


Emerging Issues in Human Rights Law

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Ian Wallace




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When results count.

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Outline of Presentation

1. The Duty to Accommodate
2. Responsibilities in the Workplace
3. Assessing Undue Hardship
4. Emerging Issues
 - Medical Certificates
 - Mental Disabilities
 - Family Status




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The Duty to Accommodate

The Purpose of Accommodation

- To ensure persons with "protected characteristics" are not discriminated against
- A "protected characteristic" is an immutable personal characteristic
- Protected characteristics constitute prohibited grounds of discrimination eg.: race, religion, sex, disability (mental/physical) and family status



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The Duty to Accommodate

What is it?

- The obligation to meaningfully incorporate diversity into the workplace.
- It involves eliminating or changing rules and behaviours that discriminate against people based on protected characteristics
- Concept developed by Courts
- Flows from human rights legislation that prohibits discrimination

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The Duty to Accommodate

Bona Fide Occupational Requirement Test:

(Meiorin: SCC, 1999)

- Stage 1: Is there “*prima facie*” discrimination?
- Stage 2: If yes, can the employer prove the discriminatory standard or policy is a “BFOR”
- Most cases move quickly to the 2nd stage

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The Duty to Accommodate

Is the Workplace Policy a BFOR?

1. Adopted for legitimate work-related purpose;
2. Adopted in good faith with belief it is necessary to fulfill work-related purpose;
3. Reasonably necessary to accomplish work-related purpose – i.e. impossible to accommodate “individual” without imposing **undue hardship** on the employer



* Most cases focus on Part 3 of the analysis

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The Duty to Accommodate

The Limits of Accommodation

- Accommodation is an adjustment or modification of the work environment or the method of doing work
- Employers must “accommodate to the point of undue hardship”
- Employers must be prepared accept *some* hardship- “*undue*” more than minor inconvenience or disruption

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The Duty to Accommodate

Factors relevant to Assessment Undue Hardship (non-exhaustive):

1. Financial cost (actual and relative to employer)
2. Size of the workforce
3. Safety
4. Interchangeability of workforce and facilities
5. Disruption of Collective Agreement
6. Employee morale

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The Duty to Accommodate

What Forms can Duty to Accommodate take?

- Limitless- effective accommodation can come as the result of imaginative or “outside the box” thinking

Specific examples:

- Waiver of a workplace rule or specific job requirement
- Light duties for a period of time



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The Duty to Accommodate

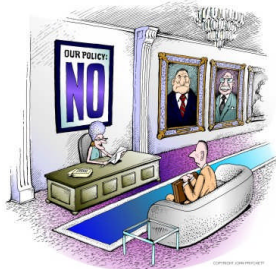
Forms of Accommodation, continued:

- "Re-bundling" an assortment of productive tasks
- Time off for medical appointments, etc. (paid or unpaid, depending on entitlements, policies)
- Directing an employee to treatment resources (EAP, drug rehabilitation program)
- Re-assignment to a different position



The Duty to Accommodate

Address accommodation requests flexibly in accordance with organizational requirements – Do not apply rigid rules



Responsibilities in the Workplace

Duties of Employers:

- Primary duty accommodate resides with Employers
- Best position to assess duties, modifications in workplace, re-assignment of employees, etc.
- Only Employers have authority to effect changes
- Duty may be triggered even if no request from employee



Responsibilities in the Workplace

Duties of Employees:

- Employees are expected to identify the need for accommodation, functional limitations, and required adjustments

The employee and his or her physician have the best understanding of the limitations entailed by the employee's physical condition, and it is the employee's responsibility to communicate clearly with the employer concerning those limitations

(McGill University Health Centre,(2007)(SCC))

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Responsibilities in the Workplace

Duties of Employees:

- Obligation to facilitate accommodation and accept *reasonable* offers of accommodation
(*Central Okanagan School District No. 23 v. Renaud* (1992) (SCC))
- *Reasonable accommodation* does not extend to perfect or even preferred solution

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Responsibilities in the Workplace

Duties of Unions:

- Unions have a duty to facilitate accommodation eg. waiver of Collective Agreement terms

...how to accommodate individual differences may also place burdens on the employee and, if there is a collective agreement, a union ...

