Introduction

We live in a very diverse and multicultural society. People from different nationalities, different ethnic backgrounds, different religions cross paths every day, be it socially or in their work environment. People with physical and mental disabilities can also be seen in many places, including the workplace. But these very different people do not all have the same needs. Needs and expectations of people vary depending on their physical condition, disability or illness, or the way they worship.

So how do we meld these different cultures and expectations to create a workplace that is barrier free and provides a respectful environment for all employees? How do we accommodate all these different people?

What is Duty to Accommodate?

According to the Canadian Human Rights Commission (CHRC), duty to accommodate is a legal principle that requires employers to identify and change any rules, practices, expectations or procedures that have or may have a discriminatory impact based on the CHRA's prohibited grounds; namely, race, national or ethnic origin, colour, religion, age, sex (including pregnancy), sexual orientation, marital status, family status and disability.

Furthermore, in accordance with the *Canadian Human Rights Act* and the *Employment Equity Act*, all federal sector employers are legally obligated to provide a work environment that is barrier free and in which all people have equal access to opportunity. Federal public sector employers must identify and remove any such barriers to ensure full participation in the federal public service.

Canadian human rights legislation recognizes that all employees should be treated equitably and with respect. While respect obviously means the way one person interacts with another in their speech and actions, it also means accommodating certain specific needs that some people may have, such as

observing different religious holidays and observances or being in a wheelchair.

All workplaces have rules that apply to everyone, such as a dress code or the prohibition to consume alcohol. However, in some instances, these rules or policies can create barriers for certain persons.

What is a Disability?

While there are many different kinds of disabilities, Treasury Board has recognized the following:

- blindness or other severe visual impairment
- deafness or other severe hearing impairment
- mobility
- chronic pain
- environmental sensitivities
- addictions
- learning disabilities
- speech impairment
- chronic conditions such as diabetes
- psychiatric disabilities
- developmental disabilities
- other permanent or temporary conditions that cause pain or limit or restrict activities

"Fit to Work" Assessments

In most cases of duty to accommodate based on medical grounds, the employee is under the care of his own physician. In some cases, however, the employer may request a second medical opinion . In the core federal public sector, the employer may request that the employee see a Health Canada physician and submit a "fit to work" evaluation.

What is meant by "Fit to Work"?

"Fit to work" is a medical assessment done when an employer wishes to be sure an employee is capable of performing the duties and responsibilities of a specific job. The purpose is to determine if the employee can perform the job or task under existing working conditions. Fit to work assessments are most often done after an illness or injury, but are sometimes done as a precondition to employment in certain fields such as firefighter or airplane pilot or as a condition of a job transfer. They may also be done in order to determine what sort of accommodation is required in the case of an employee returning to work after an injury or illness. Among other things, such accommodations could take the form of changes to an employee's work

schedule, modifications to work equipment such as computers, or an agreement to allow the employee to work from home part-time or full-time.

Situations which may lead to a Fit to Work Evaluation

There are a number of different situations which may lead a department to request a fit to work evaluation. For example, departments can request such evaluations:

- when an employee has been exposed to a health hazard (e.g. chemical spill);
- as a result of a job change where the employee will be exposed to different hazards;
- if an employee appears incapable of performing the duties of his position because of reasons of physical or psychological health;
- if an employee is absent for a long period and no return date is set; or,
- if an employee is returning to work after a long period of leave and the employer is concerned with his/her ability to perform the duties of his/her position.

Why are Fit to Work Evaluations used?

These evaluations may be helpful in determining:

- if employees are able to continue to work without detriment to their health or that of others;
- if a candidate meets the health requirements of a specific position prior to appointment; or,
- the conditions under which employees with illnesses, injuries or disabilities are able to continue to work.

The employer is not entitled to obtain a diagnosis. That information is confidential and should not be released to the employer. The employer ***is*** entitled to a prognosis on whether the employee is fit for work. If not, what are the limitations faced? How can the employee's health condition be accommodated?

Fit to work evaluations conducted by Health Canada are not intended to replace a medical examination or treatment carried out by personal or family physicians. It should be noted that, upon the employee's written request, any information obtained from the fit to work evaluation will be sent to the employee's physician by Health Canada.

It is important to note that if a return to work plan has been developed and approved by the employee's physician and the insurance company's rehabilitation staff, a fit to work evaluation is not mandatory for departments. Normally, in cases of accommodation, a fit to work evaluation should be requested only when the employee's physician has not provided sufficiently detailed information to enable management to determine what specific accommodation measures are necessary. To this end, it is suggested that employees urge their personal physicians to be as precise as possible in recommending specific accommodation measures.

