

## The duty to accommodate in action

While the duty to accommodate disabled employees is firmly entrenched in today's workplace, many problem areas remain. In our three-part series on accommodating disability, we point to key trends emerging in the case law. In the April issue of *FOCUS*, we discussed the legal framework that applies when an employee alleges discrimination on the basis of disability (see "[The accommodation of disabled employees - a guide to the legal landscape](#)"). In this issue, we will examine how the accommodation of disability plays out in workplace disputes, and how it has been interpreted by arbitrators and other tribunals. In our survey of the case law, we will consider what level of performance an employer is entitled to expect from the employee being accommodated. As well, we will review the types of accommodation employers have, or have not, been required to offer disabled employees.

### ESSENTIAL DUTIES OF THE POSITION

The duty to accommodate does not mean that a disabled employee is guaranteed a job. If a person cannot perform the essential requirements and duties of a job after being accommodated, there will be no finding of discrimination. However, while the law does not confer an absolute entitlement to employment on the disabled employee, it has evolved from the days when, as one arbitrator put it, "the handicapped employee took the job as he or she found it, and the rights of both parties ... were measured by the ability of the employee to perform that job, without special accommodation, on a regular basis." An employer can no longer refuse to adjust the workplace, short of incurring undue hardship, if the adjustment enables the employee to perform the essential duties of a job. There is no definitive list of the forms of accommodation an employer must consider, but some options would be physical adaptation of the workplace, elimination of nonessential duties from the position, obtaining the assistance of other employees, and altering work schedules.

There is some divergence in the cases as to whether employees must be able to perform all the essential duties of the job, or just some aspects of the job functions if they can be accommodated without undue hardship. An employer may not rely on the language of a job description to argue that an employee is incapable of performing the essential duties of the job. In one case, a grievor with theoretically wide-ranging duties was ordered reinstated to perform only one of those duties. The arbitrator found that the grievor could be fully employed at the restricted task without imposing undue hardship on the employer. Further, several cases dealing with disabled nurses suggest that, despite the fact that the "core" duties of a nurse generally involve direct patient care, the employer will be obliged to accommodate nurses in light duty positions with a limited direct care component, where it can do so without undue hardship.

### PRODUCTIVE, USEFUL WORK

Whether employees must be able to perform all the essential duties or just some duties of the position, there is a clear expectation that they must perform useful and productive work. Where

the employer can show that accommodation will enable the employee to perform only substandard work, or work of no real value to the employer, a refusal to accommodate will not be discriminatory.

In this regard, a Board of Inquiry under the *Ontario Human Rights Code* has ruled that there was no obligation on an employer to extend the probationary period of an employee suffering major episodes of depression to whatever period would be required to accumulate 12 months of "symptom-free" time in which to assess the employee's performance. The needs which must be accommodated, the Board held, are those which, if met, would actually enable the employee to be capable of performing the work. Extending the probationary period would obviously not enable the employee to perform the work within the normal probationary period, nor would it guarantee his ability to perform at some future date. The Board further held that an employer will be obliged neither to retain someone whose disability prevented him from working competently on a regular basis, nor to tolerate substandard performance merely because it has the resources to do so.

Arbitrators also have applied this principle. One arbitrator has held that where a grievor, because of his chronic fatigue syndrome, required a position involving extreme unpredictability in terms of work days, hours and duties, the employer was not obliged to accommodate the grievor to this extent. Another arbitrator rejected as unrealistic a union's suggestion that a disabled hospital worker, for whom no other position could be found, be paid to perform the duties normally carried out by unpaid volunteers. Elsewhere, it has been stated that the employer "need [not] assemble a number of unrelated sedentary duties for the sole purpose of filling an employee's day without regard to the significance of its production requirements."

#### ASSIGNMENT TO AN AVAILABLE POSITION

Although there is some disagreement in the cases on this point, it appears that an employer should be prepared, if necessary, to accommodate a disabled employee in a position other than the original one, where this can be done short of undue hardship. The question, however, arises whether there is a limit to how dissimilar the new position can be from the original one. Where feasible, an employer may have to provide work comparable to the employee's prior job. On the other hand, at least one arbitrator has implied that, when the requested duties are entirely foreign to those for which the employee was hired, there may be less of an obligation on the employer to agree to the accommodation. As well, where assigning the disabled employee to another position would have a disruptive effect on a collective agreement, such accommodation may constitute undue hardship.

Despite these exceptions, the balance of opinion is that, where accommodation in the original position is impossible, an employer must canvass the workplace for other available positions the employee may be able to perform, and consider adjusting the positions to meet the needs of the employee. Questions do remain, however: Will the obligation extend to offering the employee another position on a permanent basis? Is the employer obliged to offer an alternate position at the same rate of pay as the original? Presumably, the answer to these questions will depend on the point at which undue hardship is incurred.

