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EMPLOYMENT + LABOUR LAWYERS

The Duty to Accommodate

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Agenda

- Introduction to human rights obligations
- *Prima facie* discrimination
- The duty to accommodate
- Emerging issues:
 - Stress and burnout
 - Changes to work location
 - Family status
- Practical tips for fulfilling the duty to accommodate



Human Rights Obligations

Overview



BC *Human Rights Code*

Section 13: Discrimination in Employment

1) A person may not:

- a) refuse to employ or continue to employ a person, or
- b) discriminate against a person regarding employment or any term or condition of employment,

because of... [a protected characteristic]



BC *Human Rights Code*

Protected grounds in employment

...Indigenous identity, race, colour, ancestry, place of origin, political belief, **religion**, marital status, **family status**, **physical or mental disability**, sex, sexual orientation, gender identity or expression, or age of that person or because that person has been convicted of a criminal or summary conviction offence that is unrelated to the employment or to the intended employment of that person.



Discrimination in Employment

The *prima facie* case



Proving Discrimination

Overview

- The employee (complainant) has the burden to prove a “*prima facie*” case of discrimination.
- If a presumptive case is established, then the burden shifts to the employer (respondent) to justify its conduct.



Proving Discrimination

Prima Facie Case

1. Does the individual have a protected characteristic?
2. Has the individual suffered an adverse impact?
3. Was the protected characteristic a factor in the adverse impact?



Prima Facie Case

Step 1: Protected characteristic

What is a “disability”?

- Could be mental or physical; hidden or obvious.
- Physical disability generally includes a physiological state that:
 - is involuntary;
 - has some degree of permanence; and
 - impairs the persons’ ability, in some measure, to carry out the normal functions of life.
- Includes a “perceived disability”, and the Tribunal will also consider the social, legislative or other response to that impairment and/or limitations.



Prima Facie Case

Step 1: Protected characteristic

Examples of disability:

- Obesity
- Injuries and/or physical conditions
- Learning disabilities
- Chemical or scent sensitivities
- Drug and alcohol addiction
- Arthritis
- PTSD
- Bi-polar disorder
- Schizophrenia



Prima Facie Case

Step 2: Adverse Impact

- Refusing to hire
- Denying promotion
- Termination or discipline
- Denying benefits
- Refusing to return someone to work
- Harassment based on a personal characteristic
- Inability to meet workplace standard or expectation, including attendance



Prima Facie Case

Step 3: Sufficient Nexus

- Connection may be established by inference.
- No requirement that the protected ground was the *only, main, or overriding* factor in the treatment.
- No proof of intention to discriminate necessary.
- Complainant's sincere belief or speculation is not sufficient.

Proving Discrimination

Justification of Conduct

- If the employee establishes a *prima facie* case of discrimination, then the employer must justify its conduct.
- Defence that discriminatory treatment was result of a “*bona fide* occupational requirement” (BFOR).
 - Employer cannot accommodate without undue hardship



Scenario #1

Ted Tardy is a long-time EA who has always been on time and has no discipline on record.

Recently, Ted Tardy has been coming in late to work without authorization. Vice-Principal Smith confronts him about the issue and asks for an explanation.

Ted explains she is stressed and needs time off of work and produces a medical note saying “Mr. Tardy needs one week off of work for stress”.

The Human Resources Department has recommended issuing a let of reprimand for his tardiness – is there a potential breach of the Code?



Duty to Accommodate

General Principles



Duty to Accommodate

What is it?





Duty to Accommodate

When does it arise?

- Does not arise until the employer:
 - Receives a reasonable request for accommodation from the employee; or
 - Receives “constructive notice” of the need to accommodate
- Once the duty is triggered, the employer has an obligation to make inquiries, seek information, and consider accommodations.



The Duty to Inquire

What is it and when does it arise?

- Employees have a duty to notify their employer of facts relating to potential discrimination.
- In certain circumstances, an employer has a duty to inquire, even if employee has not disclosed exact nature of their circumstances.
- Duty arises when an employer is contemplating taking steps that may adversely affect the employee.



Duty to Inquire

Cyncora v. Axton Inc., 2022 BCHRT 36

- Employee reluctant to disclose mental health issues for fear of stigma.
- Employee explained absences related to stomach and personal issues.
- Once no longer able to work, employee disclosed to employer he was struggling; needed time off to deal with his depression and anxiety.
- Instead of inquiring whether employee had a medical condition impacting ability to work, employer terminated employment for absenteeism.



Scenario #2

Frustrated Frank has been a bartender with Beer & Sudz Co. for 3 years. He has always had a negative attitude and, since day one, has had complaints from servers and staff about his rudeness and crankiness.

