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THE DUTY TO ACCOMMODATE

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A. DECISIONS OF THE SUPREME COURT OF CANADA
An Overview of the Duty to Accommodate

1. The Nature of The Duty

The duty to accommodate arises in cases of both direct and indirect discrimination.

Direct discrimination occurs where a person adopts a practice or rule which on its face discriminates on a prohibited ground, whereas indirect or adverse effect discrimination arises where a neutral rule or standard of general application has a discriminatory impact on a member of a protected group.¹

All Canadian human rights statutes contain a prohibition against direct discrimination. In jurisdictions where there is no statutory duty to accommodate a person affected by an instance of direct discrimination, a duty to accommodate has arisen in the context of applying the bona fide occupational requirement or qualification defence that is contained in the statute. If the discriminatory rule is applied without any attempt to accommodate employees in circumstances where accommodation could be made, then the rule will not be bona fide. An employer may fail to establish a BFOQ defence in a case of direct discrimination "if he is unable to provide an acceptable explanation as to why it was not possible to deal with employees on an individual basis."²

The duty to accommodate employees in cases of adverse effect or indirect discrimination was clearly established in *O'Malley*³, where the Court implied such a duty in order to give effect to the provisions and intent of the legislation. McIntyre J. stated:

The reasonable standard . . . and the duty to accommodate, referred to in the American cases provide that where it is shown that a working rule

¹ The difference between direct and indirect discrimination was addressed by McIntyre J. in *Ontario Human Rights Com'n v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536, 23 D.L.R. (4th) 321, 7 C.H.R.R. D/3102 (*O'Malley*) in the following terms:

Direct discrimination occurs . . . where an employer adopts a practice or rule which on its face discriminates on a prohibited ground. For example, "No Catholics or no women or no blacks employed here." [Adverse effect discrimination] . . . arises where an employer for genuine business reasons adopts a rule or standard which is on its face neutral, and which will apply equally to all employees, but which has a discriminatory effect upon a prohibited ground on one employee or group of employees in that it imposes, because of some special characteristic of the employee or group, obligations, penalties, or restrictive conditions not imposed on other members of the work force.

In this case, the Court concluded that there had been indirect discrimination due to a neutral rule that required that all employees be available to work on Saturdays.

² *Central Alberta Dairy Pool v. Alberta (Human Rights Commission)*, [1990] 2 S.C.R. 489, 72 D.L.R. (4th) 417. Concurring judgments were written by Wilson J. and Sopinka J. While Wilson J. analysed the requirement in less specific terms, Sopinka J. stated that . . . the duty to accommodate must be dealt with in the context of the bona fide occupational qualification ("BFOQ") exception or defence . . . If the employer fails to provide an explanation as to why individual accommodation cannot be accomplished without undue hardship, this will ordinarily result in a finding that the duty to accommodate has not been discharged and that the BFOQ has not been established.

³ See f.n. 1. (*O'Malley*)

has caused discrimination, it is incumbent upon the employer to make a reasonable effort to accommodate the . . . needs of the employee, short of undue hardship to the employer in the conduct of his business. There is no express statutory base for such a proposition in the Code. Hence, the vacuum in the Code and the question: Should such a doctrine be imported to fill it?

In answering that question in the affirmative, McIntyre J stated:

The Code accords the right to be free from discrimination in employment. While no right can be regarded as absolute, a natural corollary to the recognition of a right must be the social acceptance of a general duty to respect and to act within reason to protect it. In any society, the rights of one will inevitably come into conflict with the rights of others. It is obvious then that all rights must be limited in the interests of preserving the social structure in which each right may receive protection without undue interference with others. This will be especially important where special relationships exist, in the case at bar the relationship of employer and employee. In this case, consistent with the provisions and intent of the Ontario Human Rights Code, the employee's right requires reasonable steps toward an accommodation by the employer.

The duty requires that the accommodation be to the point of undue hardship⁴:

Accepting the proposition that there is a duty to accommodate imposed on the employer, it becomes necessary to put some realistic limit upon it. The duty in a case of adverse effect discrimination on the basis of religion or creed is to take reasonable steps to accommodate the complainant, short of undue hardship: in other words to take such steps as may be reasonable to accommodate without undue interference in the operation of the employer's business and without undue expense to the employer.

2. **The Onus of Proof**

The burden of proof in establishing the defence lies with the person who is advancing the defence:⁵

⁴ See f.n. 1 (O'Malley)

⁵ See f.n.1 (O'Malley)

The complainant in proceedings before human rights tribunals must show a prima facie case of discrimination. A prima facie case in this context is one which covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in the complainant's favour in the absence of an answer from the respondent-employer. Where adverse effect discrimination on the basis of creed is shown and the offending rule is rationally connected to the performance of the job, . . . the employer is not required to justify it but rather to show that he has taken such reasonable steps toward accommodation of the employee's position as are open to him without undue hardship. It seems evident to me that in this kind of case the onus should again rest on the employer, for it is the employer who will be in possession of the necessary information to show undue hardship, and the employee will rarely, if ever, be in a position to show its absence.

