

Duty to Accommodate: Legal Framework



Prepared by Raphaëlle Laframboise-Carignan, lawyer, and Jacob Saltiel, student-at-law¹
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¹ From the law firm of Raven, Cameron, Ballantyne & Yazbeck LLP/s.r.l.

Introduction

The employer has a duty to accommodate employees for characteristics that are protected by the *Canadian Human Rights Act* (the "Act")². The duty to accommodate can be triggered in a wide variety of situations and imposes obligations on employees, employers, and unions.

Understanding what the duty to accommodate is, when it applies, and how it operates is important to ensuring that your rights are protected at your workplace.

LEGAL SOURCES

i) Human Rights Legislation

Human rights legislation is the legal source of the duty to accommodate on your employer. As federally regulated employees, the *Canadian Human Rights Act* applies to your workplace and sets out the employer's duty to accommodate:

Employment

- 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.
- [...]

Exceptions

- 15 (1) It is not a discriminatory practice if
- (a) any refusal, exclusion, expulsion, suspension, limitation, specification or preference in relation to any employment is established by an employer to be based on a bona fide occupational requirement; [...]

Accommodation of needs

- (2) For any practice mentioned in paragraph (1)(a) to be considered to be based on a bona fide occupational requirement and for any practice mentioned in paragraph (1)(g) to be considered to have a bona fide justification, it must be established that accommodation of the needs of an individual or a class of individuals affected would impose undue hardship on the person who would have to accommodate those needs, considering health, safety and cost.

Together, section 7 and 15 of the *Act* prohibit discrimination in employment, but allow the employer to defend against a claim of discrimination by proving that it has accommodated the employee up to the point of undue hardship.

² *Canada Human Rights Act* RSC 1985 c. H-6, s. 2.

ii) Collective Agreement

The PSAC/UPCE collective agreement with Canada Post includes the following language:

13.01 No Discrimination

(a) The provisions of the Canadian Human Rights Act shall be adhered to. There shall be no discrimination on the grounds of race, creed, national or ethnic origin, colour, religion, religious affiliation, age, sex, marital status, sexual orientation, family status, mental or physical disability, conviction for an offence for which a pardon has been received, or membership or activity in the Alliance.

(b) There is a duty to accommodate in relation to employment up to the point of undue hardship.³

The Collective Agreement with Purolator does not have a similar provision, but the duty to accommodate under the *Act* still applies.

THE DUTY TO ACCOMMODATE

Workplace rules or employment conditions will sometimes have a negative effect on employees because of a protected characteristic. Employers must accommodate by adjusting those workplace rules that discriminate against employees, unless the accommodation would cause the employer to suffer undue hardship.

The duty to accommodate creates obligations for the employer, the employee, and the union:

i) Employer's Responsibilities

When an employee asks for accommodation, an employer has several duties it must satisfy in consultation with the employee and the union.⁴

The employer must determine what kind of accommodation will be necessary through an individualized assessment.⁵ The employer must create an accommodation plan, and to do so it may ask for additional information, such as documentation, a medical opinion, or expert advice. If the employer requests such information, it is obligated to:⁶

- keep the information private;
- keep a record of the accommodation request and action taken;
- generate options for accommodation and take an active role in presenting solutions;
- refrain from asking for information about the history of the illness or its treatment;
- work with the employee and their union, if requested, to identify accommodation options and an accommodation plan appropriate to that employee; and
- grant accommodation requests in a timely manner.

³ *Collective Agreement between the Canada Post Corporation and the Public Service Alliance of Canada*, s13.

⁴ Donald JM Brown and David Beatty, *Canadian Labour Arbitration Vol 1*, loose-leaf (Toronto: Thomson Reuters) at 7-232.25.

⁵ *McGill University Health Centre (Montreal General Hospital) v. Syndicat des employés de l'Hôpital général de Montréal*, [2007] 1 SCR 161, 2007 SCC 4 (CanLII) at para 22.

