

Evans, Philp LLP  
Barristers and Solicitors

Breakfast Series:  
**The Duty to  
Accommodate:**  
Obligation of Employers

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# *The Duty to Accommodate: Obligations of Employers*

## **Presenters:**

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## *What is Accommodation?*

**Accommodation** = adaptations to the workplace to remove barriers preventing an otherwise qualified individual from performing the essential duties of his/her job



## *What is Accommodation?*

Some examples of accommodations:

- improving accessibility
- modifying schedules
- altering duties
- acquiring or modifying equipment
- providing support or assistance
- retraining or re-assigning employees
- tolerating absences

## *The Legal Duty to Accommodate*

**Various statutes impose this duty,  
including:**

- *Canadian Human Rights Act*
- *Ontario Human Rights Code*
- *Workplace Safety and Insurance Act*



## ***The Legal Duty to Accommodate***

### **Ontario *Human Rights Code*, s. 5(1):**

*Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences, marital status, family status or disability.*

## ***The Legal Duty to Accommodate***

### ***Workplace Safety and Insurance Act, s. 41(1):***

*The employer\* of a worker who has been unable to work as a result of an injury and who, on the date of the injury, had been employed for at least 1 year...shall offer to re-employ the worker.*

(\* s. 41 does not apply to employers who regularly employ < 20 workers)



## ***The Legal Duty to Accommodate***

***Workplace Safety and Insurance Act, s. 41(6):***

*The employer shall accommodate the work or the workplace...to the extent that the accommodation does not cause the employer undue hardship.*





## ***When Does the Duty to Accommodate Arise?***

**What is a “disability”?**

**Ontario *Human Rights Code*, s. 10(1) :**

*Disability includes any degree of physical disability, infirmity, malformation or disfigurement caused by bodily injury, birth defect or illness... a mental impairment...a learning disability, a mental disorder ... or an injury for which WSIA benefits are claimed or received.*



## *When Does the Duty to Accommodate Arise?*

### What is a “disability” cont’d?

- typically the condition must be more than **transitory**
- the condition may arise from either a **work-related** or **non-work-related** condition or injury

## *When Does the Duty to Accommodate Arise?*

**What is a religious belief?**

**Syndicat Northcrest c. Amselem (SCC) [2004]**

*“a [sincerely held] practice or belief, having a nexus with religion, [requiring either objectively or subjectively obligatory or customary conduct], or... subjectively engendering a personal connection with the divine... irrespective of whether a particular practice or belief is required by official religious dogma or [conforms] with the position of religious officials.”*



## *When Does the Duty to Accommodate Arise?*

### **Employer Obligation To Non-Employees:**

An employer must hire a successful or qualified candidate *even if* he/she requires accommodation, unless doing so would amount to undue hardship.



## *Fulfilling the Duty to Accommodate*

### **Role of the Employer:**

An employer's duty to accommodate requires that it to do **whatever is necessary, short of undue hardship**, to accommodate the employee.



## *Fulfilling the Duty to Accommodate*

### **An employer must:**

- determine **needs, restrictions or limitations**
- determine **barriers**
- **remove barriers**



## *Fulfilling the Duty to Accommodate*

### Other considerations:

- an accommodation may be **temporary** or **permanent**
- accommodations must be addressed on a **case-by case basis** accommodations can be simple or complex

## *Requests for Information Regarding Disability*

### **Employers have the right to:**

- be satisfied of employee's fitness
- be advised of functional limitations and prognosis
- request that employee's doctor respond to specific questions



## *Requests for Information Regarding Disability*

**Employers generally do NOT have the right to:**

- know the diagnosis
- require an employee to be seen by doctor chosen by employer

## *Requests for Information Regarding Disability*

**If medical information is not provided, the employer may:**

- request additional information
- contact physician directly if employee consents
- sanction employee, where appropriate



## *Union Duties and Responsibilities*

### **Unions also play a role in accommodation**

- Examples of union obligations:
  - work with employer to facilitate an accommodation
  - agree to amendment of negotiated provision in order to eliminate its discriminatory impact

## *Union Duties and Responsibilities*

### **Responsibilities of a union include:**

- advocating for the worker
- facilitating reasonable accommodations
- balancing competing needs
- facilitating the communication and sharing of information

# *Union Duties and Responsibilities*

## **The Collective Agreement**

- individual's right to accommodation may prevail over negotiated provisions
- however, if accommodation involves **significant interference** with **fundamental rights** under collective agreement, union may be entitled to withhold consent

## *Employee Duties and Responsibilities*

**Employee duties and responsibilities include:**

- communicating need for accommodation
- providing timely and useful information regarding functional abilities/limitations
- cooperating and acting reasonably



## *Undue Hardship*

### **“Undue hardship” constitutes a threshold:**

- employer has a duty to do whatever is necessary to accommodate the employee, short of the undue hardship threshold
- the undue hardship threshold is flexible, difficult to define, changeable and fact or circumstance specific