3. The Duty Extends Well Beyond the Employer

Any person who causes or contributes to an instance of discrimination incurs absolute liability unless they can establish that they met their duty to accommodate to the point of undue hardship. The duty to accommodate extends to the employer, the union, the affected employee and other employees in the workplace.

(a) The Union's Obligation to Accommodate

The Renaud⁶ case considered the extent of a union's obligation to accommodate and the manner in which the discharge of that duty could be reconciled and harmonized with the employer's duty. Sopinka J., writing for the Court, cautioned that the duty only arises where the union is a party to the discrimination. Although the union has an obligation to accommodate to the point of "undue hardship," it will most often discharge that obligation by establishing that the proposed accommodation would create an undue hardship on its members:

The primary concern with respect to the impact of accommodating measures is not, as in the case of the employer, the expense to or disruption of the business of the union but rather the effect on other employees. The duty to accommodate should not substitute discrimination against other employees for the discrimination suffered by the complainant.

⁶ Central Okanagan School District No. 23 v. Renaud, [1992] 2 S.C.R. 970, 95 D.L.R. (4th) 577, [1992] 6. W.W.R. 193

Any significant interference with the rights of others will ordinarily justify the union in refusing to consent to a measure which would have this effect.

The scope of the union's duty is dependent on whether the union contributed to the discrimination by participating in the formation of the offending rule, or whether it has become a party to the discriminatory practice by refusing to cooperate in the employer's efforts to accommodate the affected employee. The union can become a party to the discrimination in one of two ways:

First, it may cause or contribute to the discrimination in the first instance by participating in the formulation of the work rule that has the discriminatory effect on the complainant. This will generally be the case if the rule is a provision in the collective agreement. It has to be assumed that all provisions are formulated jointly by the parties and that they bear responsibility equally for their effect on employees. . .

Second, a union may be liable for failure to accommodate the religious beliefs of an employee notwithstanding that it did not discriminate in the formulation or application of a discriminatory rule or practice. This may occur if the union impedes the reasonable efforts of an employer to accommodate. . . If reasonable accommodation is only possible with the union's cooperation and the union blocks the employer's efforts to remove or alleviate the discriminatory effect, it becomes a party to the discrimination.

In considering the union's responsibility where it participates in the formulation of the offending rule, Sopinka J. stated:

A union which is liable as a co-discriminator with the employer shares a joint responsibility with the employer to seek to accommodate the employee. If nothing is done, both are equally liable. Nevertheless, account must be taken of the fact that ordinarily the employer, who has charge of the workplace, will be in the better position to formulate accommodations. The employer, therefore, can be expected to initiate the process. The employer must take steps that are reasonable. If the proposed measure is one that is least expensive or disruptive to the employer but disruptive of the collective agreement or otherwise affects the rights of other employees, then this will usually result in a finding that the employer failed to take reasonable measures to accommodate and the union did not act unreasonably in refusing to consent. This assumes of course that other reasonable accommodating measures were available

which either did not involve the collective agreement or were less disruptive of it. In such circumstances, the union may not be absolved of its duty if it failed to put forward alternative measures that were available which are less onerous from its point of view. I would not be prepared to say that in every instance the employer must exhaust all the avenues which do not involve the collective agreement before involving the union. A proposed measure may be the most sensible one notwithstanding that it requires a change to the agreement and others do not. This does not mean that the union's duty to accommodate does not arise until it is called upon by the employer. When it is a co-discriminator with the employer, it shares the obligation to take reasonable steps to remove or alleviate the source of the discriminatory effect.

The union's duty to accommodate is less onerous where the union did not participate in the formulation or application of the discriminatory rule or practice:

In the second type of situation in which the union is not initially a contributing cause of the discrimination but by failing to cooperate impedes a reasonable accommodation, the employer must canvas other methods of accommodation before the union can be expected to assist in finding or implementing a solution. The union's duty arises only when its involvement is required to make accommodation possible and no other reasonable alternative resolution has been found or could reasonably have been found.

(b) **The Complainant's Duty to Accommodate**

A complainant is not necessarily entitled to demand a perfect solution. The complainant's duty to assist in the search of an acceptable solution was set forth in Renaud in the following terms:

The search for accommodation is a multi-party inquiry. Along with the employer and the union, there is also a duty on the complainant to assist in securing an appropriate accommodation. The inclusion of the complainant in the search for accommodation was recognized by this Court in O'Malley. At page 555, McIntyre stated:

Where such reasonable steps, however, do not fully reach the desired end, the complainant, in the absence of some accommodating steps on his own part such as an acceptance in

this case of part-time work, must either sacrifice his religious principles or his employment.

To facilitate the search for an accommodation, the complainant must do his or her part as well. Concomitant with a search for reasonable accommodation is a duty to facilitate the search for such an accommodation. Thus in determining whether the duty of accommodation has been fulfilled the conduct of the complainant must be considered.