Fitness to Work Evaluation Process in Cases of Illness

As a first step, an employee should provide the employer with a medical certificate obtained from his/her personal physician, stating the necessary accommodation measures.

Should this not prove sufficient to the employer, managers must, in accordance with departmental policies, inform an employee that a fit to work evaluation is required and provide the reasons for the request. The employee must consent to it. Should an

employee refuse to undergo a fit to work evaluation, a departmental staff relations advisor is consulted. In such cases, members should contact their union representative. In many cases, the union representative will be able to persuade the employer to drop the request for a fit to work evaluation providing that the employee returns to his or her physician and requests a more detailed report providing more specific guidance as to necessary accommodation measures.

If the employee agrees to the fitness evaluation, the employer will send an explanatory letter containing factual, objective and pertinent information related to the purpose of the referral to the Health Canada occupational health physician.

Should the employer request a fit to work evaluation, the employee may see his own physician. In such cases, the department will provide the appropriate Health Canada medical form, a description of the work, including the hazards, the extent of exposure and the use of protective equipment. The physician fills out the appropriate forms, performs required tests, and forwards results to Health Canada. The employee should also consent, in writing, that Health Canada contact his/her physician, should additional information be required.

All information which employees' physicians send to Health Canada should also be sent to the employee, thus ensuring transparency and preventing unauthorized release of personal information. It is important to note that medical references to an employee's condition must address only the accommodation measures required. Specific details regarding an employee's illness must ***not*** be included either by Health Canada or by the employee's personal physician.

Who Performs Health Evaluations?

Health evaluations are conducted by occupational health professionals, such as physicians, nurses or mental health specialists, hired by Health Canada. They must have knowledge of the employer's workplace health hazards, Occupational Safety and Health (OSH) legislation, human rights legislation and government policies.

Results of the Evaluation

Once the evaluation is completed, a written report of the results is sent to both the employer and the employee. As already mentioned, the report is not a diagnosis. It should outline the assessment of the employee's ability to carry out the duties and

responsibilities of their position and/or the employee's limitations or physical restrictions.

Should the employee be unable to perform the duties of his position under existing working conditions, the department must make every reasonable effort, to the point of undue hardship, to accommodate the employee. Employees who find that their managers are unwilling to provide the accommodation proposed by their personal physicians, or Health Canada, should consult their union representatives. If need be, the union representative can help them file a grievance or a human rights complaint.

Should a health problem be discovered in the course of an evaluation performed by a Health Canada physician, the individual will be referred to his or her own physician, and copies of medical records will be forwarded to the physician upon written request from the employee.

Should the employee's physician disagree with the Health Canada assessment, the physician should write a letter to the Health Canada physician who performed the assessment, as well as to the employer. The letter should clearly state the objections and reasons.

What Should the Employee Do?

- Speak to a health professional (family doctor, specialist, chiropractor, physiotherapist, etc.) about your illness or disability. See if they will support your request for accommodation in writing, explaining what you need to be able to work.
- Involve a union representative as early as possible. Explain the situation and what the health care professional feels is needed. The employer may trivialize the employee's illness, and the union representative can be a strong voice to overcome opposition.
- Request a meeting with the employer to discuss accommodation needs. The member should be prepared to explain the situation and how it needs to be accommodated. Remember that the employee is not required to reveal the nature of his illness, although it may be helpful to provide some general information.

What Must the Employer Do?

The duty to accommodate requires employers to identify, and eliminate, or amend rules that have an adverse effect on employees, and to include alternative arrangements that eliminate discriminatory barriers. This can

mean implementing flexible work arrangements to allow certain employees to deal with family situations or to pray at specific times. It can also mean adapting the work environment by designing all systems (e.g. computer equipment), processes (e.g. selection process) and facilities (e.g. building access) to assist employees with specific disabilities, such as being visually impaired or being in a wheelchair.

However, the duty to accommodate requires more from an employer than simply investigating whether an existing job might be suitable for a disabled employee. The law requires an employer to determine if existing positions can be adapted or modified for an employee requesting accommodation, or whether there are any other positions in the workplace that might be suitable for the employee.

While it may be easier for an employer to implement the simplest accommodation possible, the employer and the union are obligated to canvass viable options to accommodate a disabled employee by considering options that do not create undue impairment of the rights of others.

An employer is not required to provide the perfect accommodation where other

possibilities for reasonable accommodation exist. Employees do not have unbridled entitlements to dictate the terms of accommodation, and cannot require an employer to modify the requirements where there are no compelling reasons to do so.

The following are various options that an employer can look into when trying to provide accommodation to an employee.