Unbeknownst to the Employer, Frustrated Frank has never indicated that he has a diagnosis of anxiety.

One day, in response to a request to train a new employee, Frustrated Frank swears at his boss and storms out.

The Employer decides that this is the last straw and wants to terminate - is the Duty to Inquire triggered?



Medical Information

When is it appropriate to seek further information?

- Where duty to inquire is triggered
- Where employee provided incomplete or conflicting medical information
- Where employee claims cannot attend at work, but can participate in other activities
- Where employee's conduct requires an explanation
- Where employee provides cryptic or vague medical information



Medical Information

What can an employer seek?

- Employer has the right to clear, current and credible medical information
- Employers will be entitled to different information at different stages
 - Initially only have a right to information relating to nature of illness and expected return to work date
 - Request for additional information depends on the circumstances
 - When accommodations have been requested
 - During extended medical absences



1. Does the employee suffer from any psychological or medical condition which would adversely affect her ability to perform her duties as an elementary school teacher?
2. If yes, please describe the nature of such condition(s) and how such psychological/medical condition(s) restrict/s the employee from performing their duties as an elementary school teacher.
3. Has the employee been prescribed a course of treatment for the psychological/medical condition(s) affecting their ability to perform their duties?
4. If no course of treatment has been prescribed, has a course of treatment been recommended for the employee to follow related to the psychological/medical condition(s)?
5. If a course of treatment has been prescribed or recommended, has she followed the prescribed or recommended course of treatment?
6. Does any of the treatment that has been prescribed or recommended adversely affect the employee's ability to perform the duties of an elementary school teacher? If yes, please describe what limitations are placed on their ability to perform her duties.
7. To your knowledge, has the employee been referred to a medical specialist?
8. To your knowledge, what medical follow-ups, if any, are occurring related to the medical conditions?



Independent Medical Examinations

When can employers request one?

- Typically, when the issue is beyond the expertise of a family physician
 - Substance use disorders
 - Personality disorders
 - Bipolar disorder
 - Safety sensitive & safety-critical positions
- Recent case law, however, has created additional procedural steps



Failure to Provide Medical Information

What happens if the employee fails to comply?

- Generally not a disciplinary matter*
- Consequences for an employee
 - May be held out of service
 - May be denied an accommodation
 - Termination of employment
- If there is an absence of medical information supporting an accommodation, then there is no requirement to provide one



Medical Information – Case Law

Klewchuk v Burnaby (City), 2022 BCHRT 29

- Employee allergic to latex, garlic, and onions.
- Described the latex allergy as “severe and life threatening”.
- Evidence showed employee was in close proximity to balloons for years.
- Employer demonstrated a “pragmatic and inclusive approach”.



Medical Information – Case Law

Petrar v. Thompson Rivers University, 2014 BCHRT 193

- Employee had demonstrated performance issues.
- Employer was aware that the employee had MS and took certain medication, and requested medical information.
- Employee alleged that this request was discriminatory since she had not sought accommodation.
- Tribunal dismissed the complainant for no reasonable prospect of success.



Independent Medical Examination – Case Law

Bottiglia v Catholic School Board, 2015 HRTO 1178, upheld in 2017 ONSC 2517

- Employee goes on sick leave due to depression and later asks to return to work
- Employee's physician gives conflicting information regarding prognosis.
- Employer asks Employee for IME due to conflicting medical
- Employee refuses, and Employer considers the denial to have brought the accommodation process to an end.
- Court determined that, in certain circumstances, an employer will be justified requesting IME as part of duty to accommodate



Scenario #3

Pennywise T. Clown is a part-time firefighter with the Town of Derry and is required to maintain a certain level of physical fitness as a condition of his employment.

During a search and rescue drill, Pennywise appeared to be in medical distress, being observed being short of breath, pale and sweating profusely.

As a result of these observations, the employer told Pennywise that he would be provided a medical form for his physician to complete regarding his fitness for work.

Pennywise disputed the requirement to fill out the medical form and refused to provide the information sought. Despite repeated requests, Pennywise continued to refuse to provide the information sought and, eventually, the employer provided a drop-dead deadline to provide the information, barring which Pennywise would be terminated from his employment.

After no further word from Pennywise by the deadline, the employer dismissed his employment. A day later, Pennywise provided a one-line medical note clearing him to return to duty.

Pennywise brings a human rights complaint alleging that there was no basis for the employer to request the information and that he was terminated based on a perceived disability – what are the risks?



General Principles

Reasonable Accommodation and Undue Hardship



Reasonable Accommodation

General Principles

- Employee is entitled to “reasonable” but not “perfect” accommodation.
- Employer, employee (and Union) have a duty to participate in and help facilitate the accommodation process.
- Employer’s duty to accommodate is up to the point of undue hardship.