This does not mean that in addition to bringing to the attention of the employer the facts relating to discrimination, the complainant has a duty to originate a solution. While the complainant may be in a position to make suggestions, the employer is in the best position to determine how the complainant can be accommodated without undue interference in the operation of the employer's business. Where an employer has initiated a proposal that is reasonable, and would, if implemented, fulfil the duty to accommodate, the complainant has a duty to facilitate the implementation of the proposal. If failure to take reasonable steps on the part of the complainant causes the proposal to flounder, the complaint will be dismissed. The other aspect of this duty is the obligation to accept reasonable accommodation. This is the aspect referred to by McIntyre in O'Malley. The complainant cannot expect a perfect solution. If a proposal that would be reasonable in all the circumstances is turned down, the employer's duty is discharged.

4. **The Concept of Undue Hardship**

The question of undue hardship must be determined in the circumstances of each case. An accommodation that does not constitute an undue hardship for one employer may well constitute an undue hardship for another. As Wilson J. stated in the Central Alberta Dairy Pool⁷ case:

⁷ See f.n. 2: Central Alberta Dairy Pool

I do not find it necessary to provide a comprehensive definition of what constitutes undue hardship but I believe it may be helpful to list some of the factors that may be relevant to such an appraisal. I begin by adopting those identified by the board of inquiry in the case at bar - financial cost, disruption of a collective agreement, problems of morale of other employees, interchangeability of workforce and facilities. . . The size of the employer's operation may influence the assessment of whether a given financial cost is undue or the ease with which the work force and facilities can be adapted to the circumstances. Where safety is at issue both the magnitude of the risk and the identity of those who bear it are relevant considerations. This list is not intended to be exhaustive and the results which will obtain from a balancing of these factors against the right of the employee to be free from discrimination will necessarily vary from case to case.

Sopinka J. considered the foregoing in the Renaud⁸ case and noted that employee reactions can only be considered in determining undue hardship where they are consistent with human rights obligations. He stated:

The reaction of employees may be a factor in deciding whether accommodating measures would constitute undue interference in the operation of the employer's business. In Central Alberta Dairy Pool, Wilson J. referred to employee morale as one of the factors to be taken into account. It is a factor that must be applied with caution. The objection of employees based on well grounded concerns that their rights will be affected must be considered. On the other hand, objections based on attitudes inconsistent with human rights are an irrelevant consideration. I would include in this category objections based on the view that the integrity of a collective agreement is to be preserved irrespective of its discriminatory effect on an individual employee on religious grounds. The contrary view would effectively enable an employer to contract out of human rights legislation provided the employees were ad idem with their employer.

Sopinka J. also commented on the fact that the Court had rejected the American notion that an employer should not have to bear more than a negligible cost in order to fulfil its duty to

⁸ See f.n. 6: Central Okanagan School District No. 23 v. Renaud

accommodate.⁹ He went on to state that the interference with the rights of other employees must be substantial before a finding of hardship can be made:

. . . more than minor inconvenience must be shown before the complainant's right to accommodation can be defeated. The employer must establish that actual interference with the rights of other employees, which is not trivial but substantial, will result from the adoption of the accommodating measures. Minor interference or inconvenience is the price to be paid for religious freedom in a multi-cultural society.

The mere fact that an employer "might have been required to defend an ill founded grievance cannot justify an employer's failure to accommodate."¹⁰

Cole J., writing for the Court in Commission Scolaire Regionale De Chambly¹¹, summarized the factors that had previously been considered by the Court and then commented on the differing applications of the factors to different employers and to the economic climate of the day:

These factors are not engraved in stone. They should be applied with common sense and flexibility in the context of the factual situation presented in each case. The situations presented will vary endlessly. For example, in a large concern, it may be a relatively easy matter to replace one employee with another. In a small operation replacement may place an unreasonable or unacceptable burden on the employer. The financial consequences of accommodation will also vary infinitely. What may be eminently reasonable in prosperous times may impose an unreasonable financial burden on an employer in times of economic restraint or recession.

Cole J. stated that the provisions of a collective agreement are relevant in assessing the nature of the duty to accommodate. A collective agreement that provides a discretionary paid leave of

⁹ See f.n. 6: Central Okanagan School District No. 23 v. Renaud: The Supreme Court of the United States had adopted a "de minimis" test in *Trans World Airlines v. Hardison*, 432 U.S. 63 (1977). In rejecting that test, Sopinka J. stated:

The Hardison de minimis test virtually removes the duty to accommodate and seems particularly inappropriate in the Canadian context. More than mere negligible effort is required to satisfy the duty to accommodate. The use of the term "undue" infers that some hardship is acceptable; it is only "undue" hardship that satisfies this test. The extent to which the discriminator must go to accommodate is limited by the words "reasonable" and "short of undue hardship". These are not independent criteria but are alternate ways of expressing the same concept. What constitutes reasonable measures is a question of fact and will vary with the circumstances of the case.

