

DUTY TO ACCOMMODATE

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WORKERS ACCOMMODATE

Workers have been accommodating co-workers since long before human rights codes made it a legal requirement. We often make allowances for someone who has a bad back, is upset by family problems or is the worse for wear after a night out, and we expect our colleagues to do the same for us.

But, accommodation also developed as a legal obligation, based on federal and provincial human rights legislation and Supreme Court of Canada decisions from the mid 1980s on. This legal workplace duty to accommodate requires the elimination of employment standards, rules, practices or other requirements that discriminate on prohibited grounds.

There are approximately a dozen prohibited grounds for discrimination under human rights legislation; the number varies with jurisdiction. But accommodation is usually associated with cases of discrimination on the grounds of disability, (including physical and mental disability, and drug or alcohol addiction,) religion, sex (including pregnancy), race and family status.

As accommodation law has developed, tensions have emerged for unionists and other workers. This examination of accommodation cases clarifies some of these tensions.

WHO IS NORMAL?

Two 1999 Supreme Court of Canada cases, *Meiorin* (gender discrimination at the workplace) and *Grismer* (service discrimination to a person with a disability) radically changed our understanding of the legal duty to accommodate, and of who is to be considered normal.

Meiorin and *Grismer* established that accommodation is to be the norm. Equality and accommodation must be integral parts of all workplace rules and practices. This is in line with affirmative action and employment equity work that unions have been promoting for years.

The *Meiorin* decision requires employers to design workplace standards that do not discriminate:

By enacting human rights statutes and providing they are applicable to the workplace, the legislatures have determined that the standards governing the performance of work should be designed to reflect all members of society, in so far as is reasonably possible.

This touches tensions around workplaces where only men, or the able-bodied, or certain religious beliefs are considered the norm. *Meiorin* deals with a woman in a traditionally male job.

Tawney Meiorin had been a forest fire fighter for three years when the BC government introduced new fitness tests. She failed one of the four tests; she took 11:49.4 minutes to complete a 2.5 kilometre run, 49.4 seconds too slow, and was dismissed.

An arbitrator found that the aerobic capacity the run supposedly measured discriminated against women; there was no evidence this aerobic capacity was necessary for firefighters of either sex to work safely and effectively. He ordered reinstatement. The case wound its way to the Supreme Court of Canada.

The court developed the three-step *Meiorin* Test to determine if the employer has established a standard that is a *bona fide* occupational requirement. (The term *bona fide* occupational qualification and the abbreviations BFOR and BFOQ are also used.)

The employer must:

1. Demonstrate the standard was adopted for a purpose rationally connected to the performance of the job;
2. honestly believe the standard is necessary to fulfill the legitimate, work-related purpose; and
3. show the standard is reasonably necessary to the accomplishment of the legitimate, work-related purpose, so must demonstrate it is impossible to accommodate workers without undue hardship to the employer.

To deal with step 3, the following questions are asked:

- Have alternatives been considered?
- If so, and they meet the employer's needs, why were these alternatives not adopted?

- Must all workers meet a single standard, or could different standards be adopted?
- Does the standard treat some more harshly than others?
- If so, was the standard designed to minimize this differential treatment?
- What steps were taken to find accommodations?
- Is there evidence of undue hardship if accommodation were to be provided?
- Have all parties who are required to accommodate played their roles?

The Meiorin Test was applied in *Grismer*. Terry Grismer developed homonymous hemianopia. It eliminated his left-side peripheral vision. He constructed a system of mirrors to compensate for his vision loss when driving, but had his driver's license cancelled anyway because he did not have 120° vision when given the standard examination. The Supreme Court applied the Meiorin Test. They found Grismer was discriminated against because he was not allowed to take an individual assessment, using his mirrors, to show he could drive safely.

The court in *Meiorin* did say accommodation would be the norm "in so far as is reasonably possible". Accommodation is not required if it causes undue hardship.

HOW HARD IS "UNDUE HARDSHIP"?

The degree of hardship in undue hardship is high. MacNeill says: "overall, the balance of case law characterizes undue hardship as an onerous standard".

