
HReview: Accommodation Update

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Agenda

- Duty to accommodate under human rights law
- Accommodating physical and mental disabilities
- Family status or child-care accommodation
- Limits on accommodating substance use disability

Duty to Accommodate

Duty to Accommodate

Discrimination

- To claim discrimination, employee must prove:
 1. They are a member of a protected group
 2. They have suffered adverse treatment, and
 3. Their membership is **a factor** in the adverse treatment

- Burden then shifts to employer to show:
 - Bona fide* occupational requirement (“BFOR”)
 - Accommodation to the point of “undue hardship”

Duty to Accommodate

Undue Hardship

■ Meaning of “undue hardship”

- ❑ Can consider financial cost, health & safety, funding
- ❑ May consider size of organization, nature of position and impact on co-workers

■ Employer **not required** to:

- ❑ Displace another employee
- ❑ Pay employee to perform unnecessary work
- ❑ Hire additional person to work with them

Duty to Accommodate

Process

- Process usually triggered by request from employee
- Employer may have a “**duty to inquire**”
- Procedural duty to engage in a collaborative and iterative process with the employee
 - Document and update accommodation plans
- Substantive duty to provide reasonable (but not perfect or preferred) accommodation

Duty to Accommodate

Employee Obligations

- Employee should disclose that they require accommodation and basis for request (*e.g.*, disability)
- Employee must:
 - a) Provide sufficient documentation to support the need for accommodation (including any updates or requests for clarification)
 - b) Cooperate in accommodation process in good faith
 - c) Accept **reasonable** offers of accommodation

Accommodating A Disability

Accommodating a Disability

Definition of “Disability”

■ Includes:

- Both physical and mental disability
- Whether temporary or permanent, acquired or developmental
- Actual or *perceived*

■ Does not include:

- Personal characteristics or normal ailment (*e.g.*, flu)
- An expected response to common stressors

Accommodating a Disability

Definition of “Mental Disability”

■ **Includes:**

- Mental impairment
- Learning disability, or
- Mental disorder

■ **Does not include** (but can be symptom of disability):

- General stress and anxiety
- Merely having pain
- Going to therapy or taking medication

Case Study: Stress and Anxiety

Crowley v LCBO, 2011 HRTO 1429

- Employee was harassed by a customer and requested a permanent transfer to another store
- Doctor's note recommended a transfer, but employer denied request on a permanent basis
- Employee alleged denial amounted to discrimination
- Ontario's Human Rights Tribunal ("HRTO") found medical evidence insufficient to establish disability and dismissed application
 - Self-report of "stress" and "health problems"
 - Doctor's note did not mention "disability"

Prevalence of Mental Disabilities

- Mental illness is one of the leading causes of disability in Canada*
- Mental illness can negatively impact job performance and productivity
 - Fewer than 25% of employees are comfortable disclosing mental illness to their employer (Ipsos, 2019)
- Mental illness can be triggered by work related stressor(s)
- Treatment and accommodation can improve productivity and employee retention in the long-term

Accommodating a Mental Disability

Challenges

- Concerns re: confidentiality are significant due to stigma
- Disclosure to employer is not always clear (*i.e.*, duty to inquire engaged)
- Restrictions are usually cognitive in nature – harder to specify or define and then apply to work
- Mental condition may be impacted by work and non-work related factors
- Symptoms can be dynamic and unpredictable

Accommodating a Disability

Process

“**Bullseye**” approach to assessing accommodation options:

1. Accommodate in employee’s own position if possible
(with/without modification)
2. Accommodate in comparable position
(without modification; then with modification)
3. Consider an alternative, not comparable role
(without modification; with modification)
4. Finally, offer leave of absence if no role can be performed

Accommodating a Disability

Strategies

- Encourage disclosure of accommodation needs
- Ensure you understand needs and triggers
- Possible accommodations may include:
 - Modify job duties
 - Adjust schedules
 - Modify training
 - Change method/form of supervision
 - Alter work environment

Accommodating a Disability

Strategies

- Plan for relapse, setback, and intermittent absence
- Consider in advance how you will handle:
 - Changes to employee's restrictions or prognosis
 - Conflict that may arise in relation to disability
 - Decline in employee performance
 - Communication to managers/co-workers working with accommodated employee.