¹⁰ See f.n. 6 :Central Okanagan School District No. 23 v. Renaud

¹¹ *Commission Scolaire Regionale De Chambly v. Bergevin* [1994] 2 S.C.R. 525, 94 CLLC 17,023

absence will be a consideration in determining whether it would constitute an undue hardship on the employer to require it to accommodate an employee's religious needs by granting a paid leave for such purposes. Similarly, the fact that the employer had granted a paid leave of absence for religious leave in prior years suggested that it would not pose an undue hardship to impose that degree of accommodation.¹²

¹² See f.n. 11: *Commission Scolaire Regionale De Chambly*; Here the Court held that the school division was required to accommodate the religious needs of Jewish teachers by providing them with a paid leave for Yom Kippur. Cole J. stated that:

... other cases may demonstrate circumstances which would make reasonable accommodation impossible. For example, if the religious beliefs of a teacher required his or her absence every Friday throughout the year, then it might well be impossible for the employer to reasonably accommodate that teacher's religious beliefs and requirements. However, that is far from the situation presented in this case.

B. APPLICATION OF THE DUTY TO ACCOMMODATE IN CASES OF DISCRIMINATION BASED ON DISABILITY

In the context of a disability, the concept of accommodation refers to an obligation to take reasonable steps to accommodate the unique needs of a disabled individual.

In Rogers v. Newfoundland¹³, the Newfoundland Court of Appeal held that a duty to accommodate does not involve changing the basic purpose of the rule or practice. It stated:

The concept [of accommodation] suggests processes of adapting, adjusting, reconciling, conforming or harmonizing. None of these notions engage the more radical act of changing or altering the basic purpose or thrust of a rule or practice. . . It follows that the duty to accommodate inherently comprehends the adjusting of a rule or practice to a person's disability; but it does not extend to actually changing the basic purpose of that rule or practice.

1. Establishing a Level Playing Field

The object of human rights legislation is to put handicapped persons on a level playing field with non-handicapped persons. That is to be contrasted with an affirmative action program that may slant the field to the advantage of a disabled or otherwise disadvantaged employee.¹⁴

It follows that if an employee's handicap "is ignored for the purposes of deciding who gets the job, then there is nothing unfair or unequal about that person losing the job competition solely because another candidate was better qualified."¹⁵

2. The Handicapped Employee Must Have the Essential Skills to Perform the Core Functions of the Position

¹³ Rogers v. Newfoundland (Dept. of Culture, Recreation and Youth) (1994) 25 C.H.R.R. C/235 (Leave to appeal to S.C.C. denied May 11, 1995)

¹⁴ Metropolitan Toronto (Municipality) and C.U.P.E., Loc. 79 (Lekousheff) (1994), 46 L.A.C. (4th) 110 (Fisher); See also Manitoba and M.G.E.U. (Ulasy) (1994) 42 L.A.C. (4th) 86 (Teskey). In this latter case, a disabled employee was being interviewed within the context of a "competition". The arbitrator noted that it might be more conducive to the establishment of a "level playing field", and might also remove the "potential of unconscious discrimination", if the employer was to examine the possibility of modifying posted positions in advance of the employee interviews. If a position could be modified to accommodate the applicant, then the interviewing committee could simply be informed that the employer was of the view that the disability was not a factor to be considered. This would permit the interviewing committee to restrict itself to an examination of the quality of the applicants qualifications and skills.

¹⁵ See f.n. 14: Metropolitan Toronto (Municipality)

Arbitration boards have concluded that given an employer's obligation to accommodate, employees need only be required to perform the material elements of the position. In Johnson Matthey Ltd.¹⁶, the employee had become handicapped due to the loss of his thumb. It was the company's position that the employee was unable to carry out the demands of the lightest job that was available within the company. The Board held that it was not enough for the company to demonstrate that some job functions incidental to the work could not be performed. It stated:

... the question is not so simple as whether the employee can perform each and every task assigned to the job. To effect the balance between competing interests, there is the very important matter of materiality. That is, just how material is the task to the job? And, related to this, what is the nature of the inconvenience, if any, on an employer in accommodating a handicapped employee.

Similarly, in the Pharma Plus Drug Mart¹⁷ case, the Board acknowledged that the Code does not entitle a person to employment in a job where the person is unable to adequately perform a particular job because of a handicap. However, it went on to state:

An employer cannot demand of a handicapped individual that he or she perform any more than the "essential duties or requirements" of a job, and even then, the employer is required to seek a way to accommodate the employee's handicap, short of "undue hardship" as defined.

3. **The Obligation to Accommodate Requires an Employer to Look Beyond the Employee's Present Position**

The duty to accommodate clearly extends to the particular job that an employee was holding at the time that the employee became disabled. However, arbitrators have differed on whether an employer is obligated to find an employee another position in circumstances where the employee's former job could not be adapted to accommodate the disability. While earlier decisions have limited that obligation, there appears to be a growing trend requiring an employer to look beyond the employee's present position.

