



FPSE **UPDATE** **ISSUES**

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Duty to Accommodate: Making Accommodation Work in the Workplace



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Over the last twenty years, a number of Supreme Court of Canada decisions have not just confirmed, but also defined and framed the extent to which an employer must make reasonable accommodations at the workplace, to ensure that there are no discriminatory barriers to an individual's full participation at work (based on, for example religion or disability). In BC, these decisions have helped further define how an individual's protection under legislation like the BC Human Rights Act gives real meaning in a workplace setting.

Although much of the emphasis in the duty to accommodate is focused on an employer's responsibilities, in a unionized workplace, the duty to accommodate also has implication for the union. This Update provides an overview of the most current information on the duty to accommodate. It is designed to reinforce the work done by FPSE Labour Relations Staff Representatives who regularly provide counsel and advice to FPSE Locals on this and other labour relations issues.

What is the duty to accommodate?

The 'duty to accommodate' is a legal requirement arising out of human rights legislation and case law in Canada. Although "duty to accommodate" is not found in *the BC Human Rights Code*, a series of Supreme Court of Canada decisions confirm the duty exists and applies to all provincially regulated employers. Where a barrier exists, or a policy or practice has

adverse consequences on an individual in a protected group, the law says that the employer should reasonably accommodate that individual's difference provided they can do so, without incurring undue hardship, or without sacrificing a *bona fide* or good faith requirement of the job.

What does undue hardship mean?

Courts have determined that accommodation efforts must go to the point of undue hardship. While 'hardship' on its own infers a degree of effort is required, the threshold as to undue hardship is actually quite high. However, once an employer reaches that point, their legal duty to accommodate may be discharged. Factors that are used by the courts to assess the threshold include: financial costs; health and safety risks; and size and flexibility of the workplace. While a successful resolution to an accommodation request will vary greatly from one employer to another,

more than mere inconvenience or disruption is expected in all situations.

What is a union's responsibility in the search for accommodation?

Unions play a pivotal role in the accommodation process. While the employer has the primary duty to provide reasonable accommodation, the union also shares that responsibility.

The union will share responsibility where the union has participated in forming a discriminatory work rule, including provisions in a collective agreement.

A union may not impede the reasonable efforts of an employer to accommodate an employee. For example, the collective agreement may contain provisions on hours of work that exclude employees who refrain from work on their Sabbath.

The union has a positive obligation to participate in facilitating the accommodation process, however, as part of that process, the union would first look to solutions which do not impact the collective agreement and if none could be found then the union could make an exception to its collective agreement.

In the case of the employee who observes a Sabbath day, a union could make an exception to its collective agreement, the union and employer could arrange for the employee to make alternate shift arrangements. And the rule itself could be changed when

the collective agreement is next re-negotiated.

The relationship between the employer's and the union's responsibilities must take into account the union's duty to represent the best interests of all its members. If the union does not agree to an accommodation proposed by the employer, it must put forward alternative measures that it believes are less onerous for its members.

In some situations, the best accommodation conflicts with the collective agreement or with the rights of other union members. In these situations, the union will have to work with the employer to amend the collective agreement.

What if the accommodation conflicts with a collective agreement?

The duty to accommodate prevails over private arrangements such as collective agreements. However, a substantial departure from the normal operation of the collective agreement may amount to undue interference and may accordingly constitute undue hardship.

Union members have a legitimate interest in ensuring that the employer implements the terms of the collective agreement. Some employers and unions have developed joint "accommodation committees" to maximize opportunities to accommodate and minimize the impact

of accommodation on the collective agreement.

It is legitimate to be concerned about the impact that an accommodation will have on others. However, you have to show more than minor inconvenience to overrule the employee's right to be accommodated.

What constitutes a disability for the purposes of accommodation?

A disability is a physical or mental condition that is both:

- permanent, ongoing, episodic or of some persistence, and;
- a substantial or significant limit on that person's ability to carry out some of life's important functions or activities, such as employment.

Disabilities include visible disabilities, such as the need for wheelchairs, and invisible disabilities, such as cognitive, behavioral or learning disabilities.

