



Duty to Accommodate

Education Section
Regional Operations
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Human Rights & the Duty to Accommodate



Duty to Accommodate

- The duty to accommodate refers to the obligation of an employer or service provider to take measures to eliminate disadvantages to employees, prospective employees or clients that result from a rule, practice or physical barrier that has or may have an adverse impact on individuals or groups protected under the *Canadian Human Rights Act* or identified as a designated group under the *Employment Equity Act*. In employment, the duty to accommodate means the employer must implement whatever measures necessary to allow its employees to work to the best of their ability. Source: Canadian Human Rights Commission
- The duty to accommodate requires that once barriers have been identified, there is a commitment on the part of the employer to search for alternative arrangements (with some limitations... which we will discuss)!

The Human Rights Act

- The purpose of the Human Rights Act is to give effect ... to the principle that all individuals should have an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have and to have their needs accommodated, consistent with their duties and obligations as members of society, without being hindered in or prevented from doing so by discriminatory practices ...
- Canadian human rights legislation recognizes that true equality means respect for people's different needs and requirements.
- In employment, this means valuing and accommodating differences so that all employees can work to the best of their ability.

Discrimination

According to the *Human Rights Act*, “discrimination” means making a distinction between certain individuals or groups based on a prohibited ground of discrimination.

There are a number of provisions in the Act that set out what acts amount to discrimination in the workplace. The two which are of primary importance to PIPSC stewards are:

Provision 1

- (7) It is a discriminatory practice, directly or indirectly,
 - (a) to refuse to employ or continue to employ any individual, or
 - (b) in the course of employment, to differentiate adversely in relation to an employee, on a prohibited ground of discrimination.

Discrimination

Provision 2

- (10) It is a discriminatory practice for an employer, employee organization or employer organization
- (a) to establish or pursue a policy or practice, or
 - (b) to enter into an agreement affecting recruitment, referral, hiring, promotion, training, apprenticeship, transfer or any other matter relating to employment or prospective employment, that deprives or tends to deprive an individual or class of individuals of any employment opportunities on a prohibited ground of discrimination.

Prohibited Grounds

Under the Canadian Human Rights Act, section (2), it is against the law for any employer or provider of a service that falls within federal jurisdiction to discriminate on the basis of:

- race
- national or ethnic origin
- colour
- religion
- age
- sex
- sexual orientation
- marital status
- family status
- disability
- conviction for an offence for which a pardon has been granted

Disability

Section 25 of the Human Rights Act defines disability as being either:

- physical or mental;
 - previous or existing; and
 - including dependence on alcohol or a drug.
 - A disability can be either permanent (e.g., a visual or mobility impairment), or temporary (e.g., a treatable illness or temporary impairment which is the result of an accident). In determining whether a temporary illness would be considered a disability you must consider the extent to which the illness/injury has on a person's ability to do their job or obtain service, not only the nature of the illness itself.
- ! Can you think of some examples where an injury/illness could be considered a short-term disability?

Understanding Disabilities

The following may be considered disabilities, this is not an exhaustive list.

- visual and hearing impairment
- mobility issues
- chronic pain and conditions
- environmental sensitivities
- learning or intellectual disabilities
- mental health or psychological conditions
- addictions
- other permanent or temporary conditions

Group Poll!

- ! By a show of hands, how many of you think that the duty to accommodate overrides collective agreement provisions?

Accommodation & Collective Agreements

Yes! Accommodation that is founded on human rights legislation i.e. the duty to accommodate is based on a prohibited ground under the Human Rights Act, this trumps the collective agreement.

Case #3 Renaud (Okanagan School Board and CUPE local 523)

- Issue: Is there a duty to accommodate when both the collective agreement and the employer require someone to work a shift from 3:00 p.m. – 11:00 p.m. on a Friday which conflicts with someone's religious beliefs which forbid them from working sundown on Friday to sundown on Saturday?



Duty to Accommodate: Key Considerations



What is Accommodation?

Accommodation is defined as “an adjustment or adaptation to suit a special or different purpose.”

Accommodation refers to the design and adaptation of the work environment to the needs of as many types of persons as possible and, according to the Supreme of Canada, refers to what is required in the circumstances of each case to avoid discrimination. Source: Treasury Board Policy on the Duty to Persons with Disabilities in the Federal sector

Examples of Accommodation

Examples of accommodation in the workplace include making the following changes:

- duties and tasks
- physical demands
- equipment (tools, clothing)
- workspace/workstation and equipment
- hours or days of work
- location of work
- (re)distribution of duties
- breaks, work schedule
- workload

Perfect or Reasonable?

- Is there a distinction between reasonable solutions and perfect solutions with respect to the duty to accommodate?
- The duty to accommodate speaks to reasonable accommodation. In other words an employer may meet their duty to accommodate with a solution that may be not be viewed as a perfect solution.
- Reasonable is defined as: fair, proper, suitable and appropriate, rational.