Case Study: Mental Disability

Hamilton-Wentworth School Board, 2016 ONCA 421

- Employee took medical leave for two years and then attempted to return to work with restrictions
 - Required accommodation for generalized anxiety disorder, depression and PTSD
 - Sought position with reduced exposure to stress
- Employer **did not** consider a variety of alternative positions and insisted on additional medical information
- Employee was terminated
- HRTO found employer breached duty to accommodate
 - Reinstated employee with \$430,000 in damages
 - Decision upheld at judicial review

Accommodating a Disability

Obtaining Medical Documentation

- Employer has **right** to obtain relevant information about employee's disability
- Employee has **duty** to provide medical documentation to:
 - Substantiate disability and need for accommodation
 - Allow employer to determine appropriate accommodation(s)
 - Understand employee's prognosis for recovery
- Doctor does not have right to dictate form of accommodation

Accommodating a Disability

Clarifying Medical Information

- Seek clarification if medical information subjective or unclear
- Request for information should go through employee (unless you have consent to interact with doctor directly)
- Put request in writing, ask specific questions, and explain issue with earlier documentation
 - Provide context for request
 - Outline physical and/or cognitive demands of job
 - Identify areas of concern

Accommodating a Disability

Third-Party Review or IME

- If employer receives conflicting, unclear or subjective medical documentation or doctor is unresponsive to follow up questions, employer may request:
 - Third-party medical review (less intrusive)
 - IME (more intrusive)
- Consent is required in both scenarios
- Costs associated with this process
- **Beware:** may result in same outcome/findings

Case Study: Medical Information

Bottiglia v Ottawa Catholic School Board, 2017 ONSC

- Employee went on medical leave due to mental disability
- When benefits were about to run out, doctor cleared employee to return to work with many restrictions
- Employer found this suspicious and requested IME
- Employer communication with examiner tainted planned IME
- Employee withdrew consent to IME and was not permitted to return to work
- HRTO and Divisional Court held:
 - Employer was entitled to an IME, **but**
 - Employee's refusal was reasonable in the circumstances

Accommodating a Disability

Work from Home (“WFH”) Request

- Employee may be entitled to WFH accommodation if:
 - ❑ They can perform essential duties of role from home, **and**
 - ❑ Work **cannot** be performed in office even with accommodation

- Employer should consider whether:
 - ❑ Employee request is a want or need
 - ❑ There are other ways to meet employee’s need
 - ❑ In-person work is a *bona fide* occupational requirement

Case Study: WFH Request

Pepper v Lamb, 2022 ONSC 1378

- Employee suffered from mental illness, including depression and generalized anxiety
- Employee wanted to WFH after an argument with her boss triggered her mental disability
 - Some work could be done remotely but most could not (e.g., photocopying, faxing, promotional materials)
- Employer offered a suitable accommodation of a hybrid arrangement to avoid direct contact with boss
- Court found employer met duty to accommodate

Family Status Accommodation

Family Status

- “Family status” is defined as being in a parent and child relationship
 - Includes adoptive, foster and same-sex families
- Usually associated with caregiving needs:
 - Caring for children
 - Caring for an aging parent
- Test to establish *prima facie* family status discrimination varies across Canada

Family Status

Jurisdictional Differences

■ **Federal: *Canada v Johnstone*, 2014 FCA 110**

1. Child must be under employee's care and supervision
2. Childcare obligation must engage employee's legal responsibility for the child, and not a personal choice
3. Employee must make reasonable effort to meet obligations, and there must be no solution reasonably accessible
4. Workplace requirement must interfere with the fulfillment of the obligation in a non-trivial manner