¹⁶ Johnson Matthey Ltd. and United Steelworkers Local 9046 (1990), 14 L.A.C. (4th) 1992 (Baum)

¹⁷ Pharma Plus Drug Mart Ltd. and United Food and Commercial Workers Union (1993), 33 L.A.C. (4th) 1 (Mitchnick)

In the Canada Safeway¹⁸ case, the Board held that the employer's duty to accommodate extended beyond the employee's own position. It stated that before the employer could terminate a disabled employee, it would have to establish:

- (i) That the employee was unable to discharge his duties at the time that he was terminated;
- (ii) That the employee would be unable to discharge his duties within a reasonable time following the date of his termination;
- (iii) That reasonable assistance from the employer would not have enabled the employee to discharge his duties as of the termination date or within a reasonable time thereafter; and
- (iv) That there is no other job in the bargaining unit which the employee could perform as of the termination date or within a reasonable time thereafter.

In the Calgary District Hospital¹⁹ case, the Board held that the employer's duty to accommodate transcends a determination of whether the employee can perform existing jobs. An employer's duty to accommodate requires it to investigate whether existing jobs can be adjusted, or adapted or modified short of undue hardship.

In this particular case, the employer reviewed all of the existing positions in an effort to determine whether a disabled nurse could be assigned to any of those positions. The employer's focus clearly went beyond the employee's job and included all positions which existed in the Hospital. Despite that, the Board found that the employer had not gone far enough. It stated:

It is the Board's conclusion, however, that the duty to accommodate requires more than determining that an employee cannot perform existing jobs . . . The duty to accommodate goes beyond investigating whether an employee can perform an existing job - it involves investigating whether something could be done to existing jobs to enable the employee to perform a job. Having determined that the grievor could not perform any existing job, the employer was obligated to turn its attention to whether, and in what manner, existing nursing jobs could have been adjusted,

¹⁸ Canada Safeway Ltd. and United Food and Commercial Workers (1992), 26 L.A.C. (4th) 409 (Wakeling)

¹⁹ Calgary District Hospital Group and United Nurses of Alberta, Local 121 (1994), 41 L.A.C. (4th) 319 (Ponak)

modified or adapted - short of undue hardship to the Hospital - in order to enable the grievor to return to work despite her physical limitations.

The employer was directed to conduct a thorough examination of its workplace to ascertain how it could adapt or modify nursing jobs so that the grievor's physical limitations could be accommodated without the Hospital having to incur undue hardship.

The duty of accommodation has not generally extended to requiring an employer to create a new position for an injured employee, nor has it extended to requiring an employer to remove an incumbent in order to provide that employee's position to a disabled employee.

In Better Beef Ltd.²⁰, the Board determined that the duty to accommodate does not require a company to "redesign its workforce to create a new position" for a disabled employee. Furthermore, the duty to accommodate "does not go so far as to require an employer in a unionized workplace to displace an incumbent and give the position to another disabled employee." The Board concluded that the employer had no obligation to provide accommodation in circumstances where there was no "bargaining unit job that the grievor is capable of performing or fulfilling the essential duties of."

An employer may have a greater duty to accommodate an employee by finding suitable long term modified work in circumstances where the collective agreement contains a provision giving the employer authority to establish a special classification for a disabled employee. Such a clause:

. . . provides that employer with the authority to create a special classification and salary in the event a disabled nurse is unable to carry out the regular functions of her position. That authority, together with a reference to "continued employment" suggests the parties contemplated that the employer would make a diligent effort to find suitable employment for the affected nurse.

The United Airline²¹ case suggests that an employer, while not having to create a job, may have to modify a multi-task job in such a way as to limit the grievor's work to certain restricted aspects of the job. In this particular case, the grievor was one of a number of customer service representatives whose duties included check in, gates, ticketing, baggage, air freight, plane cleaning and other ramp duties. While there was no such job as pure cleaning of the aircraft, the function occupied a majority of a shift for some employees, and the Board considered it would not be an undue hardship for the employer to fully employ the employee at the restricted task of cleaning.

²⁰ Better Beef Ltd. and United Food and Commercial Workers International Union, Region 18 (1994), 42 L.A.C. (4th) 244 (Welling)

²¹ United Airlines and International Association of Machinists and Aerospace Workers (1993), 33 L.A.C. (4th) 89 (MacIntyre)

The Board stated:

The rather unusually wide range of duties within this job classification cannot be used to prove that this employee can do “little” of his job, where there are significant areas in which specialization is normal although not universal. There appears to be ample evidence that the grievor could be fully employed with restricted tasks. He should be started on a part time basis, and, if he is satisfactory on this basis after a reasonable trial period, then he should (if he chooses) be tried in this function on a full time basis. Gradually he should be tried on some other aspects of the job, always with safety considerations in mind. With reasonable cooperation on his part, the part of his supervisors, on the part of the union, and on the part of his fellow employees, he may gradually be able to return to a significant, if not complete, range of the various job duties.