How long does an employer have to accommodate an employee who is absent from work due to a disability?

An employee's disability can lead to extended absences from work, which may be an undue hardship for the employer. Each case needs to be considered individually. Case law has not established a time limit or time formula for determining when a disability-related absence becomes an undue hardship. Here are some ways in

which an extended absence can create an undue hardship.

- The employer may be unable to attract or retain persons qualified for the position because it is not being offered permanently.
- The cost of paying an employee's benefits while that person is not working may become an undue hardship.
- The employee's skills may become outdated.
- A new business focus or approach may no longer require the employee's skill.

Undue hardship due to absence is determined case by case. At some point, absenteeism will frustrate the employment contract, as the employer is unable to benefit from the contract.

Useful steps toward successful accommodation

The BC Human Rights Coalition has developed a useful checklist approach for employers who are committed to making accommodation arrangements work in their workplace. As well, the BCHRC also provides some useful guidance to those seeking accommodation at their workplace. Both lists are summarized below and provide an important framework for local unions that are dealing with duty to accommodate issues in their institution. In addition to this information, FPSE Labour Relations Staff Representatives have a wide range of experience on this issue and

can provide more specific advice to locals interested in developing new accommodation policies.

Guidance for employers

- Establish an accommodation process that respects the dignity and the privacy of the person seeking accommodation;
- Ensure an inclusive process that allows for multi-party participation;
- Consider and facilitate the process of accommodation once a request has been made;
- Determine if a particular request is based on a protected ground of discrimination;
- Confirm and secure additional relevant information necessary to assess the accommodation requirements. This may include a medical assessment that identifies abilities or restrictions related to the request, or information that speaks to specific religious requirements;
- Involve those seeking accommodation; listen to and consider their suggestions;
- Consider and assess each accommodation request on an individual basis; there is no 'one-size' fits all solution to accommodation;
- Be prepared to bear the cost of required medical information or other documentation;

- Be willing to take substantial and meaningful measures to secure an appropriate accommodation;
- Be flexible and creative. Aim towards identifying the best option suited to the needs of the individual, while respecting the privacy, the autonomy, and the integration of the individual;
- Reply to requests in a reasonable time period and keep records of all actions taken.

Guidance for those seeking accommodation

Just as the courts have provided guidelines for employers in the accommodation process, so too have they commented on corresponding roles and responsibilities of those seeking accommodation. Many are outlined below:

- Through your union, where possible, advise or inform your employer of your need for an accommodation;
- Provide support and assistance in facilitating the process by providing sufficient information as to:
 - why the accommodation is required (a religious requirement, a physical or mental disability, or because of pregnancy or family status);
 - support your request by providing evidence and / or information (i.e. medical or

doctors reports that speak to limitations / restrictions or information that explains specific religious requirements);

- make suggestions that would work for you (i.e. a specific adaptive software or hardware devise, extra sick days to allow for increased illness during pregnancy, etc.); and
- how long the accommodation is required.

Generally, you are only obligated to discuss your requirements with management although you should cooperate with experts whose assistance may be required;

- Allow a reasonable amount of time for your employer to reply or respond to your request;
- Always participate and cooperate in efforts to make the accommodation work;
- Be flexible. Reasonable accommodation may mean something less than a perfect solution; be prepared to consider retraining, relocating or rebundling of work in order to take on different job related duties;
- If your requirements change, make sure you let management know;
- If a solution is offered and you accept it, get it in writing;
- If the process loses momentum,

provide additional information that may help re-activate it;

- If your employer claims they are unable to fulfill your request, ask through your union for written details that explain the decision;

Conclusion

It is important to remember that there is no obligation on employers to provide the *perfect solution*. The employee must be prepared to accept an accommodation that provides a reasonable solution.

Although the accommodation process can sometimes seem confusing and intimidating, it is a legal right that infers a corresponding legal duty. All parties have a vested interest in achieving a resolution. Often, the best solutions are achieved when those involved cooperate with one another and respect each of their corresponding roles and responsibilities.

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