An Overview of The Duty To Accommodate Canadian Employees

It's a two-way street

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The workplace is no longer what it used to be, and the circumstances that an employer must accommodate continue to expand. Employers are sometimes caught off guard by requests for non-traditional types of accommodation, such as childcare obligations, medicinal marijuana, or gender identity. Employers expose themselves to significant liability if they fail to respond to these requests appropriately. Unfortunately, many make the mistake of dismissing unusual requests for accommodation without proper consideration. Such a mistake could be very costly!

Why must we accommodate?

So, where does the obligation to accommodate come from? Human rights legislation across Canada, such as the Canadian Human Rights Act and the Ontario Human Rights Code, defines discrimination as the adverse treatment of a person on the basis of a protected ground. Such legislation is intended to provide equal opportunity to all citizens and prohibit discrimination based on various protected grounds, including race, religion, age, sex (including pregnancy), sexual orientation, family status, gender identity and expression, disability, and many others.[2] One of the underlying purposes of such legislation is to eliminate discrimination that impacts the rights of traditionally disadvantaged groups.To prove discrimination, an employee must show that there is a connection between the negative treatment and one of the protected grounds (for example, the employer's failure to accommodate an employee who has a disability). Discrimination, in and of itself, is not unlawful—for example, a policy of refusing to hire any candidate who wears a blue shirt in an interview is discriminatory, but not a breach of human rights. Once the employee establishes that the employer has engaged in discriminatory conduct that is contrary to human rights legislation, the onus shifts to the employer to justify the conduct.

This paper will examine the duty to accommodate Canadian employees. It will address some of the legal requirements for employers across Canada and will look at how employers should respond to requests for accommodation.

Why must we accommodate?

Employers are required to accommodate individuals to the point of "undue hardship," where the need for accommodation relates to a ground protected by human rights legislation. For example, an employee may request accommodation for a disability. In such a scenario, the employer would be obligated to accommodate the employee's needs up to the point of undue hardship. The law is very clear that employees are not entitled to their preferred accommodation, but only to a reasonable accommodation that meets their needs.

Employers are obligated to accommodate the employee's needs, not preferences.

The accommodation process is a two-way street: both parties have obligations to fulfil in this process. On one hand, employees must participate in the accommodation process by providing sufficient information, so their employer can make an informed decision about appropriate accommodations and how they can be meaningfully implemented. On the other hand, employers are obligated to genuinely consider any request for accommodation and to take active steps to make inquiries where the employer knows or ought to know of a need for accommodation.

The objective of the duty to accommodate is to ensure the employer is engaged in a serious effort to consider and assess the issue of accommodation in all of the circumstances of the case. Any accommodation policy should be applied to the individual circumstances of the employee.

Employees must participate in the accommodation process by providing sufficient information.

Undue hardship and *bona fide* occupational requirements

Undue hardship is the limit beyond which employers are not obligated to accommodate. Employers are expected to exhaust all reasonable possibilities for accommodation before they can claim undue hardship, which is a high standard to meet.

Undue hardship includes cost, health, and safety considerations. In other words, employers will not be required to risk the health and safety of others to accommodate one employee, or to put the organization on the verge of bankruptcy. So, where is the line drawn? The analysis will vary from case to case. But one thing is for sure: it is not enough for the employer to say, "It costs too much." The employer must provide documentation to support its position. For instance, the employer can show that, given its size and financial situation, it would be impossible to provide reasonable accommodation, and, therefore, providing accommodation would lead to undue hardship. With respect to health and safety considerations, the employer should be prepared to provide objective evidence that it honestly believes an unreasonable risk exists.

Requests cannot be dismissed out of hand. Employers must be prepared to provide documentation of their efforts to assess their ability to accommodate and justify any conclusion that accommodation would result in undue hardship.

Employers need to provide evidence of undue hardship. It is not enough to say, "It costs too much."

Employers need to be careful, though. None of the following factors should be considered in determining whether there is undue hardship:

- customer or public preference that is based on prejudice or stereotyping
- discriminatory objections, such as other employees' objections to accommodations based on prejudice or attitudes inconsistent with human rights values

Aside from undue hardship, another exception is a *bona fide* occupational requirement ("BFOR"), e.g., a skill or characteristic that is essential to a job, without which the job cannot be performed. Like undue hardship, BFOR is also a high standard to meet.

Both undue hardship and BFOR are high standards to meet.

To establish a BFOR, the employer must show:

- the standard was rationally connected to job performance,
- the standard was adopted in an honest and good-faith belief that it was necessary to the fulfillment of that work-related purpose, and
- the standard is reasonably necessary to the accomplishment of that legitimate purpose.