In Boise Cascade²², the grievor’s position was comprised of two primary tasks. His disability prevented him from performing one but not the other. The evidence established that some employees in the grievor’s classification worked solely on the task that could be performed by the grievor. The employer’s failure to assign the grievor to that particular task resulted in a finding that the employer had failed to properly accommodate the grievor.

Two recent decisions suggest that an employer may be obligated to accommodate a disabled employee by assigning the employee to perform identifiable bundles of tasks within a particular job.

In the Greater Niagara General Hospital²³ case, a Board chaired by arbitrator Brown, concluded that while the employer was not required to create a new position in order to accommodate the grievor:

... where there exists a discrete bundle of duties performed by specific nurses who are assigned to those duties on a regular schedule and those types of duties fall within the grievor’s medical restrictions, then it would not be a hardship to allow the grievor to perform that work.

²² Boise Cascade Canada Ltd. and United Paperworkers International Union, Local 1330 (1994), 41 L.A.C. (4th) 291 (Palmer)

²³ Greater Niagara General Hospital and Ontario Nurses Association (1995), 50 L.A.C. (4th) 34 (Brown)

A Board, again chaired by Arbitrator Brown, arrived at the same conclusion in the Mount Sinai²⁴ case. The Board commented that:

The Code refers to a person's ability to fulfil the duties or requirements attending the exercise of the right to equal treatment in employment, not the duties or requirements of existing jobs.

It then went on to state:

Adopting the broad and liberal interpretation which is appropriate in human rights cases, we interpret the duties or requirements attending the right to equal treatment so as to include not only the duties and requirements associated with current jobs but also the duties and requirements associated with a bundle of existing tasks within the ability of a disabled employee. If a number of such tasks can be consolidated into a new job without undue hardship, the employer is obliged to do so.

While an employer may be required to assign a bundle of duties, it need not do so where that assignment would create an undue hardship. In Canada Post Corporation (Godbout)²⁵, the Board concluded that compelling the Corporation to reorganize to provide ongoing duties for an employee would in the context of that workplace amount to an undue hardship. It stated:

I am satisfied that in reviewing the issue of financial cost to an employer the matter of an incapacitated employee's productivity in whatever duties might be fashioned to accommodate his needs is of significant relevance . . . surely the availability and ability to perform duties must be subject to a test of productivity. In my view the corporation is not under any obligation to create an occupation for the grievor in the nature of performing duties which are entirely foreign to those for which he was hired and which may be of little economic benefit to it . . . I am not persuaded that the corporation need 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 . . . The productivity aspect is fundamental to a consideration of the financial cost of the accommodation.

²⁴ Mount Sinai Hospital and Ontario Nurses Association (1996), 54 L.A.C. (4th) 261 (Brown)

²⁵ Canada Post Corp. and Canadian Union of Postal Workers (Godbout) (1993), 32 L.A.C. (4th) 289 (Jolliffe)

The Board in this case went on to say:

I am not able to conclude that accommodating an employee entails pushing another seniority rated employee out of his/her job altogether. I also have difficulty with the notion of potentially stripping co-workers of the more sedentary aspects of their working day where the rest of their workday, day in and day out, is of a relatively heavy labouring nature. It is not much of a stretch to foresee morale problems developing.

4. **The Employer's Assessment Must Be Objective**

The employer's assessment must be objective, in the sense that the employer must actively consider the medical evidence that is or could be made available in relation to any possibility that might exist for accommodating the employee.

In Hamilton Street Railway Co.²⁶, the Board found that the employer had failed to accommodate the grievor, for in removing the grievor from her job:

(the) company relied on its subjective impression from [the grievor's] record rather than objectively assessing the situation. There was no objective medical evidence to establish that [the grievor] could not be accommodated as a bus operator without undue hardship considering the cost, outside sources of funding, if any, and health and safety requirements, if any. The evidence, for example, did not identify or assess any particular health and safety risks. Further, there was no objective medical assessment, review or opinion directed to the question of whether [the grievor] could attend work regularly as a bus operator in the future. An arbitration board considering the issue of accommodation without undue hardship must be careful about making an assumption of undue hardship.

²⁶ Hamilton Street Railway Co. and Amalgamated Transit Union, Local 107 (1994), 41 L.A.C. (4th) 1 (Levinson)

Similarly, in Orangeville Police Services Board²⁷, the arbitrator, drawing upon the Emrick Plastics²⁸ case, stated:

The courts have directed in situations where an employer asserts reasons for its decision not to accommodate, the onus is upon the employer to establish the reasonableness of its position. The generally accepted rule is that impressionistic evidence is not good enough, and that some degree of objective evidence is required before an employer may be found to discharge [its] duty to adduce evidence that the employer's effort to accommodate was reasonable in all the circumstances.

