

*Synopsis of paper prepared by
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the Reference Materials*

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A. WHAT IS A DISABILITY?

- ◆ Handicap" has been defined as "... an illness, injury or disfigurement that creates a physical or mental impairment and thereby interferes in that person's physical, psychological and/or social functioning." (*Entrop v. Imperial Oil Ltd.* (No. 6)).
- ◆ The impairment may be temporary, long lasting or permanent. It may be an actual disability, or quasi – voluntary disability (i.e. alcoholism, drug addiction).
- ◆ A finding that an impairing condition amounts to a disability or a handicap is the legal pre-condition to accessing the duty to accommodate.

B. THE EMPLOYER'S DUTY TO ACCOMMODATE

- ◆ Employers are required to make every reasonable effort, short of undue hardship, to accommodate an employee who has a disability.
- ◆ The employer is required to engage in a four-step process:
 - (i) determine if the employee can perform his or her existing job as it is;
 - (ii) if the employee cannot, then determine if he or she can perform his or her existing job in a modified or "re-bundled" form;
 - (iii) if the employee cannot then determine if he or she can perform another job in its existing form;
 - (iv) if the employee cannot then determine if he or she can perform another job in a modified or "re-bundled" form.
- ◆ **Re-Bundling** - consider whether a specific position be created for the disabled employee.
- ◆ **Larger Workplaces** – allow for more flexibility to accommodate disability.
- ◆ **Training** - the employer's obligation to accommodate includes training.
- ◆ **Safety Standards** - the employer's decision to exclude an employee or job applicant from a job because of a health or safety risk must be based upon a medical or technically verifiable standard that is unable to yield to an accommodation.
- ◆ **Independent Assessment** - the employer is responsible for conducting its own independent assessment of an employee's accommodation requirements. It cannot rely solely on WSIB findings.

- ◆ **Temporary Disability** - must be accommodated.
- ◆ **Pregnancy** - pregnant employees entitled to request accommodation.
- ◆ **Ongoing Obligation to Accommodate** - employer must reassess opportunities to accommodate as employment circumstances change.

C. UNDUE HARDSHIP: WHAT IS IT?

- ◆ The employer must accommodate up to the point of "undue hardship".
- ◆ The efforts must be "substantial", "serious", "conscientious", "genuine", "more than mere negligible effort". Minor interference or inconvenience can be expected.
- ◆ There are 7 relevant factors which are relevant in considering what constitutes "undue hardship".

(i) Financial Cost

- is tied to the size and viability of the enterprise;
- has been found to amount to undue hardship only where it would alter the essential nature or substantially affect the viability of the enterprise responsible for the accommodation;
- the employer must be prepared to present detailed financial and accounting evidence, and not to impressionistic evidence.

(ii) Safety

- Consideration must be given as to whether the proposed accommodation would pose a safety risk to:
 - (i) other employees, or to
 - (ii) the employee seeking an accommodation.
- The 2000 accommodation guidelines issued by the Ontario Human Rights Commission state the factors the Commission considers relevant to the health and safety risk:
 - (i) the willingness of a person with a disability to assume the risk in circumstances where the risk is to his or her own health and safety;
 - (ii) whether the modification or waiving of the requirement is reasonably likely to result in a serious risk to the health and safety of others;

(iii) the other types of risk legally tolerated at the place of work;

(iv) the types of risks tolerated within society as a whole.

(iii) Size of the Operation

- the larger the operation, the more likely it is that it can afford to provide a wider range of accommodation for an employee with a disability.

(iv) Interchangeability of the Workplace and Facilities

- relates to the flexibility and adaptability of the operations.

(v) Provisions of a Collective Agreement

- a viable accommodation can override the provisions of a collective agreement, unless the proposed accommodation would *significantly* interfere with the rights of other employee;
- a proposed accommodation that would cause the loss of another employer's job (i.e. bumping a senior employee out of a job) or granting super-seniority to an accommodated employee (i.e. re-lettering him or her, so that he or she couldn't be bumped) would amount to an undue hardship because of its impact upon the job interests of other employees.

(vi) The Legitimate Operational Requirements of a Workplace

- an employer has been found to have adequately attempted to accommodate an employee with a serious substance-abuse problem where the employee's rehabilitation has been repeatedly unsuccessful;
- an employer is not obligated to continue to employ an employee with depression whose illness has resulted in frequent and unpredictable absences.

(vii) Employee Morale

- little regard is given to this factor and it is to be applied with caution;
- Courts distinguish between employee concerns over legitimate rights (i.e. protection of seniority) and concerns based on stereotypical or discriminatory reactions (i.e. an unwillingness to work alongside a person with a disability).

D. BOUNDARIES ON THE EMPLOYER'S DUTY TO ACCOMMODATE

- ◆ Accommodation requires a balancing act between two underlying issues: the right of an employee with a disability to equal treatment and the right of an employer to operate a productive workplace.
- ◆ The employer is not obliged to create an unproductive position that does not suit its needs.
- ◆ In any permanent accommodation, an employee has to be able to perform the *essential* duties of the existing, restructured or newly – assigned position.

– Innocent Absenteeism and Accommodation

An employer is entitled to terminate an employee where the evidence demonstrates that at the time of dismissal, the employee was:

- (i) unable to meet his or her employment obligations;
- (ii) unable to offer any persuasive medical assurance that he/she would be able to meet these obligations at some predictable point in the near future; and
- iii) no accommodation short of undue hardship was possible in any other position in the employer's operations.

– Accommodation does not mean an employee should be in a superior position to other employees

i.e.. does not mean the employee will be retained following an employee-wide lay-off.