■ Federal test more stringent on employee than in other jurisdictions

Family Status

Jurisdictional Differences

- **Ontario: *Misetech v Value Village*, 2016 HRTO 1229**
 - ❑ Not every negative impact or conflict between a family and work obligation is discriminatory
 - ❑ Employee must establish a negative impact on a family need that results in “**real disadvantage**” to parent/child relationship and responsibilities that flow from relationship

Family Status

Reasonable Care Options

- **Ontario:** reasonable options are less relevant for determining whether there is *prima facie* discrimination
 - ❑ Accommodation is a multi-party obligation
 - ❑ Employee has duty to look for solutions and options to reduce work/family conflict
 - ❑ Availability of reasonable care options an appropriate consideration

Family Status

Employee Responsibilities

- Employee must:
 - ❑ Make reasonable effort to use outside resources prior to making accommodation request
 - ❑ Inform employer of caregiving needs
 - ❑ Cooperate in accommodation process
 - ❑ Provide relevant information
 - ❑ Meet any agreed-upon standards once accommodation provided

Family Status

Request for Information

- Employer entitled to seek information, including:
 - Documentation of validity of needs
 - Nature and extent of need
 - Any available outside resources
- Employer should not make inquiries based on stereotypical assumptions
 - E.g.*, “why can’t your wife do it”
- Information should be kept confidential and shared only with those who need it

Family Status

WFH Requests

- Responding to a WFH request:
 - ❑ Determine whether request is due to need or want (*i.e.*, employee **wants** to pick up child from daycare)
 - ❑ Seek reasonable information to understand nature of family status needs (*i.e.*, are there alternative caregiving options?)
 - ❑ Evaluate information provided by employee
- If the information shows a **need** for accommodation, determine if employee can WFH
 - ❑ WFH may not be only way to meet need

Case Study: WFH Request

Cosentino v Octapharma Canada Inc., 2024 HRTO 860

- Employee was a home-based field representative and her mother's primary caregiver
- Mother was diagnosed with cancer
- Employee requested WFH accommodation
- Request initially approved and then revoked, and employee was required to come into the office
- Employee continued to WFH and was terminated
- Employee alleged family status discrimination and reprisal
- Complaint successful – employee awarded \$100,000

Case Study: WFH Request

Tarek-Kaminker v Canada, 2023 FCA

- Employee was a mother of five children
 - WFH agreement for two days a week for about 12 years
- In 2016, employer did not renew WFH agreement
- Employer argued non-renewal discriminated against her on basis of family status
- Grievance dismissed – no *prima facie* discrimination
- Federal Court of Appeal affirmed dismissal

Case Study: Duty to Cooperate

Aguele v Family Options Inc., 2024 HRTO 991

- Employee was a residential support worker and single parent of six-year-old child
- Sought scheduling accommodations based on family status
- Employer could not accommodate desired scheduling requests and attempted to work with her to find reasonable accommodation
- HRTO found while employee had family status needs, employer met its duty to accommodate

Accommodating Substance Use Disability

Substance Use Disability

- Addiction is a disability under human rights legislation
- Substance use may include controlled and illegal drugs, cannabis, and alcohol
- Accommodation of substance use disability can pose unique challenges
 - Employee may not be aware of the disability
 - Stigma may hinder proactive disclosure
 - Employer may have a ‘duty to inquire’

Substance Use Disability

Duty to Inquire

- Duty to inquire prior to discipline if reasonable to suspect connection to disability
 - Cannot be willfully blind
- Even if conduct otherwise culpable, obligation to explore connection to disability
 - If it **is**, may first require accommodation
 - No obligation to accept employee's word
 - If **not**, disciplinary response is appropriate

Substance Use Disability

Investigating Suspected Impairment

- If employee attends work impaired:
 - ❑ Document conduct/symptoms
 - ❑ Conduct drug/alcohol test if permitted
 - ❑ Send employee home in a cab and instruct them to contact employer the following day

- Speak with employee prior to their return:
 - ❑ Allow employee opportunity to respond/explain
 - ❑ Ask if conduct may be related to a substance use disorder
 - ❑ If employee says ‘yes’ request medical documentation