#### CREATION OF A POSITION

It has been said that the duty to accommodate does not extend to the point of requiring an employer to create a position for the disabled employee. But while it may be uncontroversial to say that there is no requirement to create a job consisting of tasks not presently being performed, it is not clear that an employer may refuse to reassign existing duties so as to create a position, where this can be done without undue hardship.

One arbitrator has held that the *Ontario Human Rights Code* was not written with the intention of requiring an employer to redesign its workplace, and that one had to accept "the way the company and the union have decided that work will be organized into specific job classifications and positions." Therefore, as there were no existing positions the grievor was capable of performing, the employer was not obliged to reassign duties to create such a position. On the other hand, there is also a line of cases holding that where the disabled employee is capable of performing a bundle of existing duties, and these could be reassigned to create a position for the employee without undue hardship, the employer must consider this option.

It is not easy to reconcile these two lines of decisions. The first seems to suggest that it is inappropriate for human rights legislation to be read so as to intrude into questions of how work is organized, whether or not undue hardship is incurred, while the second holds that the only limitation on accommodation through reassignment of duties is that of undue hardship.

### TEMPORARY MODIFIED WORK AND TRAINING

Many employers provide modified duties as a temporary measure with the aim of returning employees to their regular jobs. It follows from the discussion above that this type of "work hardening" program may not be sufficient to satisfy the duty to accommodate, where the employer does not consider the permanent modification of the employee's own position or, possibly, placement in another position.

In cases where the employee returns to work at duties on a temporary or trial basis, it has been suggested that the criteria for what is productive, useful work are not the same as for a permanent position. Where it is expected that the employee will recover to full capacity, an employer may have to accept that the employee will not be of much economic benefit to the business in the short run. Obviously, the fact that a position is temporary will also affect the indices of undue hardship, such as cost, effect on operational requirements and employee morale.

An employer may also have to consider providing training in cases where the employee is seeking accommodation in another position. Presumably, training will be required only where it can be shown that it will enable the employee to perform the requisite duties within a reasonable period of time. One arbitrator has held that where the grievor needed two years of on-the-job training, the employer was not obliged to provide it. Training may also be necessary for other employees. In a case involving an epileptic grievor, the arbitrator suggested that the parties include in their negotiated accommodation a requirement that the employer provide first aid training to the grievor's co-workers.

### PART TIME AND NON-BARGAINING UNIT WORK

In some situations, an employer may offer accommodation in the form of a part-time position. Where this results in economic loss to the employee, and is imposed against his will, the employer may have to demonstrate that doing otherwise would have entailed undue hardship. Conversely, where the employer can show no undue hardship in permitting an employee to work part-time yet retain her status in a full-time bargaining unit, the employer may not be justified in demanding that the employee work on a full-time basis to retain that status.

Arbitrators have differed over whether employers are required to offer accommodation in the form of a non-bargaining unit position. While one has suggested that the duty to accommodate does not require an employer to offer a position outside the bargaining unit, another has held that, in appropriate circumstances, he could award an excluded position to a grievor relying on his rights under the *Human Rights Code*.

Where an employee has been accommodated by being assigned an excluded position, that employee may be in a position to claim that the loss of bargaining unit status, with its attendant benefits, constitutes discrimination. Where it was determined that a transfer to an excluded position was the only alternative, one arbitrator has ordered that the employee suffer no loss of seniority, service or benefits, but held that she could not retain full bargaining unit status for other purposes. On the other hand, where the employee is transferred into another bargaining unit, the union representing that unit may be in a position to argue that crediting the employee with full seniority would constitute an undue hardship for its members.

## IN THE NEXT ISSUE

In the next issue of *FOCUS*, we will conclude our series on accommodating disability by discussing what has been called the "meat" of the duty to accommodate: the assessment of undue hardship. We will see that, while this assessment will vary with the facts of each case, a number of factors may be identified that are relevant to determining when the point of undue hardship has been reached (see "[Accommodating disability short of undue hardship](#)"; on a related issue, see "[Managing innocent absenteeism in the unionized workplace](#)", "[Emerging issues in attendance management](#)", "[Discharging the duty to accommodate: Hospital case provides some pointers](#)", "[Canadian Human Rights Act](#)", "[A question of comparison: Appeal Court rules on restrictions to benefits, seniority and service accumulation of disabled employees](#)" and "[Arbitrator rules against "perfect" accommodation for phobic technician](#)", and "[Two federal labour bills now in force](#)").

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