An example of this would be a requirement for a driver to have an acceptable level of eyesight and an appropriate driver's licence.

Put simply, if the employer finds that removing a barrier or changing a workplace rule would create an undue hardship on the business, then the employer can show that the rule or practice is a BFOR, in which case the employer does not have to accommodate.There are potentially four types of workplace cannabis users:

- **Purely recreational users –** Employers have no duty to accommodate them, since there is no disability or addiction. Employees don't have a right to use recreational marijuana or be impaired at work. Employers can discipline employees who are purely recreational users and who are impaired at work. Having clear policies in place is key, since employers can then discipline based on breach of such policy.[3]

consider this:

An employee in a safety-sensitive position uses cannabis. Is the employer required to accommodate the employee? The answer depends on the type of cannabis user in question.

- **Addicts –** Addiction is recognized as a disability under human rights legislation, and as a result, an employee who has a marijuana addiction may trigger the employer's duty to accommodate up to the point of undue hardship, unless the employer can show that there is a BFOR (e.g. safety-sensitive position).
- **Prescription users –** Employers have to accommodate users of prescribed medical marijuana up to the point of undue hardship. Employers should have a written policy requiring employees to disclose the use of prescription medication, including marijuana, that might cause impairment. The employer can then work with the employee to see if their drug use can be accommodated.
- **Self-medicators –** Employers likely have a duty to accommodate; however, they may be able to show the duty was not triggered if there was no request for accommodation.

Furthermore, the employer will have to assess whether the use of marijuana will impact the employee's ability to do their job. For example, it may not result in impairment or may be used at such times that it will not result in impairment at work. In that case, it is irrelevant. Otherwise, the duty to accommodate may be engaged.

Even if the duty to accommodate would otherwise be triggered, the employer might be able to establish that requiring the worker to perform work safely is a BFOR, since the employee works in a safety-sensitive position. Note that just because a workplace or industry is considered safety-sensitive does not mean the position itself is safety-sensitive. When dealing with a specific scenario, employers should assess the particular position. If the position is safety-sensitive, then that will inform the undue hardship analysis.

Moreover, during the accommodation process, some hardship is expected—the threshold is undue hardship, and the bar is high. The magnitude of the safety risks will likely be critical to finding undue hardship. For example, what if the employer cannot measure cannabis impairment (including residual impairment), and, due to that, the employer cannot manage the safety risks arising from it in a safety-sensitive position? In such a scenario, the employer is likely going to be able to establish undue hardship.

The accommodation of medical cannabis used to treat a disability should be treated the same way as any other accommodation. Accommodating disability includes accommodating the treatment associated with it.

Types of accommodation

Accommodation can take many different forms, but examples may include:

- leave of absence
- removing physical barriers (e.g., building a wheelchair ramp)
- modified ergonomic conditions (e.g., specialized computer equipment)
- modified duties
- modified hours
- temporary assignments (e.g., light duties until recovery from back surgery)
- placement in a different role or position

This list is not exhaustive. The type of accommodation that is appropriate in a given scenario is based on a variety of factors, such as the employee's needs and options for reasonable accommodation, as well as cost, health, and safety considerations. Note that accommodation can include a reduction in compensation.

Importantly, to be accommodated in their current positions, employees must be able to perform the "essential duties" of the position. Otherwise, an employer is entitled to consider accommodation options outside of the current position, such as placing the employee in a different role.

When is the duty to accommodate triggered?

The employer's duty to accommodate is often triggered when an employee requests an accommodation. But what happens when the employer suspects that the employee has a disability and may need accommodation? What is the employer obligated to do then? Is there a duty to inquire?

consider this:

An employee has performance issues, including recurring mistakes in violation of the employer's policy. He discloses his diagnosis of attention-deficit/ hyperactivity disorder (ADHD) to his supervisor. This disclosure is sufficient to trigger the duty to accommodate, and the employer would be obligatedto inquire into whether the disability had any role in the recurring mistakes made by the employee.

Even if the employee had not told his supervisor, if there were any indications of a disability, then the employer may be obligated to take active steps to inquire as to whether there was a duty to accommodate. Otherwise, the employer risks breaching its duties under the applicable human rights legislation.

An employer cannot bury its head in the sand and choose not to inquire, in order to avoid a duty to accommodate.

What constitutes appropriate documentation?

Any request for accommodation must be accompanied by appropriate documentation, but, in many cases, the parties cannot agree on what that means. There has been significant confusion about the type and scope of medical information that is required to support a request for accommodation. On one hand, employers often mistakenly think they are entitled to an employee's entire medical file, or, at the very least, the diagnosis. On the other hand, employees often assume that their right to privacy means they can request disability-related accommodation without providing any supporting medical documentation whatsoever.

