



primer

Duty to Accommodate

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DUTY TO ACCOMMODATE

The National Union of Public and General Employees and its Components are committed to ensuring that workplaces are equitable and fair. This means that we view human rights in the workplace as an essential element in our mandate to represent our members. The **Duty to Accommodate** is an essential principle in our approach to human rights.

What is the Duty to Accommodate?

The duty to accommodate in the workplace is the legal requirement for employers to proactively eliminate employment standards, requirements, practices or rules that discriminate against individuals or groups on the basis of a prohibited ground, such as race, sex, disability, age and so on.

The employer must take all steps short of undue hardship to eliminate discrimination related to human rights grounds. For example, policies must be designed to ensure that those who have a lower level of visual acuity, or those who require a private area in which to conduct prayers, or those who require modified work hours for family care responsibilities, do not encounter barriers in the first place.

Is the Duty to Accommodate defined by legislation?

Only the federal, Manitoba and Ontario human rights codes make specific reference to a legislative obligation around the duty to accommodate. While other jurisdictions do not specifically legislate a requirement to accommodate, recent Supreme Court of Canada decisions suggest that the duty to accommodate is implied to the point of undue hardship.

What is the legal jurisprudence around the Duty to Accommodate?

The most significant development around duty to accommodate is directly related to a 1999 Supreme Court decision on a case brought forward by one of the National Union's B.C. components, the B.C. Government and Service Employees' Union (BCGEU/NUPGE).

The case involved a BCGEU/NUPGE member who was forest firefighter. Tawney Meiorin, who worked for two years as an Initial Attack Crew forest firefighter and had received positive reviews, was laid off after failing one of the four components of a job

fitness test. Meiorin failed the fourth component of the test – a 2.5 kilometre run to be completed in 11 minutes. Her time was 11:49. The Court agreed that Meiorin was a victim of sex discrimination.

The Supreme Court unanimously ruled that a workplace rule that systematically excludes women or other groups must be scrutinized to ensure that it is truly required to ensure job performance. These requirements are now referred to as the *Meiorin* standards.

What has been the impact of *Meiorin* case?

The BCGEU/NUPGE firefighter's case is having an impact all across the country; due to the *Meiorin* decision, the concept of the duty to accommodate has been radically changed in a very positive way.

Prior to *Meiorin*, the duty to accommodate a worker only arose when a problem had been identified. For example, the worker was not able to perform the job in the traditional manner. In this case, the worker had an obligation to advise the employer of the need to be accommodated and the employer had an obligation to ensure that difficulties arising out of discrimination based on a prohibited ground were accommodated. Employers, and the Union, were legally required to take reasonable actions to eliminate the effects of employment practices or rules that discriminated against individuals or groups on the basis of a prohibited ground, such as race, sex, age and so on.

The *Meiorin* decision however, broadened that definition to place a positive obligation on employers to design workplace standards and requirements so that they do not discriminate (i.e., the employer must take proactive action to ensure these standards and requirements are not discriminatory). In other words, there is now a positive obligation on the employer to design the workplace so that equality and accommodation are built in to all policies and practices.

Is the employer the only one who has a Duty to Accommodate workers?

While the employer has the principal duty to accommodate workers, the Union also has a duty to accommodate. Where the Union has negotiated an arrangement that has a discriminatory impact, it has a joint responsibility with the employer to proactively eliminate that discrimination. Even if the Union was not involved in implementing a discriminatory provision, it must cooperate with the efforts of the employer to accommodate the worker. If the employer does not take this responsibility seriously, the Union should insist that the employer take the necessary action.

What is a Bona Fide Occupational Requirement (BFOR)?

Bona Fide Occupational Requirements (BFORs) are the *essential tasks* required to perform a job. Where an employer can establish a particular BFOR, they

can exclude certain workers, under certain circumstances, from a job. BFORs are not preferences, they are essential to the job. Thus, while an employer may prefer workers to have a high school diploma for certain jobs, it is not a BFOR unless the employer can demonstrate that the job cannot be done without that qualification. Preferences such as this may have the effect of screening out certain groups of applicants unnecessarily.

The *Meiorin* decision sets out three steps that help determine whether a discriminatory standard is a BFOR:

1. Did the employer adopt the standard for a purpose rationally connected to the performance of the job?
2. Did the employer adopt the particular standard in an honest and good faith belief that it was necessary to the fulfillment of that legitimate work-related purpose?
3. Is the standard reasonably necessary to the accomplishment of that legitimate work-related purpose? (Remember that to show the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer.)