(*Meiorin* (1999), (SCC))

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Assessing Undue Hardship

Q: What is not required?

- Creating a new position
- Providing non-productive duties on long-term basis
- Tolerating excessive absenteeism which is unlikely to improve
- Tolerating misconduct, even if related to disability
- Holding position for absent employee indefinitely

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Assessing Undue Hardship

Hydro-Quebec (2008)(SCC)

- Employee missed 960 days of work during 7.5 years preceding her dismissal
- Doctor recommended employee stop working for an indefinite period
- Terminated as not able to return to work on regular and continuous basis in the foreseeable future

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Assessing Undue Hardship

Hydro-Quebec:

- Grievance dismissed - proposed accommodation would constitute undue hardship
- Quebec CA- overturned Arbitration Award as Hydro-Quebec had not established it was *impossible* to accommodate employee
- SCC- test not if accommodation is impossible, but whether impossible to accommodate *without incurring undue hardship*

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Assessing Undue Hardship

Lessons from *Hydro-Quebec*- Not “impossibility”

- Duty *does not* require that all possible means of accommodation be exhausted before it is satisfied
- Only accommodation to point of undue hardship
- If no accommodation is possible without undue hardship, employer has discharged its duty



Assessing Undue Hardship

Lessons from *Hydro-Quebec*- Business Efficacy:

- Employer not required to completely alter the essence of the contract of employment- work in exchange for remuneration
- Undue hardship will be established if proper operation of business is hampered excessively
- Also if employee unable to work in reasonably foreseeable future despite efforts to accommodate
- (*McGill University Health Centre, SCC 2007*)



Emerging Issue: Medical Certificates

- Employer entitled to sufficient medical information to establish a *bona fide* sickness or disability
- Employer's enquiries into medical information must be reasonable
(*British Columbia Public School Employers' Assn (Surrey): B.C. Arb., 2000*).
- Employer's enquiries must also be in accordance with any limitations in the Collective Agreement



Emerging Issue: Medical Certificates

When can Employer require medical certificates?

1. Hiring- determine if employee able to perform duties
2. Absences- to substantiate absences from workplace
3. Accommodation- to substantiate requests for workplace accommodation
4. RTW- to determine if employee fit to safely return to work

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Emerging Issue: Medical Certificates

Honda v. Keays (SCC: 2008):

- Keays enrolled in Honda's Disability Program following extensive absences from work due to CFS
- Medical notes provided by employee were "cryptic"
- Honda required Keays meet with its specialist
- Keays terminated for refusal

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Emerging Issue: Medical Certificates

Honda v. Keays:

- Ont. S.C- 24 months severance and \$500,000 punitive damages- ruled Honda overzealous in demands for medical evidence
- Court of Appeal- reduced punitive damages to \$100,000
- SCC- overturned punitive damages award: Honda's requests for medical evidence not unreasonable

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Emerging Issue: Medical Certificates

Lessons from *Honda v. Keays*-

Right to ask that employee meet with a specialist

- SCC found the requirement to meet with a specialist not "callous", "insensitive" or "hardball tactic"
- The request for expert medical information was "perfectly normal in the circumstances"

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Emerging Issue: Medical Certificates

Lessons from *Honda v. Keays*:

Right to complete and substantive medical information

- Requirement to provide doctor's notes not discriminatory
- Part of the accommodation- permitted absences without disciplinary consequences

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Emerging Issue: Medical Certificates

What can the employer ask?

- Right to know prognosis, **not diagnosis** (eg. timing for RTW or when updated information available)
- Right to know whether illness related to workplace
- Right to know whether illness prevents performance **any** duties- eg. can employer accommodate the employee?