## *Undue Hardship*

### ***OHRC Policy and Guidelines on Disability and the Duty to Accommodate:***

According to the OHRC, only 3 considerations are relevant to assessing whether undue hardship threshold met:

1. cost
2. outside sources of funding, if any
3. health and safety requirements





## *Undue Hardship*

### *Policy and Guidelines on Disability and the Duty to Accommodate, cont'd:*

According to the policy:

- business inconvenience, employee morale, customer preferences **not** relevant to assessing whether threshold met
- cost will = undue hardship **only** if so substantial that it alters essential nature of the enterprise or affects its viability

## *Undue Hardship*

### Other interpretations of the undue hardship threshold:

- courts and arbitrators have accepted that additional factors may be relevant
- regardless, there is agreement that employer must show that burden is **substantial** and **not trivial**



## *Undue Hardship*

### *Renaud v. Central Okanagan School District No. 23 (SCC) [1992]*

*"short of undue hardship" [imports] a limitation on the employer's obligation so that measures that occasion **undue interference** with the employer's business or **undue expense** are not required."*



## ***Undue Hardship***

### ***Renaud v. Central Okanagan School District No. 23 (SCC) [1992]***

*“...employee morale [may]...be taken into account [but it]... must be applied with caution. The objection of employees based on well-grounded concerns that their rights will be affected must be considered. On the other hand, objections based on attitudes inconsistent with human rights are ... irrelevant ....”*

## *Undue Hardship*

The core or essential duties of a job are key:

- accommodation may require distinguishing between **essential** and **non-essential** duties of a job
- a core or essential duty is a **bona fide occupational requirement (BFOR)**



## *Undue Hardship*

How to determine what is a BFOR:

*British Columbia (PSEERC) v. B.C.G.E.U. (Meiorin)*  
(SCC) [1992]

A job requirement or standard is a **BFOR** if it is:

1. adopted for a purpose rationally connected to the job;
2. adopted in the honest and good faith belief it is necessary; and
3. reasonably necessary to the accomplishment of that legitimate work-related purpose



## *Undue Hardship*

How to determine what is a BFOR, cont'd:

*British Columbia (PSERC) v. B.C.G.E.U. (Meiorin)*

(SCC) [1992]

“This approach is premised on the need to develop standards that accommodate the **potential contributions of all employees** in so far as this can be done without undue hardship to the employer...”



## *Undue Hardship*

### The extent of the duty to accommodate:

- the nature of the accommodation varies according to **specific needs of the individual**
- **non-essential duties** which cannot be performed should be altered, eliminated or reassigned
- if **essential duties** cannot be performed, even with accommodations, **alternative available jobs** must be explored



## *Undue Hardship – Some Cases*

### *407 ETR Concession Co. v. CAW* [2007]

- biometric hand scanning security system installed
- 3 employees who refused to participate based on religious objections were disciplined and eventually terminated for insubordination
- at arbitration, employees/union claim right to accommodation, employer argues undue hardship

## *Undue Hardship – Some Cases*

### *407 ETR Concession Co. v. CAW* [2007]

- arbitrator: despite some inconsistencies or illogicalities in their beliefs, there was **some basis** in their church's religious teachings and their beliefs were **sincerely held**
- therefore a human rights issue requiring accommodation to point of undue hardship

## *Undue Hardship – Some Cases*

### *407 ETR Concession Co. v. CAW* [2007]

- excusing **these** 3 employees from using hand scans is **not** undue hardship **in this case**
- however if “too many” other employees seek this accommodation, security system may become so compromised as to jeopardize its viability, which **may** constitute undue hardship at some future point

## *Undue Hardship – Some Cases*

### *USW v. Winpak Portion Packaging* [2003]

- to require *this* employer to create permanent job that operates at a loss would constitute undue hardship
- duty to accommodate **does not** require carving out lighter duties to create permanent job for employee where to do so would have **considerable negative health and safety impact** on other employees

## *Undue Hardship – Some Cases*

### *McGill University Health Centre v. Syndicat des Employés* (SCC) [2007]

- issue: role of collective agreement in assessment of employer's duty to accommodate
- clause provided for automatic termination after 36 months of absence due to disability

## ***Undue Hardship – Some Cases***

### **McGill University Health Centre v. Syndicat des Employés (SCC) [2007]**

*“...although a clause providing for termination...after a specified period is not determinative, it does give a clear indication of the parties’ intentions [regarding] reasonable accommodation ....[and] is a significant factor that an arbitrator must take into account...”*

## ***Undue Hardship – Some Cases***

### **McGill University Health Centre v. Syndicat des Employés (SCC) [2007]**

*“...automatic termination clauses of reasonable length represent [an appropriate] trade-off.... [that] balances an employer’s legitimate expectation that employees will perform the work they are paid to do with the legitimate expectations of employees with disabilities that those disabilities will not cause arbitrary disadvantage.”*



## *Evans, Philp LLP Breakfast Series Continues*



Next Presentation: Tuesday, May 29, 2007  
Employee Discipline