In *Meiorin*, the Court suggested the following as important questions to be asked in relation to Step 3:

- Has the employer investigated alternative approaches that do not have a discriminatory effect, such as individual testing against a more individually sensitive standard?
- If alternative standards were investigated and found to be capable of fulfilling the employer's purpose, why were they not implemented?
- Is it necessary to have all employees meet the single standard for the employer to accomplish its legitimate purpose or could a standard reflective of group or individual differences and capabilities be established?
- Is there a way to do the job that is less discriminatory while still accomplishing the employer's legitimate purpose?
- Is the standard properly designed to ensure that the desired qualification is met without placing an undue burden on those to whom the standard applies?
- Have other parties (i.e., the Union) who are obliged to assist in the search for possible accommodation, fulfilled their roles?

How do we identify the essential elements or duties of a job?

It is important in identifying BFORs to differentiate between tasks or skills that *appear* to be essential, as opposed to those that *are* essential. For example, let's look at a situation where the job is to move plywood from one area of the storeroom to another. Traditionally, this may have been done by a worker picking up the plywood and manually moving it to the new location. While it may appear that the essential task is to be able to pick up and manually move the object, the actual

essential task is to move it. A scissor lift or other device could be used to allow someone to perform the essential task in question.

In an office, the work might involve computer operation and, thus, the essential task might appear to be the ability to use a keyboard. In fact, the essential task is to operate the computer and some of the more recent voice recognition and response systems would allow a worker without full use of his/her hands to complete this task. While the technology is not always available at this point to enable someone to perform certain tasks in non-traditional ways, it is important to clearly define what the actual task is so that the appropriate accommodation can be identified.

What is Undue Hardship?

Employers are obligated to reasonably accommodate workers up to the point of undue hardship. This principle has been largely defined through jurisprudence (decisions by various Courts and Tribunals in human rights matters) and implies the excessive disruption or interference with the employer's operation. Undue hardship does not mean merely inconvenience. Two major issues have been identified as important in defining undue hardship, namely:

- If the **financial costs** associated with the accommodation would be prohibitive to the point that it would alter the essential nature or substantially affect the viability of the enterprise. Outside sources of funding, however, will be considered in this determination.
- If **health and safety** considerations are not met; in particular where the degree of risk, which remains after accommodation has been made, is so significant that it outweighs the benefits of the accommodation. Public safety and the health and safety of co-workers are considerations in this regard.

As well, several other related factors may be raised depending on case law and the particular jurisdiction. It is important to be aware of the specific definition given to undue hardship in the legislation within your particular jurisdiction and to hold the employer to that definition, rather than allowing additional factors to creep in.

The point of undue hardship will obviously vary depending on the size of the employer's operation, but the burden must be substantial and not trivial in order to be undue hardship. Subjective belief and speculation by the employer about future costs are not allowed.

As well, there must be consideration given to the question of who is the employer in determining undue hardship. For example, an employer may insist that the department in which the accommodation is required cannot carry the cost of the accommodation. This may be the case, but it is the employer (i.e., the whole

company) that is responsible and the question is whether it would be an undue hardship on this larger body.

In all cases, it is the employer who is responsible for establishing undue hardship.

What are the responsibilities of the employer in accommodating a worker?

The responsibilities of the employer include:

- to design workplace requirements and standards so that, from the outset, they do not discriminate;
- to proactively "build conceptions of equality into workplace standards";
- to accommodate individuals to the point of undue hardship, with the first priority being the modification of the duties and practices related to the present position;
- to solicit information concerning their workers' disability-related employment needs;
- to address the issue with the worker and the Union;
- to be creative and flexible;
- to respect the collective agreement in terms of accommodation;
- to maintain confidentiality;
- to ensure that discrimination is not allowed on the part of both employer and co-workers;
- to demonstrate a willingness and commitment to accommodate; and
- to work with the Union and the workers to provide education on the duty to accommodate.

As well, employers have related responsibilities that will affect the success of reasonable accommodation initiatives, specifically for example, the responsibility to provide a workplace free from harassment.

What are the responsibilities of the worker being accommodated?

The worker requiring accommodation has the following responsibilities:

- to identify the need for individual accommodation;
- to be reasonable and open in looking at possible accommodations;
- to communicate with the Union and the employer; and
- to supply job relevant medical information (non-diagnostic information only, such as the functional limitations and residual capabilities).

While the worker has a requirement to be cooperative and assist in identifying and implementing an appropriate accommodation, the final bullet above is very important. There is no legal requirement to reveal a diagnosis and, in some cases, the worker may wish to keep the diagnosis private due to current social stigmas, i.e., in cases involving HIV or psychiatric illness.

What are the responsibilities of the Union as a worker representative?

The responsibilities of the Union representative include:

- to insist that the employer fulfills its proactive duty to design workplace requirements and standards so that, from the outset, they do not discriminate;
- to model a problem-solving approach to accommodation;
- to represent the needs of the worker for accommodation purposes;
- to work with the worker and the employer in accommodating the worker; and
- to follow-up after the accommodation is implemented to assess whether it is working and to help address any associated issues that may surface.