⁶ *Policy and Procedures on the Accommodation of Mental Illness*, October 2008, online: Canadian Human Rights Commission <http://www.chrc-ccdp.ca/sites/default/files/policy_mental_illness_en_1.pdf>

Employers may request second opinions, but only when it is necessary to provide accommodation. Employers should not ask for additional medical opinions about an accommodation for the purposes of refuting an employee's request.⁷

An employer must first attempt to accommodate an employee into their current position. If that cannot be done, the employer may also look to re-assign the employee within the organization.

In some cases, the employer may be required to consider "bundling of duties", or re-distributing work duties to permit an employee to perform duties within her restrictions, while assigning other tasks to her co-workers. This measure is not always available; in some cases, employers have established that it is not possible to accommodate if the employee is unable to perform "the essential, core functions of their position",⁸ and is instead only performing minor duties.

ii) Employee Obligations

Employees must participate in the search for reasonable accommodation. Employees should make their requests for accommodation to their supervisor, ideally in writing, and explaining why the employee requires accommodation and what the restriction or limitation is.

Once the accommodation process has begun, an employee should:

- cooperate with their employer's efforts to accommodate;
- provide information as requested;
- search for alternative forms of accommodation; and
- accept a reasonable accommodation that allows them to perform their work functions.

An employee who has requested accommodation does not have a right to a perfect accommodation nor their preferred means of accommodation; the accommodation simply needs to meet the limitations and restrictions. Therefore, if an employer has offered accommodation that will allow the employee to perform their duties while respecting the employee's limitations and restrictions, an employee cannot refuse the offer on the basis that a better accommodation exists. Once accommodation has been provided, an employee must continue working with the employer to ensure that the accommodation remains effective.

iii) Union Obligations

Unions also have an important role in the accommodation process. Unions can help to generate options for accommodation based on their knowledge of the workplace. The Union will work actively with the employer and employee to identify and implement a reasonable accommodation, and will consider the impact of any accommodation on employees' rights under the collective agreement.

⁷ "More about disability-related accommodation", online: Ontario Human Rights Commission <<http://www.ohrc.on.ca/en/iv-human-rights-issues-all-stages-employment/9-more-about-disability-related-accommodation>>.

⁸ *Supra*, note 4.

GROUPS OF DISCRIMINATION

The protected grounds listed in the *Canadian Human Rights Act* include:

- 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 or in respect of which a record suspension has been ordered.

The *Canadian Human Rights Act* protects against discrimination on the basis of these grounds. The employer cannot discriminate against an individual for these reasons.

The most common workplace accommodations requests arise under the grounds of family status, disability, and religion.

(1) Family status

Family status includes a parent's childcare obligations. For example, "a parent cannot leave a young child without supervision at home in order to pursue his or her work."⁹ It generally does not include voluntary family activities or recreational programs that parents choose for their children.¹⁰

In *Canada (Attorney General) v Johnstone*, the landmark family status case, a husband and wife both worked for the Canada Border Services Agency, and both worked unpredictable schedules, making it impossible to secure childcare for their children. Ms. Johnstone requested a fixed schedule, which the employer would only grant if she went down to part-time status.¹¹ The CBSA was held to have discriminated against Ms. Johnstone, as it had not proven that it could not accommodate her childcare needs on a full-time basis without incurring undue hardship.

Family status is one area of human rights law that is still developing. Courts, arbitrators, and tribunals are in the process of determining the scope of the duty to accommodate for family obligations, as well as how much effort the employee must make to resolve a conflict between work and family obligations prior to requesting accommodation from the employer.

(2) Disability

The *Canadian Human Rights Act* defines a disability as follows:

"disability means any previous or existing mental or physical disability and includes disfigurement and previous or existing dependence on alcohol or a drug;"¹²

⁹ *Canada (Attorney General) v Johnstone* 2014 FCA 110 (CanLII) [*Johnstone*] at paras 70-71.

¹⁰ *Ibid*, at para 72.