Bundling of Duties

In agreement with the union, the employer may modify duties from a number of positions to accommodate the employee with a number of tasks he is able to perform. In such a situation, the accommodation must ensure that the arrangement enables the employee to return to work, while providing productive work for the employer.

Waiving Collective Agreement Provisions

The Supreme Court of Canada has decreed that collective agreement provisions are to be respected, but they may, on occasion, have to be waived if they unreasonably block a viable accommodation option. This means that a union may accept to waive certain parts of a collective agreement in ways that would not disrupt the rights of other employees as a way to provide alternative solutions to a challenging accommodation. However, a number of judicial

awards suggest that this option should only be used as a last resort.

Re-Training

The employer's obligation to accommodate may include the provision of retraining the employee, provided that the costs of such training would not amount to an undue hardship.

Job restructuring

An employer must look beyond the employee's existing position when considering possible accommodation options. In such situations, two requirements must be met: (1) an employee must be able to perform the essential functions of any accommodation position and (2) the employer is not required to offer a permanent accommodation position that is not productive.

Transfer

Commonly, the issue of a job transfer arises in the context of accommodation. This option varies from case to case and depends on whether a case for undue hardship has been demonstrated. Bearing in mind that an employee in a permanent accommodation situation must be able to perform the essential job duties of the position, an employee requiring accommodation cannot request to bump a more senior employee but the

employer can appoint that employee to a more senior position when it can be demonstrated that this accommodation causes the least amount of interference with the rights of other employees.

Demotion

Employers may place an employee requiring accommodation in a lower level position if, after an exhaustive search, no other reasonable accommodation can be found. However, in such cases, the duty to accommodate does not normally extend to maintaining the higher wage rate.

Workplace Standards

According to the Supreme Court of Canada, certain workplace standards such as heavy lifting or work schedules, may, unintentionally discriminate against certain employees according to protected human rights grounds such as gender or disability. Accommodation of such situations can usually be arranged following discussions between an employer, the employee and/or his union representative.

Ergonomics

In many cases, accommodating an employee is simply a matter of changing the employee's workstation, or adapting typing and mousing, voice-output devices, ventilation, arrangement

of furniture and installing ergonomic equipment.

"Last Chance" Agreements

Last chance agreements arise between an employer, an employee and his union. The agreement must include recognition by the employee of the nature of his problem (such as alcoholism) and is usually reached after all other possible means have been exhausted. It should be noted that some arbitrators have ruled that last chance agreements are discriminatory because they require an employee who has a disability to meet a higher standard than other employees. It should also be noted that other arbitrators have ruled that they are not bound by last chance agreements that provide for the termination of a substance-dependent employee before the employer may argue that all the necessary efforts of accommodation have been exhausted. A last-chance agreement is evidence of the fulfilment of the employer's duty to accommodate, whereas in fact it may be construed as compelling evidence that the point of undue hardship has been reached.

Creating a new job

Not an option as jurisprudence has demonstrated that an employer does not have to create a job in an effort to accommodate an employee.

Other Areas of Accommodation

When developing standards to be used for hiring or promotional purposes, employers are free to determine the relevant attributes that are required for a given position. These standards cannot directly discriminate against individuals nor have an adverse impact on applicants based on a prohibited ground as stated in the human rights legislation.

For example, some employers may require a certain dress code (i.e. uniform or protective gear) for its employees which may come into direct conflict with religious dress requirements. Another example would be certain employees of different faiths have to pray at different times during the day, which may be against the hours of work provisions of an employer.

Religion is a protected ground under Canadian human rights legislation and, therefore, requires accommodation to the point of undue hardship. In such cases, the employer must consider and grant requests for religious leave, including paid religious leave, unless undue hardship can be demonstrated.

Another example would be accommodation required for pregnant women who are unable to perform the full duties of their job. This can usually be done by allocating different tasks to

the employee during her pregnancy. However, various courts have ruled that employers must also provide an employee on maternity leave with all the same opportunities that she would have received had she been present in the workplace, such as opportunities for promotions.

Can Accommodation be Denied?

In the past an employee's complaint of not being accommodated was usually linked with discrimination. Courts approached discrimination cases by determining whether the discrimination was characterized as being "direct" or "indirect".

Direct discrimination occurs when an employer invoked very specific factors, for example, stating that only men could accomplish certain work, thus excluding women. Indirect discrimination occurs when less obvious factors were required for a certain job, such as needing to have a valid driver's licence.

While both direct and indirect discrimination were negatively affecting certain individuals, the courts would only entertain the Bona Fide Occupational Requirement (BFOR) defence in cases of direct discrimination.