As well, the Union may play a role in the following ways:

- providing and ensuring the employer provides education about equity issues and the duty to accommodate;
- seeking to ensure that the worker's rights (human rights) are respected;
- seeking to ensure the health and safety of co-workers is not compromised;
- balancing the need of the individual worker for accommodation and the interests of the bargaining unit members as a whole; and
- involving health and safety officials as required.

Who needs to be involved in workplace accommodation?

Co-workers need to be involved to the point that they understand what the duty to accommodate is and why it is valuable for the whole workplace. It is not helpful if other workers feel that a co-worker is receiving special treatment. The duty to accommodate must always be approached in a problem-solving mode, involving everyone who will be affected, at least through education. As well, accommodation may involve professionals to assess the workplace, the job in question or the worker requiring accommodation.

What would be an ideal process for the accommodation in the workplace?

An ideal duty to accommodate process would involve the following steps:

- The employer and bargaining agent jointly conduct a thorough review of all standards, requirements, procedures and policies to ensure that they are not discriminatory; if they are, then they should be modified. An important part of this proactive review is ensuring that flexibility and a willingness to accommodate individual needs are built in to all workplace standards and practices.
- A work-related issue that was not identified in the first step is raised by a worker, the Union or the employer.
- The employer reviews the essential elements of the job and makes the changes possible without individual information about the worker in question.

- If the employer is not able to rectify the matter with a systemic approach, the worker provides the employer with as much information as possible about the required accommodation or the situation, or the employer raises the issue with the worker in the context of enquiring whether accommodation is required.
- The Union is advised that an individual accommodation is necessary.
- The worker, employer and Union representative meet to determine how best to proceed (e.g., accommodation is obvious and will be implemented; professional assessment of some variety is necessary; or if the situation impacts on language in the collective agreement, the Union and the employer need to negotiate accommodation that does not adversely impact on the workers).
- The workplace and co-workers are prepared in advance for the implementation of the accommodation, including co-worker education.
- Accommodation is implemented for a trial period.
- Accommodation is evaluated and appropriate adjustments made.
- Accommodation is finalized and formalized, as necessary, including, in cases of variable disabilities, the need for ongoing modification.

A key element to ensuring the success of an accommodation is the thorough and on-going involvement of the individual being accommodated. Especially in the area of disability, there is sometimes a tendency to decide what is best for the individual worker without their involvement, when, in fact, the individual in question knows their own situation better than anyone else.

It is not helpful for the employer and the Union to try to accommodate a worker between the two of them. Where decisions are made without the permission or knowledge of a worker, it can result in that worker feeling excluded from a process that will affect them on a daily basis. It might also prevent other members from stepping forward for fear they will begin a process over which they have no control.

How is the right to reasonable accommodation enforced?

There are several routes workers can take to enforce their right to be reasonably accommodated. For many members, a grievance is a possibility and may be based on specific or general "No Discrimination" language in the collective agreement.

A complaint may be made to the relevant Human Rights Commission on the basis of discrimination on a prohibited ground. Complaints may also be made under Workers' Compensation legislation.

What is the Dignity of Risk?

The Dignity of Risk refers to the right of an individual to assume a higher risk to him/her than might normally be considered acceptable in a workplace. This concept extends only as far as it does not increase the risk to co-workers or the general public. As well, it must be reasonable. In some cases, higher risk might

result in increased liability for the employer and, thus, higher costs. In these cases, the ability to assume risk would also be limited.

What is the New Approach to the Duty to Accommodate?

As noted throughout this Primer, the *Meiorin* decision has radically changed the way in which we will deal with accommodation. There has been debate about how useful the old, individualized reasonable accommodation was. While it allowed individuals the ability to fully participate at work, participation was individualized, (i.e., the problem is of a particular individual) rather than one of society, namely to ensure inclusion. Rather than forcing employers to solve individual problems, some argued that employers should be compelled to set their workplaces up in such a way that these problems do not exist in the first place, in much the same way that wheelchair ramps are now expected, rather than added as an after-thought when someone requires one.

That debate is over and the latter perspective is now the law. We realize that even if we were to find ourselves in a world designed to accommodate all needs, there would still be individual accommodations required. The *Meiorin* decision, however, has taken us a giant step forward towards an inclusive workplace.

The main sources of information used to prepare this Primer are:

Duty to Accommodate: A PSAC Guide for Local Representatives (March 2000)

Our Duty to Accommodate in the Unionized Workplace contained in
The Steward, a publication of the B.C. Government and Service Employees' Union
(BCGEU/NUPGE) (October 1999)