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# *Accommodation Update: New and Important Decisions in Human Rights*

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Brian Wasyliw and Allyson Lee

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*The webinar will begin at 9:00am EST*



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250 Yonge Street Suite 3300  
Toronto, Ontario M5B 2L7  
Tel 416.603.0700  
Fax 416.603.6035  
24 Hour 416.420.0738  
[www.sherrardkuzz.com](http://www.sherrardkuzz.com)

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# *Agenda*

- Disability Accommodation
- Family Status Discrimination
- Drugs and Alcohol in the Workplace

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# *Disability Accommodation-* **The Test**

- Not every request for accommodation triggers a duty to accommodate.
- Has the employee established a need for accommodation?
  - Existence of a protected ground (*e.g.*, disability)
  - Adverse treatment
  - Disability a factor in adverse treatment
- If duty to accommodate is established, consider if accommodation is possible to the point of undue hardship.

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# *Disability Accommodation-* **Commute-Related Restrictions**

- *TDSB v. CUPE Local 4400*, 2020 CanLII 32053: Employer obligation is to provide **reasonable** accommodation, not the preferred accommodation of the employee.
- Grievor was a Safe and Caring Schools Office Assistant.
- Suffered a knee injury, was unable to take public transit (although this restriction was later modified), and had medical report stating she was unable to drive to and from work for greater than 30 minutes.
- Initially, WSIB paid for taxi transportation but payments came to an end.

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# *Disability Accommodation-* **Commute-Related Restrictions**

- No issue that grievor could perform the duties of the position – this was a medical issue related to her ability to **get** to work.
- Refused to take a break during her commute.
- Continued to assert public transit was not an option.
- Grieved that failure to place her at one of two schools within her desired commute radius constituted a breach of the duty to accommodate.

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# *Disability Accommodation-* **Commute-Related Restrictions**

- Arbitrator disagreed; grievance dismissed.
  - While the grievor had a disability, any adverse impact she experienced was based not on her disability-related need, but her personal preference on how to commute to work.
  - Grievor failed to pursue reasonable alternatives:
    - Break up drive.
    - Take public transit for all or part of commute.

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# *Disability Accommodation-* **“Perfect” vs. “Reasonable”**

- General principles:
  - ❑ Employee not expected to originate a solution to an accommodation request.
  - ❑ Employer is often in the best position to determine how the employee can be accommodated.
  - ❑ Employee has an obligation to accept reasonable accommodation and take steps to implement any proposal that would satisfy the duty to accommodate.

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# *Disability Accommodation-* **“Perfect” vs. “Reasonable”**

- *Tone v. Canada Post*, 2020 FC 604: An employee must clearly communicate and substantiate grounds for accommodation; they must raise their issues as best they can.
- Employee was a delivery agent terminated for failure to report to work after repeatedly advised to do so when disability benefit claim denied.
- Employee requested accommodation on the basis of disability (anxiety and depression), sex and marital status.
- Harassment complaints began flying back and forth.
- Employee was directed to report to a route from a different depot.



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# *Disability Accommodation-* **“Perfect” vs. “Reasonable”**

- Employee failed to provide medical evidence to support request for disability accommodation; as such, employer required him to return to work.
- After termination, filed a complaint with the Canadian Human Rights Commission alleging termination was discriminatory on the basis of disability, as well as sex and marital status.
- Commission dismissed the complaint; employee appealed to Federal Court of Canada.

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# *Disability Accommodation-* **“Perfect” vs. “Reasonable”**

- Federal Court dismissed appeal:
  - ❑ Employee was entitled to **reasonable** accommodation, not perfect or preferred accommodation.
  - ❑ Employee was free to communicate any specific accommodation needs and provide medical to that effect – he had not done so.
  - ❑ There was no obligation on the employer to proactively ask if there were any additional needs he had not articulated or to accommodate in absence of information requested.

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# *Disability Accommodation-* **COVID-19-Related Anxiety**

- Employers experiencing an increasing number of requests for accommodation related to anxiety around return to work.
- General feeling of worry or fear of contracting COVID-19 is not sufficient to engage duty to accommodate.
- Employee needs to establish existence of a disability and provide detailed medical information about restrictions and limitations.
- Only then need the employer look to accommodation.