¹¹ *Ibid*, at paras 11-13.

¹² *Supra*, note 2, at s.25

The definition of disability includes not just that someone has a disability, but also how others perceive that disability and its effect on the person.¹³ The definition of disability includes conditions that are not totally disabling, but does not generally extend to normal ailments like the flu.¹⁴

In all cases involving disability, the accommodation provided will depend on the employee's needs and the workplace's requirements. An employer's policies may also be relevant, but cannot override the employer's legal obligations. For example, in one case, an employee with a hearing disability requested a digital hearing aid after other attempts to accommodate her disability had failed to allow her to perform her job. The employer refused based on a policy that they would not provide prosthetic aids.¹⁵

The arbitrator held that, while employers have the discretion to choose the form of accommodation, it must still "enable the disabled employee to participate in the workplace on substantially equal terms with other non-disabled co-workers."¹⁶ As the hearing aid was an accommodation that would enable the employee to perform her job and providing it would not rise to undue hardship, the employer's failure to provide the hearing aid failed its duty to accommodate.

(3) Religion

Religious beliefs sometimes conflict with workplace rules. As a result of human rights legislation, employers have an obligation to recognize and respect the right of every employee to practice his or her religion without discrimination.¹⁷

Examples of religious accommodation include when employees request days off to observe religious holidays that fall on regular workdays. Employers generally are required to allow some flexibility to employees to organize their work schedules to meet their respective faith's commitments.¹⁸ In all cases, however, it will depend on the particular facts, and the available options to accommodate the employee.

LIMITS TO DUTY TO ACCOMMODATE

Bona fide occupational requirement or "BFOR"

To justify the discriminatory impact of a workplace rule or condition, the employer must show the rule is a *bona fide* occupational requirement, or "BFOR". In order to establish that a workplace rule cannot be modified to accommodate an employee, the employer must satisfy three elements:

- 1) The rule was adopted for a purpose rationally connected to the performance of the job;
- 2) The rule was adopted in an honest and good faith belief that it was necessary to the fulfillment of that legitimate work-related purpose; and

¹³ *Mou v MHPM Project Leaders*, 2016 HRTO 327 (CanLII) [*Mou*] at para 15.

¹⁴ *Ibid*, at para 16-18.

¹⁵ *Thunder Bay Catholic District School Board v Ontario Catholic Teachers' Association (Thunder Bay Secondary Unit)* 2011 CanLII 38669 (ON LA) [*Thunder Bay*] at para 1.

¹⁶ *Ibid*, at para 67.

¹⁷ *Ontario (Ministry of Community and Social Services) v Grievance Settlement Board*, 200 CanLII 16854 (ON CA) [*Grievance Settlement Board*] at para 30.

¹⁸ *Ibid*, at para 49.

- 3) The rule is reasonably necessary to the accomplishment of that legitimate work-related purpose, meaning that the employer has shown that it is impossible to accommodate the individual employee short of undue hardship.¹⁹

First, the test requires that the workplace rule can actually achieve the effect it was implemented for.²⁰ For example, requiring an employee to wear a hardhat is rational if the workplace involves hazards that can be prevented by wearing a hardhat. If, however, it can be shown that there are no workplace hazards that might be prevented by the use of hardhats, the rule requiring them will not have any rational connection to the job.

Second, the test requires the employer to show that they have adopted the rule for its stated, work-related purpose, and not in an attempt to create grounds of discipline and discharge of a particular employee or group of employees. Employers are not permitted to create rules designed to discriminate against individual employees.²¹

Lastly, the test requires the employer to accommodate an employee to the point of "undue hardship". Undue hardship is a legal term referring to when an accommodation for an employee is unavailable because of the effect on the employer. Generally, undue hardship occurs after attempts to accommodate an employee fail, leaving only potential accommodations that would be extremely expensive, require a fundamental change to the workplace, or result in the employee performing a "make work" job.²²

Whether an employer can claim undue hardship, like the duty to accommodate generally, depends on the accommodation requested and the workplace's requirements. Examples of problems that can qualify as undue hardship include: (1) danger, (2) excessive financial cost, and (3) availability of bundling of duties.

