions of the employment or occupation;

(c) training, advancement or promotion;

(d) seniority;

(e) any form of remuneration or other compensation received directly or indirectly in respect of the employment or occupation, including salary, commissions, vacation pay, termination wages, bonuses, reasonable value for board, rent, housing and lodging, payments in kind, and employer contributions to pension funds or plans, long-term disability plans and health insurance plans; and

(f) any other benefit, term or condition of the employment or occupation.

In addition to the relevant provisions of *The Human Rights Code*, many collective agreements expressly contain articles that prohibit discrimination against employees on the grounds of a protected characteristic.

It is important to note that even if your collective agreement does not contain an express prohibition against discrimination, the collective agreement is deemed to contain such a provision. That is, an employer cannot discriminate respecting the application of terms of the collective agreement even if nothing in the collective agreement prevents them from doing so and a grievance could be filed and pursued to arbitration if discrimination did occur.

Remedies

The remedies available to an arbitrator or the Human Rights Commission are broad and usually include (where a complaint of discrimination is successful) a requirement that the employer accommodate an employee to the point of undue hardship. This often includes

reinstatement with back pay, elimination of any record of discipline from the employee's personal file, damages for lost wages and/or other benefits and (primarily in the case of a human rights complaint with the Commission) general damages for loss of dignity and self-respect which would be in addition to any damages for lost income.

Until recently, there was no limit on the amount of damages the Human Rights Commission could award for loss of dignity and self-respect. The Manitoba Government introduced *The Human Rights Code Amendment Act* which came in force on January 1, 2022 which limits the amount of damages for injury to dignity, feelings or self-respect to a maximum of $25,000.

Due to the need to respect settlements freely made by parties, arbitrators will often show deference to last chance agreements. However, arbitrators are also mindful of the need to enforce the standards imposed by human rights legislation and last chance agreements do not negate the employer's need to establish that it has satisfied the duty to accommodate.

Damages awarded in failure to accommodate cases are beginning to grow in amounts. In 2016, a Manitoba arbitrator awarded a total of $75,000 in damages for a failure to accommodate and employee and for mental distress. In that case the grievor had ADHD, Borderline personality traits and had major depression which resulted in some behavioural issues at work. Once the employer became aware of the diagnosis, they began to successfully accommodate the grievor in a different position. But the employer failed to continue that accommodation when they returned her to her old position despite both employer and employee doctors recommending, she not be returned. There was more problematic behaviour after the move and the City terminated her.

In awarding damages, the arbitrator concluded that the employer either knew or should have known that the grievor would not likely be successful if she was returned to that position. The arbitrator stated that the breach was "particularly disturbing" because the grievor had performed well in an accommodated position before the move.

Practical Advice for Unions

Cases involving the duty to accommodate can be extremely complex. However, these cases can often be made easier if union representatives know how to identify warning signs that an employee may be suffering from a disability and respond quickly and in a manner consistent with human rights. That is, union representatives should ensure they begin advocating on behalf of employees very early with the employer and make all attempts to ensure the employer understands that the employee is unable to fulfill their employment obligations because of a disability (which is almost always beyond the control of the employee) and that the employee's actions do not warrant discipline. At the very least, this gets employers in the proper mindset. All too often employers immediately approach these types of cases with the intent of imposing at least some discipline. Employers often take the position that the disability is only a factor which

mitigates (and thereby lessens) the imposition of discipline when the proper approach is to start from the position that no discipline is warranted and rehabilitation (and accommodation) is the process to follow.

In addition, it will be extremely important for unions to ensure their members are getting proper medical treatment and advice and ensuring their members follow their doctors' recommendations.

This is especially important in cases involving employees who suffer from drug or alcohol addiction. It will be critical to employers (and arbitrators) to demonstrate the existence of an addiction which is directly related to the misconduct and to ensure employees are taking serious steps toward rehabilitation. While a relapse is expected and permitted, like many other situations involving disabilities, only so much relapse will be tolerated and the outcome of each case depends entirely on the facts.