So, what constitutes appropriate documentation?

In fulfilling their duty to accommodate, employers should limit requests for information to those that intrude on the employee's privacy as little as possible, while providing sufficient information to understand the nature of the functional limitations on the employee's ability to carry out their duties. In fact, the Ontario Human Rights Commission has developed a Policy on ableism and discrimination based on disability[4] which includes important guidance on the medical documentation to be provided[5] when a disability-related accommodation request has been made. The policy is clear that the focus should always be on the "functional limitations" associated with the disability, not the diagnosis.

What does this mean in practice? In order to support an accommodation request, this policy indicates that the medical information to be provided should include:

- that the person has a disability
- the limitations or needs associated with the disability
- whether the person can perform the essential duties or requirements of the job, with or without accommodation
- the type of accommodation(s) that may be needed to allow the person to fulfill the essential duties or requirements of the job
- regular updates about when the person expects to come back to work, if they are on leave

When implementing appropriate disability-related accommodations, the employer does not have the right to know a person's confidential medical information, such as the cause of the disability, diagnosis, symptoms, or treatment, unless these clearly relate to the accommodation being sought, or the person's needs are complex or unclear and more information is needed in order to meaningfully implement such accommodation. If the employer needs more information about a person's disability to make an informed decision about the accommodation, the information requested must be the least intrusive of the person's privacy.

Employers should request information to understand the limitations on the employee's ability to carry out their job functions.

For example, in the case of accommodating employees who use medical marijuana, an employer should obtain as much information about the employee's restrictions and limitations as possible, including determining the impact on the employee of consuming medical marijuana and their ability to carry out their duties. This requires clear documentation from the prescribing physician regarding the impact of the medication on the individual, as the need for accommodation will have to be assessed on a case-by-case basis. Employers cannot assume that any employee prescribed marijuana poses a safety risk and must review the evidence before making any decision.

practice tip: ***Do not stereotype!***

Potential liabilities

Employers can face significant liabilities for failure to accommodate. Courts and tribunals have broad powers with respect to remedy, including reinstatement with back pay (even years after an employee's employment comes to an end), general damages for discrimination, wage-loss recovery, public-interest remedies, human rights training, and forced sensitivity courses. Even if an employee is not discriminated against, human rights tribunals will find liability when an employer mishandles a discrimination complaint. Accordingly, the risk of liability due to failure to accommodate cannot be overstated.

Employers expose themselves to significant liability if they fail to respond to accommodation requests appropriately.

Some examples of awards across Canada include:

- ***In Fair v Hamilton-Wentworth School Board,***[6] the employee was a supervisor in the Regulated Substances department of a school board, specifically dealing with asbestos. She was diagnosed with generalized anxiety disorder, which was related to the stressful nature of her job. The employee requested accommodation in any supervisor position that did not include asbestos removal. However, the employer found the medical evidence restricted her from all supervisory positions and dismissed her for refusing to return to her previous position. Approximately 8.5 years after dismissal, the Tribunal held that the school board had failed to accommodate her by failing to consider other options for accommodation, and it awarded her reinstatement to an accommodated position, over $400,000 in lost wages, no loss of seniority, up to six months of training, retroactive pension contributions, and $30,000 as compensation for injury to dignity, feelings, and self-respect. The school board's application for judicial review was dismissed by the Divisional Court, and its appeal was dismissed by the Ontario Court of Appeal.
- ***In Trinh v CS Wind Canada Inc,***[7] the employer was ordered to pay its former employee nearly $60,000 in damages after the Tribunal found that she had no choice but to resign due to discrimination, repeated harassment, and failure to accommodate her disability and pregnancy-related need to work reduced hours. In this case, the employee worked very long hours, seven days a week. Due to her doctor's advice during the early stages of her pregnancy, she requested accommodation and was refused. When she asked again, she was told she would be fired if she worked reduced hours. Due to fear of losing her job, she continued, but had to go on sick leave due to pregnancy complications. When she returned to work after her maternity leave, she was harassed and was referred to as a "stupid Vietnamese woman" at a staff meeting. The Tribunal awarded $25,000 for injury to dignity, feelings, and self-respect; $16,399.29 for unpaid bonuses and raises that had been denied due to discrimination; and $18,475.75 for lost earnings as a result of discrimination and her forced resignation. The employer was also required to review its human rights policy and provide training to its managerial staff.
- In an arbitration decision, ***Bakery, Confectionery, Tobacco Workers and Grain Millers International Union (BCT), Local 406 v Bonté Foods Limited,***[8] an employee who had been working at the company for approximately 14 years was terminated for cause for violating the safety policy. The employee had ADHD, which he had disclosed to his employer, which triggered the duty to accommodate. The arbitrator ordered reinstatement, but in a different work environment. In addition, the arbitrator directed that the parties make efforts to implement strategies to assist the employee in his workplace re-entry.
- In ***Haftbaradaran v Saturna Beach Estates,***[9] the employee was injured while working, and, as a result, could not carry out daily activities without significant pain. He could not carry out his work duties or even meet with his employer, and, thus, his employer terminated his employment. The employer did not provide any accommodation and did not prove that it would have experienced undue hardship had it accommodated his disability. The Tribunal awarded $15,000 for injury to dignity, feelings, and self-respect. It did not award wage loss, as the employee was not able to work after the injury.
- In ***Simpson v Pranajen Group Ltd. o/a Nimigon Retirement Home,***[10] the Tribunal found that an employer discriminated against a personal-support worker by failing to accommodate her special childcare needs. The Tribunal found that her employment was terminated, at least in part, because she was unable to offer more flexible hours due to her childcare obligations. The Tribunal awarded a remedy of $30,000 in compensation for injury to her dignity, feelings, and self-respect.