Bona Fide Operational Requirements

Key Court Decisions

1999 – Supreme Court of Canada Cases:

Case #1: Tawney Meiorin

- Issue: Was it reasonable given the job that a firefighter run 2.4 km in 11 minutes?
- What was this case really about? Gender discrimination at a workplace particularly in traditionally male-dominated fields.
- This case resulted in the “three-step Meiorin Test” to determine if the employer has established a standard that is now termed a bona fide occupational requirement (BFOR).

Case #2 – Terry Grismer

- Issue: Driver’s license cancelled after medical condition resulted in the loss of peripheral vision in left eye. To accommodate this, Grismer developed a system of mirrors to compensate for this loss but was prevented from taking an individual assessment and demonstrate that he could drive safely
- What was this case really about? Service discrimination to a person with a disability.
- Outcome: Meiorin Test was applied and court found that Grismer was discriminated against because he was not allowed to take the driver’s test using his mirrors in order to demonstrate that he could in fact drive safely.

Impact of the Cases

- As a result of these cases there is a workplace duty to accommodate that eliminates employment standards, rules, practices or other requirements that discriminate on prohibited grounds.
- Human rights legislation has a quasi-constitutional place in Canadian law, and all other statutes, policies and practices must normally not be inconsistent with it.

Employer Obligation

Bona Fide Occupational Requirement (BFOR)

Employer must:

- demonstrate that it adopted the standard for a purpose that is rationally connected to the performance of the job
- establish that it adopted the standard in an honest and good-faith belief that it was necessary in order to fulfill that legitimate work-related purpose
- establish that the standard is reasonably necessary to accomplish its work-related purpose and that it is impossible to accommodate the employee without undue hardship.
 - *Three step test for BFOR as defined by SCC in Meiorin*

What Constitutes Undue Hardship?

According to the Canadian Human Rights Commission, “undue hardship” refers to the limit of an employer’s capacity to accommodate without experiencing an unreasonable amount of difficulty. Employers are obligated to provide accommodation up to the point of undue hardship.

Undue Hardship can be understood as, unreasonable difficulties for the employer for example:

- If doing so would compromise safety or health
- If doing so would have severe financial (productions) considerations
- Note! Employers are required to review all options before they revert to a defence of undue hardship.

BFOR Defense

In order to establish a BFOR defense, employers must show with convincing proof what has been done to accommodate those affected short of undue hardship, considering health, safety and cost.

A Few Words on Recourse

2 main recourse mechanisms

- Complaint under the CHRA
- Grievance under the CA
- Best advice always talk to your ERO and together explore the best options for the member. Accommodation is a complex issue to navigate and highly specialized!



Responsibilities: Union, Employer & Individual



Employer Responsibilities

- design workplace requirements and standards that are not discriminatory
- identify and remove workplace discrimination and barriers in policies, practices, standards and procedures, ensure managers and supervisors are aware and understand their obligations to accommodate
- demonstrate willingness to accommodate
- review and follow up and assess accommodation of workers on an on-going basis

Employee/Worker Responsibilities

- To identify and communicate the need for accommodation if possible
- To inform the employer of changes to the accommodation needs
- To collaborate with the employer and the union to find the most appropriate accommodation
- Communicate with the Union and the employer
- To offer reasonable explanation for refusal to accept the proposed accommodation,
- To supply job relevant medical information, non diagnostic information only such as functional limitations and residual capabilities
- Workers are not entitled to perfect accommodation. If employer proposes a reasonable accommodation then employer has discharged its obligation

Union Responsibilities

- Providing its own educational resources
- Ensuring training provided to union activists
- Balancing the need of individual work and interests of the bargaining unit members as a whole
- To insist employer fulfills its duty
- Represent needs of the worker
- Respond to employer accommodation proposals
- Ensure the CA does not discriminate

Stewards' Role

- Stewards may act as a liaison
- Stewards are critical for assisting EROS to explore options for suitable accommodation
- Stewards are the eyes and ears of PIPSC in the workplace. You know the workplace, duties and challenges
- Stewards can work with EROs on possible accommodations such as bundling of duties
- Stewards are an integral aspect of return to work plans as well as follow-up after the accommodation is implemented to assess:
 - whether it is working and
 - to help address any associated issues that may surface
- Stewards may have to deal with perceptions of other members in the workplace that the member being accommodated is “getting a cushy job”, a slacker and so forth.

Return to Work: What Happens Next?

The following options may be considered as part of a return to work:

- **Work Hardening**
Work hardening is essentially a specialized program designed to enable people with physical, psychological, and psychosocial issues inhibiting a person's ability, to successfully return to work. Work hardening typically focuses on cognitive skills and is designed to gradually improve and strengthen skills and competencies in order to help someone return to work.
- **Return to Work Plans and/or Pre-Return to work meetings to assess what is required in terms of accommodation**
- **There will be situations when it is hard to determine ahead of the return work what accommodation measures will be needed – these measures may have to be identified gradually as the employee reintegrates back into the workplace.**