The distinction between direct and indirect discrimination was reduced through amendments to the *Canadian Human Rights Act*. The Act now states that for any practice to be considered to be based on a bona fide occupational requirement or a bona fide justification, it must be established that the accommodation would impose undue hardship on the person who would have to accommodate taking into consideration health and safety and cost.

In 1999, the Meiorin and Grismer cases eliminated all distinction between direct and indirect discrimination when the Supreme Court provided a unified test to be applied consistently to all BFOR/BFJ defences. This change ensures that employers must provide accommodation to the point of undue hardship.

The test is based on determining whether an accommodation would cause undue hardship taking into consideration health and safety and cost. To meet these requirements, the employer must,

1. demonstrate that the standard was adopted for a purpose rationally connected to the performance of the job;
2. honestly believe the standard is necessary to fulfil 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 employees without undue hardship to the employer.

In order to deal with step 3 above, the following questions are asked:

- Have alternatives been considered?
- If so, and if they met the employer's needs, why were these alternatives not adopted?
- Must all employees meet a single standard, or could different standards be adopted?
- Does the standard treat some employees 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?

What is Undue Hardship?

In many places in the document, we have referred to “undue hardship”. Let’s take a moment to define that term.

Undue Hardship means the limit of an employer’s capacity to accommodate an employee without experiencing an unreasonable amount of difficulty. In other words, an employer is expected to provide accommodation to the point where doing so would bring about unreasonable difficulties based on health, safety and/or financial considerations.

If accommodating a person’s age or disability would pose an undue risk to the health and safety of that person or others, the employer may be able to establish undue hardship. For example, a city government may require that its firefighters be in peak physical condition to lug heavy firefighting equipment and/or victims. This would preclude physically impaired persons from performing those duties. If the employer were to allow them to perform them, it would put the safety of the public at risk.

If the cost of providing accommodation for an employee is so high it affects the survival of the business, the employer can argue undue

hardship. However, the mere fact of incurring costs is not sufficient to claim undue hardship. Factors such as the size of the operation as well as its financial resources and the availability of external financial assistance must also be considered. Major employers such as Treasury Board or the Canada Revenue Agency would have a hard time invoking financial hardship in order to dodge their duty to accommodate.

Accommodation can be denied in certain situations. An employer can deny accommodation if it does something in good faith for a purpose related to a job or service being offered, and where changing that practice to accommodate someone would cause undue hardship to the employer or service provider, taking into consideration health, safety and cost. This is called Bona Fide Occupational Requirement (BFOR) or Bona Fide Justification (BFJ).

Recourse Mechanism

Should an employee needing accommodation feel the employer has not met his responsibilities, two recourse mechanisms are available:

- Complaint under the CHRA
- Grievance under the collective agreement

S 40 (1) of the CHRA states that an individual having grounds to believe that a person is engaging in a discriminatory practice may file a complaint with the Commission, in a form acceptable to the Commission, and within one year of the date of the action giving rise to the complaint.

The Commission will look at the complaint and may decide to refer the plaintiff back to the grievance procedure contained in his collective agreement so that he exhausts the grievance and recourse mechanism available therein.

As all collective agreements contain non discrimination articles, a grievance must be filed. The following wording is suggested:

"I have a disability requiring accommodation. The employer has not provided me accommodation to the point of undue hardship, in violation of article XX and other related articles of the YY collective agreement and S 7 and other related sections of the CHRA. I therefore grieve."

The grievance form also requires the complainant to describe the required corrective action requested. Here is suggested language:

"That I be provided appropriate accommodation.

That I be paid at my substantive pay rate until appropriate accommodation is provided.

That I receive all lost pay and benefits due to the lack of accommodation.

That I be paid $20,000 for pain and suffering under S 52(2)(e) of the CHRA.

That I be paid $20,000 under S53(3) of the CHRA for the employer having acted wilfully and recklessly (if evidence allows an arguable case)

That I be made whole in every way."

It should be noted that an adjudicator can reinstate an employee into his current position but cannot order that a person be placed in a new job as this is a staffing action under the PSEA or an agency staffing program. An adjudicator can also order that an employee continue to be paid until suitable accommodation is provided.

Furthermore, since the grievance involves a violation of the collective agreement, it can go to adjudication. In such cases, notice must be given to the CHRC that a grievance has been referred to adjudication. The CHRC reserves the right to review the outcome of the

adjudication to ensure that the process was fair. The PSLRA now allows an adjudicator to interpret and apply the CHRA.

Furthermore, the PSLRA allows an adjudicator to give relief according to two sections of the CHRA. It can provide compensation to a maximum amount of $20,000 for pain and suffering. It can also provide an additional compensation to a maximum of $20,000 if it can be proven that the employer has engaged in a discriminatory practice willfully or recklessly. However, this is very difficult to prove.