The assessment must be that of the employer, having regard to the medical evidence that is or could be available. An employer cannot rely on another to make that assessment. For example, in the Pharma Plus Drug Mart Ltd.²⁹ case, the employer had discussed the question of modified work with the Workers Compensation Board, but in the end, either concluded or adopted the Board's conclusion that the grievor couldn't do the job. There was no evidence tendered concerning the extent of the modifications that were considered or of the tests that were employed. The Board noted that while the Workers Compensation Board personnel were undoubtedly acting in good faith, they were not in the position of "final arbiter".

5. **Consideration Should be Given to the Totality of Accommodation Evidence**

In determining whether or not an employer has met its duty to accommodate, the tribunal or court should consider the totality of the evidence. In the Canadian National Railways and Niles³⁰ case, the Federal Court of Appeal was faced with an application to review and set aside the decision of a Human Rights Tribunal. The tribunal had found that Niles' employment had been terminated because of his alleged dependence on alcohol, and that such termination was based on a prohibited ground. In finding that the employer had failed to accommodate Niles, the tribunal focused on the seven-month period between the date that Niles was suspended until the date of his termination. The court found that the tribunal's focus on this period constituted a manifest error, with the result being that the tribunal had improperly ignored a great deal of the evidence that had been adduced on accommodation. In concluding that the employer had accommodated Niles to the point of undue hardship, the court noted as examples of accommodation,

²⁷ Orangeville Police Services Board and Orangeville Police Association (1994), 40 L.A.C. (4th) 269 (Knopf)

²⁸ Emrick Plastics v. Ontario (Human Rights Commission) (1992), 90 D.L.R. (4th) 476 (Ont. Div. Ct.)

²⁹ See f.n. 17: Pharma Plus Drug Mart Ltd.

³⁰ Canadian National Railway Co. v. Niles (1992), 94 O.L.R. (4th) 33, 18 C.H.R.R. D/15 (Fed.C.A.)

allowing Niles to claim 29 days of absenteeism as vacation notwithstanding that such was contrary to company policy, tolerating damage done to a vehicle including a failure to report such damage, charging of personal trips to Niles' expense account, and suspending him at a time when the employer would probably have been justified in terminating him.

In the Ottawa Civic Hospital³¹ case, the Board considered the employer's cumulative efforts at past accommodation when considering the extent to which any further effort at accommodation would constitute an undue hardship. It stated:

Most of the cost of accommodation resides in the past and the burden of employing the grievor in the future, viewed in isolation, might not amount to undue hardship. However, the Human Rights Code on its face draws no distinction between past and future accommodation and we think none should be drawn. To apply the standard of undue hardship by ignoring accommodative measures already taken and considering only those yet to be implemented would be to require an employee who has done a great deal to assist a disabled person to bear a far heavier burden than another employer who has done nothing to help. Past and future accommodation both are to be weighed in the balance.

However, in the Lever Brothers³² case, the Board adopted a much narrower approach to considering overall efforts at accommodation. In that case, the employer had accommodated the grievor by assigning tasks that were in accordance with his medical restrictions. This resulted in the grievor being placed in the general labour group. The collective agreement provided for employees to be laid off on the basis of seniority within their particular occupational group, with the labour group being the first to be laid off. The grievor challenged his subsequent lay-off on the basis that the clause discriminated against an employee who had been classified downward due to a disability. In dealing with the employer's contention that it had consistently accommodated the grievor and that it ought not to now ignore the lay-off provisions in the collective agreement, the Board noted that the obligation to accommodate disabled employees up to the point of "undue hardship" is to be "discharged at the time when a decision affecting the employee is made." Because the labouring jobs would continue to be performed by employees who remained behind, the Board concluded that it would not constitute an undue hardship for the employer to have ignored the provisions of the collective agreement and accommodated the grievor by by-passing him during the lay-off process.

³¹ Ottawa Civic Hospital and Ontario Nurses Association (1995) 48 L.A.C. (4th) 388 (Brown)

³² Lever Brothers Ltd. and Teamsters - Chemical, Energy and Allied Workers, Local 132 (1995) 51 L.A.C. (4th) 373 (Harris)

6. **An Employer May be Obligated to Provide Training**

The duty of accommodation does not require that an employer place an employee in a position where the employee does not have the basic skill set even accounting for a reasonable training period. The employee must be able to perform at a reasonably satisfactory level within a reasonable period of time.³³

The nature of the training that must be provided is a factor in determining whether it will constitute an undue hardship.