(1) Danger

In some workplaces, splitting up or modifying duties can create the potential for harm to other employees and the community.²³ Some workplaces involve duties that must be performed in a certain way that cannot be modified as a result of safety concerns. When a job's requirements are fundamental to being able to perform that position's duties safely, an employer can claim that accommodating an employee will cause undue hardship.

(2) Excessive financial cost

Some forms of accommodation may be extremely costly for an employer, which may rise to the level of undue hardship.²⁴ An employer is not, for example, required to continue to employ someone if almost all of their duties have been assigned to other employees, or if they can only be accommodated with technology or structural changes to the workplace that are unreasonably costly.

¹⁹ "5.2.3.2 Bona Fide Occupational Requirement and the Duty to Accommodate" from *eText on Wrongful Dismissal and Employment Law*, by Peter Neumann and Jeffrey Sack, 1st ed, online: Lancaster House <<http://commentary.canlii.org/w/canlii/2012CanLIIDocs1en#!fragment//KGhhc2g6KGNodW5rxIVhbsSHb3JUZXh0OicnKSxub3Rlc1F1ZXJ5xJYnLHNjcm9sbEPEiMSKOiFuxKdlYXLEh8SgxKLEpMSXxLTEtsSHU8SQdELEpFJFTEVWQU5DRSx0YWI6dG9jKSk=>>>.

²⁰ *British Columbia (Public Service Employee Relations Commission) v BCGSEU*, [1999] 3 SCR 3, 1999 CanLII 652 (SCC), [*Meiorin*] at paras 57-59.

²¹ *Ibid*, at paras 60-61.

²² *Ibid*, at paras 62-68.

²³ *Supra*, note 4.

²⁴ *Ibid*.

(3) Bundling of duties is unavailable

An employer may accommodate an employee by re-assigning duties from other employees in the workplace to the employee requesting accommodation. Bundling of duties, is in many cases, an acceptable form of accommodation, but it is not always available if it would involve creating an entirely new position or if the bundling of duties creates a “make work” position.²⁵ Employees should consult with their union to ensure that all reasonable possibilities for bundling duties together have been considered.

What to do if the employer fails to accommodate?

Grievance Procedure

Before presenting a grievance, an employee should discuss their complaint with both their immediate supervisor and union representative. Employees have the right to be accompanied by a union representative during a discussion with their supervisor relating to a complaint. If a resolution is achieved between the supervisor and the employee, the grievance process can be avoided. If the employee and the supervisor are unable to resolve the issue, an authorized representative of the union may then present a grievance. If the grievance is not resolved through the internal step process, the union may refer the grievance to arbitration.

Complaints

Federally regulated employees may also present complaints of discrimination and the failure to accommodate to the Canadian Human Rights Commission. However, the Commission generally defers to the grievance and arbitration process for unionized employees, and will not grant a second hearing to an employee regarding the same allegation of discrimination. Only in limited circumstances will the Commission agree to hear a complaint if it has been decided in another forum.

CONCLUSION

The duty to accommodate protects employees from discrimination in employment by imposing an obligation on their employer to accommodate them for their specific needs. When a rule creates a discriminatory impact on an employee, employees can request accommodation on the grounds enumerated in the *Canadian Human Rights Act*. Once accommodation is requested, employees, their employers, and their unions must cooperate to identify an accommodation that allows the employee to perform their job.

In most cases, an employer cannot refuse an accommodation. The employer may refuse to accommodate only where it would cause the employer to suffer undue hardship or if the discriminatory policy is found to be a BFOR. How accommodation is implemented depends on the facts and the workplace’s requirements. If you are experiencing discrimination as a result of workplace rules, you should consult with your union to see if accommodation is available.

²⁵ *Supra*, note 4.