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# *Disability Accommodation-* **COVID-19-Related Anxiety**

- If no accommodation possible in the workplace, may need to consider work-from-home arrangement.
- That an employee worked from home during shutdown may support the feasibility of the arrangement as a potential form of accommodation.
- But, remember, the employee is entitled to reasonable, not preferred, accommodation!

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# *Disability Accommodation-* **Takeaways**

- Important to obtain clear and meaningful medical information about an employee's restrictions and limitations.
- Employer, not employee, or an employee's physician, determines appropriate accommodation.
- Employee has an obligation to participate in the accommodation process and to be flexible with how to address restrictions.

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# *Family Status Accommodation-*

## **The Test**

- Not every request for accommodation triggers a duty to accommodate.
- Has the employee established an entitlement to accommodation:
  - Existence of a protected ground (*e.g.*, parent-child relationship).
  - Adverse treatment.
  - Family status a factor in adverse treatment.
- If duty to accommodate is established, consider if accommodation is possible to the point of undue hardship.

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# *Family Status Accommodation-* **Childcare Preference**

- *Canada Border Service Agency, 2020 FPSLRB 27:* Accommodation is based on *need*, not preference, of employee.
- Grievor alleged discrimination on the basis of family status when request for deployment in Edmonton was denied.
- Claimed, as a single parent, she needed to be in Edmonton to be close to extended family.
- Claimed she could not find suitable childcare in Coutts (where she was posted).

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# *Family Status Accommodation-* **Childcare Preference**

- Grievor had moved to Edmonton while on maternity and parental leave with no intention to return to her original work location.
- Employer offered a fixed schedule to permit her to find daycare in Coutts, but grievor never seriously sought daycare options.
- Grievance dismissed; employer had offered reasonable accommodation.



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# *Family Status Accommodation-* **“Creating a Precedent”**

- *Peternel v. Custom Granite* 2019 ONSC 5064: Granting a temporary accommodation does not contractually bind the employer in the future.
- Plaintiff employed as scheduler; quit after six years alleging constructive dismissal and discrimination on the basis of family status.
- Shortly after she started, employee advised employer she could not regularly be at work before 8:30 a.m. due to childcare.
- Frequently arrived later than 8:30 and generally not in until 10 a.m.

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# *Family Status Accommodation-* **“Creating a Precedent”**

- Subsequently, took maternity leave and met with employer prior to her return.
- Was told she needed to be consistently at work by 8:30 a.m.
- For childcare reasons, employee indicated she could return but only at her former hours of 10 a.m. to 5 p.m.
- Employer offered her a different position with comparable salary and the hours of 10 a.m. to 7 p.m.; she rejected this offer.
- Employee did not give reasons why she could not have secured before-school childcare, just that she had not.

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# *Family Status Accommodation-* **“Creating a Precedent”**

- Claim dismissed; ruling upheld by Divisional Court.
- Court affirmed that requirement she start at 8:30 a.m. was not discriminatory.
  - “...overall, Ms. Peternel could not point to evidence that showed how she had suffered adverse treatment and that her family status was a factor in that adverse treatment”
  - Employer’s leniency in start time prior to maternity leave did not transform into a contractual obligation that could be held against it.

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# *Family Status Accommodation-* **COVID-19 Considerations**

- While schools and daycares are now open, employers are increasingly receiving requests for time off or work-from-home accommodation to facilitate remote learning and other child care.

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# *Family Status Accommodation-* **COVID-19 Considerations**

- *Employment Standards Act, 2000* Infectious Disease Emergency Leave
  - ❑ Unpaid leave.
  - ❑ Eligible if time off to provide care and support to a prescribed family member for a reason related to COVID-19.
  - ❑ Ontario Government has confirmed this includes if parent chooses not to return child to school.

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# *Family Status Accommodation-* **COVID-19 Considerations**

- Request for paid accommodation should be addressed the same way as any other family status accommodation request.
- Is this a “need” or a “preference”?
- Ask for supporting evidence:
  - *e.g.*, child with a medical condition.
- Evaluate if there are “other supports” to provide child care during the day.