The federal *Canadian Human Rights Act* identifies only cost and health and safety. To be considered undue hardship, financial costs must be so great as to alter the essential nature of the enterprise or affect its viability. And, the availability of outside funding, (e.g., government programmes for retrofitting buildings,) must be considered.

In practice most workplace accommodations are not very expensive. The Ontario Human Rights Commission says: "Over two-thirds of job accommodations cost under \$500; many cost nothing at all".

UNDUE HARDSHIP AND HEALTH AND SAFETY

Health and safety includes the health and safety of the worker, the public and co-workers. Considerations include: the degree of risk that will exist after accommodation has been made, the magnitude of the risk, who bears the risk and whether the risk outweighs the benefits of the accommodation.

In *Pannu*, the recaust operator in a mill had to shut down the plant during

gas leaks. The employer's regulations required the operator to be clean-shaven, because of the requirement to wear a mask during this procedure. Mr. Pannu, a Sikh, could not comply for religious reasons, so lost his position.

The employer had tested Mr. Pannu to see if he could wear the mask with his beard, but expert advice indicated this was unsafe. The tribunal considered training a replacement, but found it an undue hardship because it would be costly and potentially confusing in an emergency.

ARE THERE OTHER KINDS OF UNDUE HARDSHIP?

In jurisdictions where undue hardship is not defined in the legislation (e.g. British Columbia, Manitoba, Quebec,) the courts may accept more factors than those specified in the *Canadian Human Rights Act*. Following *Central Alberta Dairy Pool*, they may include: financial cost, health and safety, impact on the collective agreement, interference with other workers' rights, employee morale, the size of the operation and the adaptability of the workforce and facilities.

World Wide Church of God member Jim Christie's religious beliefs prevented him from working certain holy days. In 1983 he requested an unpaid leave of absence for Easter Monday. He had been granted this in the past. This time his request was denied. He took the day off anyway, and was fired.

The Supreme Court of Canada agreed with Christie's employer, the Central Alberta Dairy Pool, that the rule about being at work on Mondays was a *bona fide* occupational requirement. Even so, the employer was guilty of adverse affect discrimination because the rule indirectly infringed on Mr. Christie's religious beliefs and the court felt that accommodating him would not have constituted undue hardship.

Tensions can arise when workers seeking accommodation are not required to perform certain parts of a job or are able to avoid less desirable shifts and fellow workers have to pick up the slack. This can be especially difficult if the duties are considered unpleasant or onerous. *O'Malley* provides another example.

Theresa O'Malley was a full time sales clerk at Simpson Sears. When she became a Seventh Day Adventist her need to observe the Sabbath, which involved no work from sundown Friday to sundown Saturday, conflicted with the store's requirement that she work Saturday shifts.

The Supreme Court of Canada decided that an employment rule, even if made in good faith for sensible business reasons, could result in adverse affect discrimination. They decided the employer could have accommodated Ms. O'Malley without undue hardship by changing her shift schedule, so ruled in her favour , and stated:

An employment rule honestly made for sound economic or business reasons, equally applicable to all to whom it is intended to apply, may yet be discriminatory if it affects a person or group of persons differently from others to whom it may apply.

The court established three rules for these situations:

1. In adverse affect discrimination cases, the employer must make reasonable efforts to accommodate, up to undue hardship.
2. The employer cannot be expected to do more, if the problem is not resolved after these reasonable efforts have been made.
3. Complainants must show they are experiencing discrimination because of a rule. If this *prima facie* case is made, the employer must show that reasonable attempts were made to accommodate up to undue hardship.

CAN ACCOMMODATION OVERRIDE COLLECTIVE AGREEMENT PROVISIONS?

Naturally, unionists are keen to protect collective agreement provisions. But human rights legislation is "not quite constitutional but certainly more than the ordinary" (*O'Malley*) and can trump the collective agreement.