– Alcoholism

- the duty requires employers to permit employees with an alcohol abuse problem the opportunity to address their problem through rehabilitation and abstention programs, but where the employee's rehabilitation efforts are unsuccessful, the employer's accommodation duty will have been satisfied.

– Employees with a long-term disability

- employers are not required to provide an accommodation to an employee who cannot perform the essential duties of an available position *and* whose disability offers no foreseeable prospect of improvement.

– Employees whose disability has led to a major workplace incident

- employees may not be protected or absolved from major employment offences merely because of illness.

E SPECIFIC CIRCUMSTANCES

(i) Automatic Termination Provisions

- ◆ Automatic termination provisions have regularly been struck down as being discriminatory.
- ◆ Other employees are entitled to "just cause" for termination, but to automatically terminate an employee due to innocent absence as a result of disability without the protection of "just cause" is not permitted.
- ◆ An employee who has been absent from work for the pre-established period of time (usually 12 or 24 months) because of a disability cannot be discharged, despite the automatic termination clause, if:
 - (i) the employee can be accommodated in another position where he or she can productively perform the essential aspects of the job; or
 - (ii) the employee's absence has been caused by a disability and he or she can provide a persuasive medical prognosis that he or she has favourable prospects of returning to work in the foreseeable future.

only If neither of these terms can be met, does the employer have the right to invoke the automatic termination clause.

(ii) Accommodation and the Calculation of Seniority

- ◆ An employer policy or provision in a collective agreement which denies or restricts an employee's accumulation of seniority while off work because of a disability constitutes discrimination.
- ◆ Vacation entitlements based on work attendance cannot be reduced for employees absent from work due to a disability.

(iii) Accommodation, Seniority and Bumping

- ◆ Seniority cannot be interfered with lightly.
- ◆ A more senior employee with an illness or injury cannot displace a junior employee out of his/her position, unless the collective agreement permits such bumping.
- ◆ However, accommodation can trump seniority when it comes to filling a vacancy, but only if there are no other accommodation possibilities available.
- ◆ Employees cannot seek accommodation by requesting the opportunity to bump more senior employees. Only very clear collective agreement language would override the concept of seniority.

(iv) Counselling for Non-Attendance

- ◆ Counselling employees with a disability about attendance requirements is permitted where it is non-disciplinary and where it occurs together with a discussion of whether accommodation is required.

(iv) Disability Discovered Only After Termination

- ◆ The duty to accommodate remains even if notification of the disability does not occur until after the termination.

(vi) Employer Requests for Medical Information

- ◆ The employer is entitled to receive an adequate diagnosis from the employee's physician concerning his or her fitness.

vii) Lower-paying Positions

- ◆ An employee can be placed in a lower-paid, lower-ranked position only if all other alternatives have been explored and there is no other viable accommodation alternative.
- ◆ The employer is not required to pay a disabled employee differently from other employees who are performing the same work.

(viii) Last Chance Agreements

- ◆ Not always upheld as the LCA may be in breach of *Human Rights Code*.
- ◆ It cannot impose a stricter condition on the employee with the disability than other employees in the bargaining unit.
- ◆ Where the employer has accommodated the grievor up to the point of undue hardship, the terms of the LAC can be applied.

(ix) Mental and Psychological Disabilities

- ◆ Employers and unions have been found to have a higher onus to accommodate the employee.

(x) Temporary and Probationary Employees

- ◆ The duty to accommodate applies also to temporary, probationary and part-time employees.

(xi) Maternity Leave, Disability and Access to Sick Leave Benefits

- ◆ A woman who has just given birth is considered disabled for the period following a normal pregnancy and delivery.

- ◆ Two court decisions have found it to be discriminatory to deny sick leave benefits to a female employee during the period of normal childbirth and recovery.

(xii) Drug and Alcohol Testing

Pre-employment

- ◆ An employer cannot ask about dependence on drugs or alcohol to screen out candidates.

Mandatory drug testing

- ◆ Such a policy will be struck down as discriminatorily targeting drug dependent employees, unless the employer can establish:
 - (i) that such testing was rationally connected to the safe and efficient performance of the employee's work;
 - (ii) was adopted honestly and in good faith; and
 - (iii) the policy is reasonably necessary – i.e. the employees with a disability who were affected by the policy were accommodated up to the point of undue hardship.

Random drug or alcohol testing policies in safety – sensitive positions

- ◆ Drug testing is not a sufficiently reliable indication of impairment for the performance of the job.
- ◆ Alcohol testing does measure actual impairment rather than past or recent use and is permissible where employees in safety-sensitive positions are fairly notified in advance of the possibility of testing and the policy accommodates individual differences of employees up to the point of undue hardship.

(xiii) Job Transfers

- ◆ Employees with a disability can request or refuse a transfer as a means of accommodation and the employer may defend against the employee's position by relying on undue hardship.

F. THE ROLE OF THE UNION

- ◆ Unions, together with employers have a responsibility to accommodate employees protected by human rights legislation.
- ◆ A union cannot sign a collective agreement which contains a discriminatory provision without the risk of liability for discrimination.
- ◆ A union cannot stand in the way of a reasonable accommodation proposal, even if the proposal would mean breaching a collective agreement clause.

G. THE RESPONSIBILITIES OF THE EMPLOYEE SEEKING THE ACCOMMODATION

- ◆ The employee must actively participate and co-operate in the process for accommodation.
- ◆ Where appropriate, the employee must offer reasonable explanations for his or her refusal to accept a proposed accommodation.