How to respond to requests for accommodation

It is crucial to have an accommodation policy and process. In responding to requests for accommodation, employers would be well-advised to adopt the following practice tips:

- Have one process for responding to all requests for accommodation, even those that may seem unconventional (such as medical marijuana or childcare obligations). The process should be a two-way dialogue between the employer and the employee (and a three-way dialogue if a union is involved). Maintain communication with the employee throughout the process.
- Do not dismiss any requests out of hand.
- Require appropriate information, including medical documentation, if applicable, speaking directly to the employee's ability to do the job. Do not request specific diagnosis, information irrelevant to job duties, or the entire medical file. Requests for information should be justifiable.
- Research and educate yourself. Work with the employee to understand the needs and limitations, and how the ground intersects with job duties. Do not stereotype.
- Assess whether there is a legitimate need for accommodation.
- Consider options for accommodation. Employees are not entitled to their preferred form of accommodation. Employers are entitled to ascertain what options are available and choose a reasonable option. In considering whether the accommodation would cause undue hardship, and in comparing available options, employers can consider the cost, outside sources of funding, and health and safety requirements of the job (if any). Remember, some hardship is acceptable.
- Document all considerations and assessments. It will help prove that you have taken every step up to the point of undue hardship, and, as a result, you will be in a much stronger position to defend a discrimination claim.
- If you cannot accommodate without undue hardship, clearly explain this to the employee and be prepared to show why this is the case.
- Maintain confidentiality.
- Monitor and adjust the steps taken, as the employee's needs or the employer's circumstances might change over time.

practice tip: ***Employees are not entitled to their preferred form of accommodation, but to a reasonable form of accommodation.***

Conclusion

Employers and employees alike must remember that the accommodation process is a two-way street. Employees must provide supporting documentation in order to allow their employer to assess and implement options for reasonable accommodation. This does not mean that they have to provide their diagnosis or their entire medical file; however, they must provide sufficient information speaking directly to their ability to do the job. The focus is to be
on limitations, not disabilities.

Similarly, employers have an obligation to ensure that their workplaces are free of discrimination. Such behaviour must be immediately addressed with proper investigation and/or accommodation. Otherwise, employers expose themselves to significant liability for violating employees' human rights, as well as negative publicity, poor morale, decreased productivity and absenteeism. It will certainly not help an organization to earn a reputation as an "employer of choice" if they are seen to be discriminatory or unwilling to accommodate the legitimate needs of
their workers.

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References:

1. Rudner Law is a Canadian law firm specializing in all areas of Canadian employment law. For more information, please visit our website at www.rudnerlaw.ca.
2. The specific grounds protected by human rights legislation vary from province to province.
3. See University of Windsor v Canadian Union of Public Employees, Local 1001, 2017 CanLII 9594 (ON LA), which upheld the right of a university to fire two janitors found smoking marijuana on campus.
4. <http://www.ohrc.on.ca/en/policy-ableism-and-discrimination-based-disability>.
5. <http://www.ohrc.on.ca/en/ohrc-policy-position-medical-documentation-be-provided-when-disability-related-accommodation-request#_ftn1>.
6. 2016 ONCA 421; 2014 ONSC 2411; 2012 HRTO 350; 2010 HRTO 1712.
7. 2017 HRTO 755.
8. 2017 CanLII 12517 (NB LA).
9. 2017 BCHRT 184; 2017 BCHRT 271.
10. 2019 HRTO 10.

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