Larry Renaud, a Seventh Day Adventist, was an Okanagan School Board custodian. His religious beliefs prevented him from working from sundown Friday evening to sundown Saturday. But, the collective agreement between CUPE local 523 and the board required that he work Friday from 3 pm to 11 pm. Because no agreement could be reached to accommodate him, Mr. Renaud was let go.

The Supreme Court of Canada ruled that the school board and union both had a duty to accommodate Mr. Renaud. The school board said it had not accommodated Mr. Renaud because it wanted to avoid violating the collective agreement and having a grievance filed against it. The court said it is relevant to review a collective agreement, to see what hardship might be involved in violating its terms. But, a grievance in this case would not constitute undue hardship. Anyway, such a grievance would not be successful because unions and employers cannot contract out of human rights law. The court also said that objections to an accommodation from other workers could be considered when

determining hardship.

The union argued an employer should exhaust all reasonable accommodations that do not contravene the collective agreement, before adopting accommodation measures that violate it. The court disagreed. They said the most reasonable accommodation might be one that required union approval for a change in the collective agreement, as in *Renaud*.

The court decided unanimously that the employer and the union discriminated against Larry Renaud by failing to accommodate his religious beliefs.

The violation of a collective agreement, might, but does not necessarily, constitute undue hardship. In this case, the fact that other workers would have to work Saturday slightly more often, to accommodate Mr. Renaud, was not deemed undue hardship.

But, worker objections could constitute undue hardship. "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 an irrelevant consideration" (*CUPW v. Canada Post Corporation*).

ACCOMODATION AND SENIORITY

Seniority and job security provisions are, in part, traditional ways that unions accommodate. As workers age they tend to lose their strength and health, but in unionized workplaces they accumulate seniority. So, it is not the young, healthy and strong who get first chance at a job. Senior workers get first refusal on the "good" jobs, often the ones that are less physically demanding or taxing in other ways.

But, "where seniority acts as a wall rather than an equity enhancement – such as in cases of separate seniority lists within the same collective agreement – then it may very well be found to be a discriminating barrier" (Lynk).

The few cases on seniority and accommodation that have been heard indicate that accommodation requirements can trump seniority provisions.

Lise Goyette and Nicole Tourville were telephone agents in a primarily female department. The departmental seniority system prevented them from moving into male-dominated ticket office jobs, because they could not accumulate enough hours in the other department. Following a Human Rights Commission employee's recommendation, a straight seniority system was adopted. This caused problems because workers could be bumped by people from other departments. Lay-offs were announced. Tensions mounted. The union members voted to readopt the original departmental system. This meant male workers with less straight seniority qualified for ticket office jobs over female telephone agents with more straight seniority.

A tribunal ruled the union had committed systemic discrimination against the female-dominated operators. They assessed damages for hurt feelings and loss of salary and benefits. The seniority system was modified to comply with the statute in the next round of negotiations.

In *Greater Niagara Regional Hospital* a registered practical nurse with back problems was accommodated in the clerical bargaining unit. The clerical union did not object to the appointment, but challenged the fact she brought over her full nursing seniority. This was especially problematic because lay-offs were in the wind. The arbitration board, based on *Renaud*, found this was “significant interference” in the rights of clerical bargaining unit members and ruled in favour of the clerical union.

Case law suggests it is acceptable for a junior worker seeking accommodation to jump ahead of more senior workers when a vacancy is posted, provided no alternative accommodation possibilities exist. But, incumbents cannot be removed from their current job to accommodate someone. For example, disabled workers returning to work after an absence cannot bump other employees out of their jobs.

RETURN TO WORK

However, one of the most common sources of tension around accommodation is the return to work of a worker with a disability. Up to four possibilities must be considered:

Can the worker perform:

- The existing job without modification?
- The existing job with modification?
- Another job without modification?
- Another job with modification?

Workers must be able to perform the essential duties of the positions they are assigned, but the employer must be willing to adjust the workplace, unless it causes undue hardship, to make this possible. Adjustments include: physical adaptation of the workplace, elimination of non-essential duties, obtaining help from other workers and changing schedules.