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# *Family Status Accommodation-* **COVID-19 Considerations**

- If duty to accommodate is triggered, employer has an obligation to accommodate to the point of undue hardship.
  - ❑ Must be more than a mere inconvenience on the employer.
  - ❑ Some hardship on employer is expected.
- Individual assessment (not cookie cutter):
  - ❑ Can employee perform essential functions of the job?
  - ❑ Be creative and flexible.
- Could include work-from-home, flexible hours, *etc.*

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# *Family Status -* **Takeaways**

- Employer has right to request information about the employee's personal circumstances and why accommodation being requested.
- Employee will need to establish any adverse treatment is a result of family requirements, not personal choice.
- Accommodation may be required if situation would result in a real disadvantage to the parent/child relationship or put a parent in a position of having to choose between working and caregiving.



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# *Drugs and Alcohol –* **Refusal to Test**

- *Lac Des Iles Mines –and- USW*, 2019 CanLII 91781: An employer must consider the context of a grievor refusing a drug or alcohol test, one-size response does not fit all.
- Grievor employed in a safety-sensitive position.
- Following workplace accident, refused to participate in post-incident drug and alcohol testing.
- Treated as a positive test, and then failed to participate in substance abuse referral program.
- Employment terminated for failure to comply with drug and alcohol policy.

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# *Drugs and Alcohol –* **Refusal to Test**

- Grievor asserted discharge was excessive.
- Arbitrator agreed; held context warranted a lesser disciplinary response:
  - Grievor had recently suffered injury, been hospitalized, was on pain medication, and then asked to undergo testing the following day.
  - Had undergone testing on two prior occasions with 40 years experience as a miner.
  - Events likely overwhelming for him.

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# *Drugs and Alcohol –* **Refusal to Test**

- Creative solution...
  - Grievance allowed, with conditions on reinstatement:
    - Assessment by a substance abuse professional within 30 days of award.
    - Reinstatement if assessment concluded capable of return to work.
    - If not capable of return to work, or failed to comply, dismissal upheld.

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# *Drugs and Alcohol –* **Refusal to Test**

- *Deering –and- Cougar Helicopters*, 2019 CLC Adjudication (unreported): Policy must clearly outline the scope of testing, and testing *must* fall within that scope.
- Aircraft maintenance engineer terminated for cause after refused post-incident drug test.
- Agreed to undergo oral-swab test but did not consent to urinalysis drug test.
- Recreational user who admitted consuming cannabis 12 hours prior to accident, and the test would come back positive.
- Denied substance use disorder.

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# *Drugs and Alcohol –* **Refusal to Test**

- Refused test on the basis policy indicated drug test would be oral fluid/saliva test, not urinalysis.
- Also took position cannabis use was permitted, as policy indicated only that an employee should not consume “alcohol or mood altering substances” within **eight hours** from start of shift.
- Adjudicator agreed; no cause for termination.
- Entitled to **\$123, 238** in damages.

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# *Drugs and Alcohol –* **Accommodation**

- ***IBEW v. Lower Churchill***, 2020 NLCA 20: If employee has medical-based prescription, onus is on employer to demonstrate it has satisfied the duty to accommodate.
- Grievor employed on the Lower Churchill project with a contractor aware of his medical marijuana use.
- After employment ended, applied for work with another contractor on the project, subject to a satisfactory drug and alcohol test.
- Offer rescinded when he advised new potential employer of medical marijuana use.

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# *Drugs and Alcohol –* **Accommodation**

- Applied for other positions on the project but was denied.
- All positions were safety-sensitive.
- Argued failure to hire was a breach of the duty to accommodate.
- Grievance dismissed; no breach of the duty to accommodate.
  - There was a lack of consensus within the medical community as to how to measure present impairment or “residual effect” of marijuana.
  - In the absence of an accurate means of measuring, the health and safety risk constituted undue hardship.

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# *Drugs and Alcohol -* **Accommodation**

- Application for judicial review dismissed.
- Court of Appeal allowed appeal; remitted back to arbitrator.
  - The absence of a scientific or medical standard does not lead to the conclusion there is no means through which an employer would be able to determine if employee is incapable of performing job due to cannabis use.
  - Individualized daily or periodic testing.
  - Onus on employer to establish this was not a feasible alternative – employer had not considered this.



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# *Drugs and Alcohol -* **Accommodation**

- *Cambridge Memorial Hospital*, 2019 ONSC 3951: If a protected ground is **a factor** in the decision to discipline or termination, this can render the decision or discipline discriminatory. Equal treatment is not the answer.
- Nurse terminated for narcotics theft.
- Arbitrator held nurse would not have engaged in theft “but for” substance use disorder.
- However, still upheld termination:
  - A nexus between the addiction and misconduct is not, by itself, a defence to theft.
  - No evidence of discrimination – treated the same as others.