Substance Use Disability

Testing

- Standard testing for **alcohol** impairment is breathalyzer
 - Courts/arbitrators recognize breathalyzer testing as a valid indicator of **present impairment**

- Present impairment testing challenging for **drug** testing
 - Most reliable method currently is oral fluid testing
 - Must consider connection between cut off levels and present impairment
 - Consider when drafting your policy; ensure cut-offs are defensible

Substance Use Disability

Testing

- Stringent requirements for drug and alcohol testing in both union and non-union environments:
 - ❑ **Non-union environment:** Testing policy must be a BFOR
 - ❑ **Union environment:** Testing policy must meet *Irving* test
- Considerations include:
 - ❑ Safety sensitive nature of the role
 - ❑ Existence of a drug and alcohol problem in the workplace
 - ❑ Nature of testing regime

Substance Use Disability

Testing

- Testing has been allowed when:
 - Reasonable grounds to suspect employee is impaired
 - Post accident or near miss if other potential causes eliminated
 - Employee return to work post-treatment for substance dependence
- In **most** circumstances, random drug and alcohol testing not permitted
 - Return to work testing an exception
- Employer must validate testing procedures and impairment thresholds

Substance Use Disability

Consent for Testing

- Employee consent for testing is required:
 - Collective agreement
 - Employment contract
 - Workplace policy
- Consent not a ‘cure all’ of testing otherwise challenged (grievance or human rights complaint)
- If employee declines testing:
 - Is it a violation of the collective agreement, employment contract or workplace policy?
 - Disciplinary measures

Substance Use Disability

Discipline and Termination

- Discipline is an appropriate response if conduct is **culpable**
- However, if conduct is the result of employee's disability, it may be viewed as **non-culpable**
 - First, consider accommodation
- It may not be clear misconduct is attributable to disability
 - Employee has onus to demonstrate conduct was caused by a medical condition

Substance Use Disability

Discipline and Termination

Cambridge Hospital v ONA, 2017 ON LA 2305

- Nurse stole patients' painkillers and falsified records
- Dismissed for cause
- Evidence nurse had addiction, but no evidence addiction caused theft and record falsification
- Post-dismissal, nurse demonstrated a commitment to rehabilitation and was unlikely to relapse
- Dismissal upheld – addiction did not **cause** misconduct
- Note: cases vary in result

Substance Use Disability

Last Chance Agreement (“LCA”)

- Accommodation can be a challenge; relapse is symptom of disease
 - Potential for relapse should be considered in accommodation process
- LCA - Employer to give employee one final opportunity, post-treatment, to remain employed
- Record history of accommodation in the LCA itself
 - How many leaves of absence provided, paid or unpaid, *etc.*

Substance Use Disability

Last Chance Agreement

- Sets out conditions on which employment will continue
 - Abstain from drug and alcohol use at workplace/during work hours, participate in treatment, undergo testing, *etc.*
- Parties agree:
 - Breach of LCA will constitute just cause for dismissal and undue hardship for the employer
 - Arbitrator lacks jurisdiction to change penalty of dismissal
- Parties cannot “contract out” of human rights obligations
- However, appropriately used, LCA can be effective tool to demonstrate employer fulfilled duty to accommodate

Case Law Update

Quong v Lafarge Canada Inc., 2024 ABKB 340

- Site superintendent at safety sensitive workplace
- Employer's Drug and Alcohol Policy required employees to test following a workplace incident
- Employee involved in workplace incident and tested positive for cannabis
- Employer sent letter advising him of next steps
- Employee refused next steps and was terminated
- Court found Policy reasonable given safety sensitive workplace