Unions often have to press the employer to be diligent in accommodating a returning employee. Tensions also arise when unions have to balance the interests of a returning worker against those of other members who may have to adjust to facilitate the accommodation.

An accommodated worker must perform useful, productive work. But, when a worker is returning to work with modified duties, it is acceptable, during

the first stages of the “work hardening process”, if that person is not of much short-term economic benefit.

DOES THE UNION HAVE A RESPONSIBILITY TO ENSURE ACCOMODATION?

The employer is primarily responsible for ensuring accommodation, but unions sometimes share the responsibility. In *Renaud* the Supreme Court said a union could become liable for discrimination in two ways - causing or contributing to discrimination in the first place or impeding the employer’s efforts to accommodate. If a union fails to correct a discriminatory collective agreement it becomes liable for the effects of discrimination and may have to pay damages.

Gohm was one of several cases where the collective agreement failed to accommodate a Seventh Day Adventist’s need to observe the Sabbath. The union would not agree to modify the collective agreement, and was found jointly liable with the employer.

However, a union may be exonerated if it has tried to amend a discriminatory clause. In *Thompson v. Fleetwood Ambulance* the collective agreement reduced vacation entitlement for every full month a worker was absent. This discriminated against workers with disabilities. The union showed that over several rounds of negotiations it had tried to have the provision changed, so was cleared of liability.

The union has a duty to represent the best interests of all its members. It may question proposed accommodations that help one or more members, but could hurt the rights of others. It can propose alternative accommodation solutions that are less hard for the membership, but it cannot contract out of human rights law.

Even individual union officers may be liable if they support discriminatory provisions during bargaining. In *O’Sullivan v. Amcon* an Ontario Board of Inquiry said a union officer who supports a discriminatory clause during negotiations may be personally in breach of the statute.

HOW CAN WE REDUCE TENSIONS AROUND ACCOMODATION?

Unions may use complementary approaches to reduce tensions and minimize problems around accommodation.

A) AUDIT THE COLLECTIVE AGREEMENT

An audit of the collective agreement reduces the likelihood of difficulties arising in the first place. The agreement should explicitly prohibit discrimination.

It should deal specifically with accommodation and specify that workers with a disability may perform available bargaining unit work. It should be clear what collective agreement rights workers retain if available work is broader than work in their original bargaining unit.

The agreement should include adequate definitions. For example, "disability" should be defined broadly enough to include temporary disability.

To correct any problems unions need to negotiate contract provisions that foster inclusive and barrier-free workplaces. This reduces the need to regulate specific problems, reduces the likelihood that individuals who require accommodation will be scapegoated, and reduces the chance of other workers resenting the "special treatment" extended to people who require accommodation.

B) REVIEW ACCOMODATION PROCEDURES

Unions should check the procedures used to solve accommodation problems at the workplace. If it is employer policy, does it meet all members' needs? Are union leaders, stewards and the general membership familiar with its provisions?

If accommodation provisions are in the collective agreement and if union and management run some procedures jointly, are the rights of members to grieve and go to arbitration fully protected?

Does the procedure:

- Identify clearly what accommodation is required?
- Identify positions that could be used for accommodation?
- Include the possibility of training as part of accommodation?
- Provide for permanent accommodation, temporary accommodation and work-hardening measures?
- Provide for adequate severance provisions if accommodation cannot be provided short of undue hardship?

Many tensions centre on the provision of medical information. Unions should ensure that it is clear:

- Under what circumstances medical information is required;
- whose doctor (the worker's or the employer's) will provide the information;
- who pays for medical opinions;
- if the employer can require medical examinations; and

- whether the worker has access to all results

EDUCATION

Finally, many of the tensions that arise around accommodation result from a lack of information and understanding. Unions must educate their leaders, stewards and grass roots members on accommodation: What is the union position? What does the law say? How should different accommodation issues be handled? Why is it important to protect the rights of workers who need accommodation? How can other workers facilitate accommodation?

Workers realize that a misfortune which has visited a colleague might one day visit them. This is the starting point for developing a firm union position on the duty to accommodate.

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