Is There a Cost for Accommodation?

According to Treasury Board, approximately 20% of all accommodations are cost-free. While TB estimates that the average cost of accommodations is $1850, the Canadian Human Rights Commission states "…employers can accommodate most adaptation needs for $500 or less. These costs are even more reasonable when you consider them amortized over the entire duration of the employee's stay in your organization."

What Benefits Come from Accommodation?

Accommodation ensures that work environments are inclusive, barrier-free, and fair to all employees. Should this be the case, accommodation usually results in lower operational costs as fewer sick days are used, less time and money are spent on formal resolution processes such as grievances. It is also estimated that proper accommodation adds 5 years to the working life of an employee, thus reducing cost of employee replacement. All this results in a workplace that is creative in its problem-solving and where employees and clients are better understood and better served.

The Role of the Union

The *Employment Equity Act* stipulates that consultation and collaboration between employers and unions is mandatory.

As a whole, the union must:

- Review policies, procedures, practices and activities to identify and remove discriminatory barriers;
- Ensure that the collective agreement does not discriminate during the collective bargaining process and during the life of the collective agreement.

- Inform employer and employees of their right to accommodation and help foster an environment in which accommodation needs to be communicated;
- Inform managers and supervisors of their responsibilities regarding accommodation;
- Obtain all information necessary to assess the accommodation requirements such as a medical assessment which identifies abilities or work restrictions;
- Implement, with the agreement of the person requesting accommodation, measures that result in the least disruption to operations while meeting the needs of the employee requesting accommodation.

Role of the Steward

The steward can:

- Play the role of liaison between the employer and the employee.
- Take on an education role vis-a-vis other employees who may feel the employee being accommodated is a slacker or is getting a cushy job. The steward should always endeavour to explain the duty to accommodate process to colleagues.

- Since the steward is in the workplace, he may play an important role in assisting the ERO in finding suitable accommodations, bundling of duties, etc.
- Provide advice and guidance to the member needing accommodation.
- Work with the employer to address existing barriers in the collective agreement, ensuring that no new barriers are added.
- Follow up after the accommodation is implemented to assess whether it is working and to help address any issues that may surface.

Roles and Responsibilities of the Employer

- Ensures that the employee is aware of his right to accommodation, explains details about the workplace accommodation policy and distributes copies of the policy.
- Once a request is received, discusses the accommodation options with the employee.
- Takes notes and keeps records of all discussions about accommodation.
- Takes an active role in exploring alternative approaches and solutions to accommodate the employee.

- Obtains expert opinion and advice from a designated human resources or health specialist when necessary.
- Keeps information / medical records confidential.
- Grants accommodation requests in a timely, reasonable manner, to the point of undue hardship.
- Remains willing to review and modify the accommodation agreement if the circumstances change or the solution is no longer working.
- Provides details to justify decision where accommodation has ben denied.
- Advises employees about their right to appeal and theier right to approach the CHRC.

Roles and Responsibilities of the Employee

- Request accommodation when needed and suggest appropriate measures, if possible.
- Provide information/documentation from a qualified health care professional to clarify health restrictions and describe the type of accommodation that would be most effective.
- Cooperate with any experts who are asked to provide guidance on the situation.

- Respond to the employer's reasonable request to undergo an independent medical exam. Note: Employees cannot be forced to submit to an independent medical examination, but failure to comply with a request may delay the accommodation process.
- Allow a reasonable amount of time for the employer to reply to the request for accommodation.
- Participate in any discussions regarding possible accommodation solutions.
- Listen to and consider any reasonable accommodation options that the employer proposes.
- Achieve the agreed-upon job performance standards once accommodation is provided.
- Work with the accommodation provider on an ongoing basis to manage the accommodation process.
- Advise the employer of any changes in accommodation needs.

Bibliography

1. Treasury Board. *Policy on the Duty to Accommodate Persons with Disabilities in the Federal Public Service.*
2. Canadian Human Rights Commission. *Preventing Discrimination.*
3. Robert Hatfeld, Education Director, Communications, Energy and Paperworkers Union of Canada (CEP). *Duty to Accommodate.*
4. Canadian Human Rights Commission. *Bona Fide Occupational Requirements and Bona Fide Justifications Under the* Canadian Human Rights Act - *The implications of Meiorin and Grismer.*
5. Canadian Human Rights Commission. *Fact Sheet on Duty to Accommodate*
6. Duty to Accommodate materials included in the Duty to Accommodate Training Session
7. Canadian Human Rights Commission. *A Guide for Managing the Return to Work*