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Emerging Issue: Mental Disabilities

Statistics (Canadian Institute of Health Research)

- Mental illness affects 1 in 5 Canadians
- Of 10 leading causes of disability, 5 are mental disorders
- Depression is leading cause of disability among people 15-44 years old in Canada
- Mental illness accounts for 30% of disability claims = \$15-33 billion annually
- Estimated by 2020, mental illnesses will be leading cause of disease in Canada



Emerging Issue: Mental Disabilities

- Employer **not** responsible to diagnose mental condition
- Employees are generally required to bring need for accommodation to employer's attention and provide supporting medical evidence
- If employee fails to do so, employer **may** not be held liable for failure to accommodate



Emerging Issue: Mental Disabilities

Mental disabilities may be hidden because of stigma or denial

- Employer cannot ignore **obvious** symptoms of mental disability
(*Conte v. Rogers Cable Systems*: CHRT, 1999)
- Employer has duty to investigate need for accommodation if mental disability suspected
(*ADGA v. Lane*: OSC, 2008)



Emerging Issue: Mental Disabilities

- Mental health issues are more difficult to accommodate than others- education of managers and individualized assessment of employees are key
- Nature of disability and stigma may excuse employee from duty to alert employer to disability (*Willems-Wilson v. Albright Drycleaners Ltd.*: BCHRT, 1997)
- Where signs of mental disability exist, constructive knowledge may be attributed to employer (*Mager v. Louisiana-Pacific*: BCHRT, 1998)



Emerging Issue : Family Status

- Family Status as prohibited ground of discrimination relatively new
- Refers to status of parent and child relationship
- Courts have provided contradictory interpretations to protection of “family status”



Emerging Issue : Family Status

Campbell River Transition Society (2004) (BC CA)

- Employer changed work schedule which interfered with employee's ability to care for special needs child
- Court found a *prima facie* case of discrimination
- Court emphasized fact the employee's child had special needs – parental obligation requiring accommodation was not “ordinary”



Emerging Issue : Family Status

Campbell River:

Court of Appeal held discrimination based on family status established if:

1. There has been a change in a term or condition of employment imposed by an employer; *and*
2. The change results in *serious interference* with a *substantial* parental or other family duty or obligation



Emerging Issue : Family Status

Coast Mountain School District (B.C. Arb.2006)

- Teacher requested return to part-time teaching after her maternity leave to accommodate breastfeeding
- School Board denied application for part-time leave – offered Teacher an extension of full-time leave
- Child had no special needs
- Arbitrator- employee's needs were too "commonplace" to trigger the duty to accommodate



Emerging Issue : Family Status

Campell River approach criticized as too restrictive

Johnstone v. AG Canada (2007), Federal Court ruled:

While family status cases can raise unique problems that may not arise in other human rights contexts, there is no obvious justification for relegating this type of discrimination to a secondary or less compelling status



Emerging Issue : Family Status

Johnstone v. AG Canada continued:

- Court rejected principle employee must prove “serious interference” with parental obligation to establish *prima facie* discrimination
- Court also rejected that duty to accommodate only arises where employer imposes a change in workplace policy- duty also triggered where change in employee’s circumstances



Emerging Issue : Family Status

IBEW v. Power Stream (Ont. Arb, 2009):

- Union grieved employer’s elimination of a shift (5 x 8 hrs/day changed to 4 x 10 hrs/day)
- Under the new schedule, several employees found it difficult to meet normal parental responsibilities
- Arbitrator found that only one employee who was forced to change a Custody Agreement was discriminated against



Emerging Issue : Family Status

Power Stream (cont’d):

Arbitrator declined to follow *Campbell River*- adopted modified test for family status discrimination:

1. What are the relevant characteristics establishing the employee’s family status?
2. What are the adverse effects and is it reasonable to expect protection under human rights legislation?



Emerging Issue : Family Status

Power Stream (cont'd):

3. What prompted the adverse effect on the employee- a change in the workplace rule or a change in the employee's family status?
4. What efforts has the employee made to self-accommodate?



Emerging Issue : Family Status

What is the current state of the law?

- *Campbell River* is the only appellate Court authority on "family status" discrimination
- However number of cases subsequently decided have declined to follow *Campbell River*
- Unsettled what test to be applied to claim of discrimination based on family status



Emerging Issue : Family Status

General guidance for employers:

- Assess each request individually and seriously
- Determine the reason for the conflict between work and family duty
- Determine what steps employee has taken to address conflict
- Consider if issues of health and safety arise



Emerging Issue : Family Status

- No discrimination if spouses able to rearrange schedules to fulfill parental obligations- spouses expected to adjust to work requirements
- No discrimination if a substantive issue not raised- eg. inability to attend child's extra-curricular activities
- But refusal to accommodate parent's attendance at a major event in child's life may be discriminatory

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Questions

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