Reasonable Accommodation

Examples of Accommodation

- Modifying workstation;
- Providing adaptive equipment;
- Part-time work;
- Rescheduling shifts;
- Providing leaves of absence;
- Removing more taxing parts of job;
- Bundling tasks;
- Reduced hours; or
- Tolerating some absenteeism or relapse.



Reasonable Accommodation

Employer and employee must participate in the accommodation process

- The search for accommodation is a “multi-party inquiry”.
- Parties (employer, employee, and if applicable, union) must:
 - *work together* to determine what is reasonable in the circumstances;
 - *facilitate* the determination of what is reasonable; and
 - *facilitate* the implementation of a reasonable accommodation.
- The employee does *not* have a duty to come up with the solution.



Reasonable Accommodation

Rajigadu v. UBC (No. 3), 2014 BCHRT 157

- Employee's medical restrictions included no cold, damp environments and no interactions with certain co-workers.
- Employer offered position that met restrictions, and Union agreed, but Employee refused to return unless he got a certain position.
- Employee dismissed for failure to return to work.
- No discrimination because employee refused a reasonable accommodation.



Undue Hardship

What constitutes “undue hardship”?

- Key factors in assessing undue hardship include:
 - Financial cost;
 - Impact on a collective agreement;
 - Problems of employee morale;
 - Interchangeability of the workforce and facilities;
 - Size of employer’s operations; and
 - Safety.
- Depends on the size and means of the employer.



Consider Possible Accommodation

What constitutes “undue hardship”?

- Employers do NOT have to:
 - Create a new job for the employee;
 - Pay the same wage for a new position, if the new position would not ordinarily require that wage;
 - Tolerate excessive absenteeism or chronic poor or non-performance;
 - Keep an employee in a position where he/she cannot perform essential duties; or
 - Accommodate a “personal choice”.



Undue Hardship

Kelly v. Saputo Dairy Products Canada, 2021 BCHRT 128

- Employee sustained injury that resulted in a permanent disability.
- Initially, the employee tried a gradual return to work program – this was unsuccessful three times.
- Employer terminated him because there were no jobs that he could perform safely.
- No discrimination.



Undue Hardship

Kelly v. Saputo Dairy Products Canada, 2021 BCHRT 128

- Employer fulfilled its procedural obligations:
 - Actively engaged in attempting to return employee to work;
 - Provided employee with opportunity to provide more or different information.
- Employer fulfilled its substantive obligations:
 - There were no jobs that he could perform for which he was qualified that were within physical limitations.



Undue Hardship

Kelly v. Saputo Dairy Products Canada, 2021 BCHRT 128

- Graduated return to work:
 - duties may not be very productive
 - expectation is worker transition back to usual role
- Permanent Accommodation:
 - should involve work that is productive for the company



After Implementing Accommodation

What happens next?

- Duty to accommodate continues as long as an employee's ability to perform their work may be impacted by their protected characteristics.
- Nature of accommodation may change over time.
- Employee not entitled to under-perform or engage in misconduct because of an accommodation.
- Employers still entitled to manage workplace, including disciplining an employee with a disability for culpable conduct.



Duty to Accommodate

Emerging Issues



Family status

The *Campbell River* test

- *Health Sciences Assoc. of B.C. v. Campbell River and North Island Transition Society*, 2004 BCCA 260
 - An employee seeking accommodation of parental or other caregiving obligations must establish that:
 - the employer has made a unilateral change in a term or condition of employment; and
 - such change results in a serious interference with a substantial parental or other family duty or obligation.

Family Status

Challenges to the *Campbell River* test

- *Envirocon Environmental Services, ULC v. Suen*, 2020 BCCA 201
 - Confirmed the *Campbell River* test for discrimination on the basis of family status.
- *British Columbia (Human Rights Tribunal) v. Gibraltar Mines Ltd.*, 2023 BCCA 168
 - *Campbell River* test survives but in modified form – change to term and condition of employment no longer required
 - “*prima facie* discrimination is made out when a term or condition of employment results in a serious interference with a substantial parental or other family duty or obligation”



Practical Tips

The Do's and Don'ts of Accommodation



Practical Tips

Best Practices

- Be aware of potential impacts on your employees.
- Maintain records of all relevant communications and documentation.
- If necessary, ask for clarification about an employee's specific limitations and restrictions.
- Be reasonable, fair, and creative in finding ways to support your employee.



The Business Case for Accommodation

- Award of damages for “injury to dignity”, plus lost wages and other expenses.
- Order for reinstatement.
- Reputational damage and long-term harm.
- Legal fees and lost time to defend complaints.

Questions?

Contact us!



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