Case Law Update

Bains v Horizon North Logistics Inc., 2024 BCHRT 247

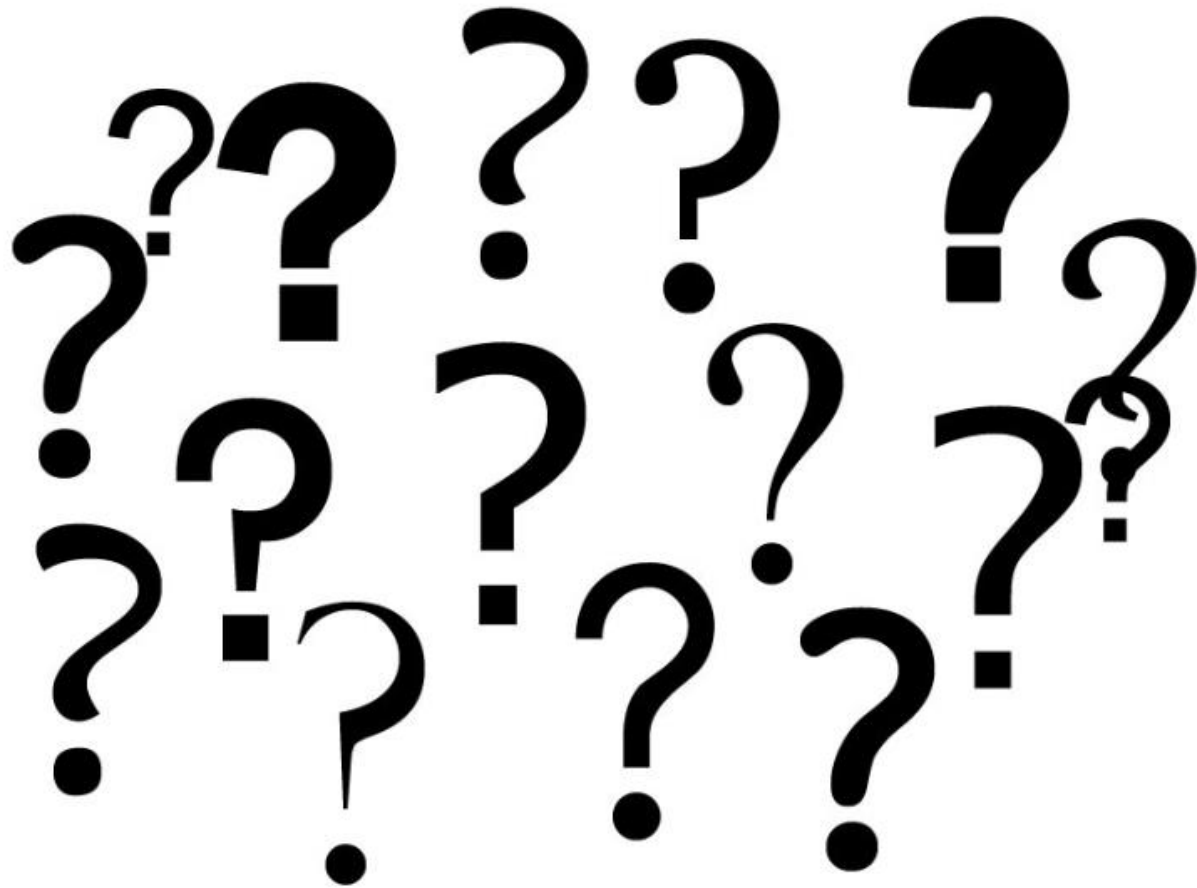
- While on call, employee went drinking with co-worker
- Employee arrived for morning shift impaired; tested, was suspended from work, and eventually terminated
- Employee claimed he had mental disability; employer unaware
- Employee's claim did not have reasonable prospect of success
 - Employee drank in a safety-sensitive position
 - No evidence linking mental health to his conduct

Case Law Update

PWU v Canada (Attorney General), 2024 FCA 182

- Nuclear Safety Commission required pre-placement and random drug and alcohol tests for safety-critical positions
- Six employees challenged mandatory testing
 - Employees claimed testing breached their rights under the *Charter* (sections 7, 8, and 15)
- Federal Court of Appeal upheld Commission's authority to implement the measures
 - Testing requirements did not violate *Charter* rights

Questions?





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