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# *Drugs and Alcohol –* **Accommodation**

- Ontario Divisional Court disagreed:
  - Must apply a traditional discrimination analysis.
  - If individual receives adverse treatment (*i.e.*, termination) and substance use disorder **is a factor**, this is *prima facie* discrimination.

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# *Drugs and Alcohol –* **Accommodation**

- *Regional Municipality of Waterloo*, 2019 CanLII 433: Employer must consider an individualized assessment regarding the impact of a substance use disorder, before taking action.
- Nurse had substance use disorder (employer did not regard this at the time).
- Terminated for theft of narcotics.
- Medical evidence demonstrated substance use disorder resulted in compulsive behaviour and impaired judgment that contributed to theft.

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# *Drugs and Alcohol –* **Accommodation**

- Employer failed to meet its procedural duty to accommodate:
  - ❑ Failed to inquire whether nurse had a disability.
  - ❑ Failed to consider accommodation.
- Employer ordered to accommodate.
- Nurse reinstated with back pay.

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# *Drugs and Alcohol –*

## **Takeaways**

- Refusal to undergo testing may be disciplinary, but will not necessarily justify dismissal.
  - Context and policy language matter!
- Employer may need to explore other means of accommodation and assessment if employee using an impairing substance for medical reasons.
- Inability to test for present impairment does not automatically mean health and safety risk amounts to undue hardship.

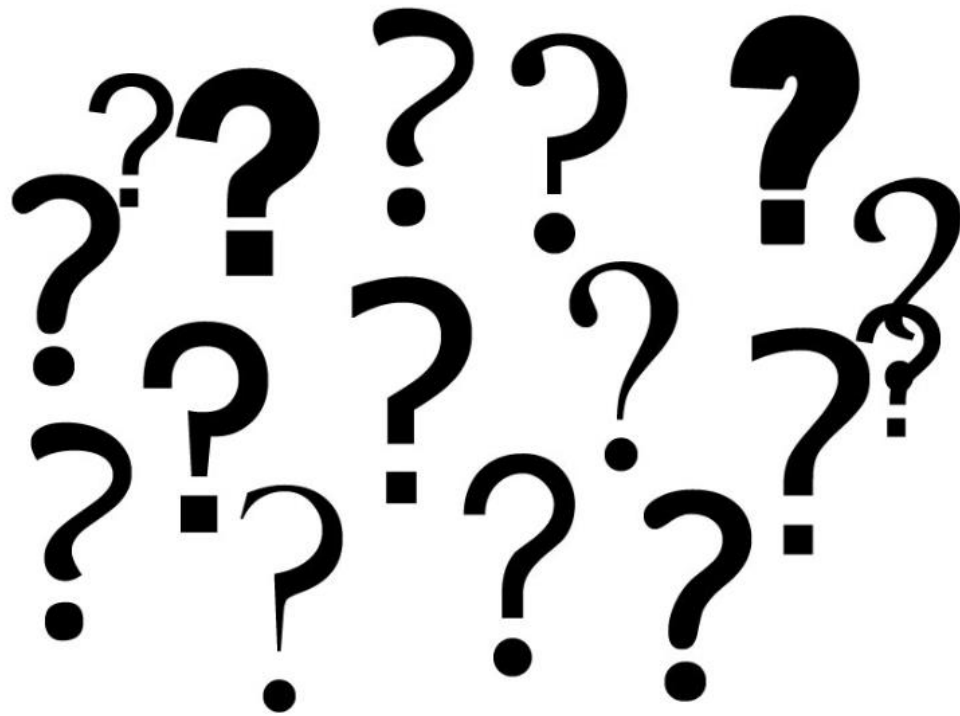
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# *Drugs and Alcohol –* **Takeaways**

- Case law is now settled in Ontario; must consider possible accommodation if substance use disorder is **a factor** in an employee's misconduct.
  - Leave of absence for treatment?
  - Last chance agreement?

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# *Questions?*





250 Yonge Street, Suite 3300  
Toronto, Ontario, Canada M5B 2L7

416.603.0700 Phone  
416.420.0738 24 Hour  
416.603.6035 Fax  
[www.sherrardkuzz.com](http://www.sherrardkuzz.com)





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