The obligation to provide some training in order to meet the duty of accommodation was recognized in the York County Hospital³⁴ case. The grievor was a Charge Nurse who suffered an occupational injury and was unable to return to full nursing duties. In an effort to identify another career path, the grievor obtained an Adult Education Certificate. Although she had worked briefly in the Education Department during a portion of her modified work time, it was the Hospital's view that she did not possess the "innate ability to teach". It was in that context that the Board concluded that:

Training may be required in the course of accommodating a particular employee. Here, we accept that the grievor received very little, if any, training. In retrospect, and in view of the grievor's present career goals, it would have been prudent for the employer to have arranged for training in the education department. Having heard all of the evidence, we are unable to concur with [the Hospital's] assessment of the grievor's abilities in that area. This dispute may also have been avoided had training been extended in the field of employee health.

Moreover, when an employee is absent due to a disability, an employer may have to accommodate the employee by providing training opportunities that were missed by reason of the employee's absence. In Metropolitan Toronto Reference Library Board³⁵, the grievor had been absent on long term disability for what was acknowledged to have been a physical handicap. The grievor worked in the computer operations department, and during the course of his absence, the computer hardware was replaced. Staff were then trained on the new equipment. When the grievor returned to work, he found that he was not qualified for the posted vacancies that had arisen. In concluding that it would not constitute

³³ See f.n. 19: Calgary District Hospital Group

³⁴ York County Hospital and Ontario Nurses Association (1992), 26 L.A.C. (4th) 384 (Watters)

³⁵ Metropolitan Toronto Reference Library Board and Canadian Union of Public Employees, Local 1582 (1995), 46 L.A.C. (4th) 155 (Burkett)

an undue hardship for the employer to accommodate the grievor by providing such training, the Board stated:

The employer relies upon the fact that [the employee] was absent from work at the time that the Hewlett Packard Training was given. This, however, is not a viable defence in circumstances where an employee is absent by reason of “handicap”. If an employee is absent from work “because of a handicap” within the meaning of The Human Rights Code, the Code requires that he/she receive “equal treatment” - that is, that he/she not suffer any loss vis-a-vis those who remained at work. The grievor in this case suffered a loss vis-a-vis those in the reference or comparator group. He lost the opportunity for training which was given to the others and was later found not to be qualified to operate the equipment in respect of which the training was given. It must be found, therefore, that he did not receive “equal treatment” within the meaning of s.5(1) of the Code.

7. **An Employer Must Focus on Long Term Accommodation**

An employer who focuses primarily on identified vacancies or short term modified work rather than turning its attention to permanent accommodation may fail in its duty to accommodate. In York County Hospital³⁶, the Board criticized the employer for having focused primarily on identified vacancies:

If the duty to secure light work was dependent on existing vacancies, the duty to accommodate would be largely illusory, and would clearly not be in accord with the requirements of The Human Rights Code.

Similarly, in Riverdale Hospital³⁷, the Board noted:

The employer seems to only be willing or able to find accommodation on a temporary or limited basis, but it was not willing to do so on a long term basis for this grievor. The duty to accommodate is not temporary. It is ongoing unless undue hardship can be established. The employer, while trying to enforce its laudable work hardening policy, seems to have lost

³⁶ See f.n. 34: York County Hospital

³⁷ Riverdale Hospital and Canadian Union of Public Employees, Local 79 (1994), 41 L.A.C. (4th) 24 (K.nopf)

sight of its continuing duty to accommodate this grievor by looking for other available duties that were within her range of ability.

8. **The Duty to Accommodate Requires Consultation by All Parties**

A disabled employee has an obligation to communicate with the employer with respect to the type of work that the employee is capable of performing.³⁸

In Babcock and Wilcox Industries Ltd.³⁹, the Board commented upon the importance of the employer being notified of the need for accommodation, and adopted the law that was set out in Bellville General Hospital⁴⁰ where the arbitrator stated:

... A person in need of accommodation should identify the fact and should suggest the sort of accommodation required, in order that an employer will know how to go about making the accommodation or to assess whether accommodation would impose hardship on it. This was not done until after the grievor was discharged and I cannot find that the employer was in breach of any obligation to accommodate the grievor's needs.

It should be remembered that the grievor's failure to identify the need for accommodation will not absolve the employer of the need to provide such accommodation; rather, it will most often simply absolve the employer of the need to compensate the employee for the period of time prior to the need for accommodation having been identified.

An employer's modified work programs and other accommodating measures should be established in consultation with the union. The employer's failure to do so was a consideration in finding that it failed to accommodate the employee in York County Hospital⁴¹. There the Board stated:

The modified work program was established without input from the union. Further, it appears that the union was not involved in the identification of suitable work for this grievor. In cases of this type, we think it advisable that the parties communicate in an attempt to isolate an acceptable

³⁸ See f.n. 34: York County Hospital

³⁹ Babcock and Wilcox Industries Ltd. and United Steelworkers of America, Local 2859 (1994), 42 L.A.C. (4th) 209 (Williamson)

⁴⁰ Bellville General Hospital and S.E.U., Local 183 (1993), 37 L.A.C. (4th) 375 (Thorne)

⁴¹ See f.n. 34: York County Hospital

accommodation . . . Indeed, the employer may have no alternative but to involve the union as other employees may be affected by the particular accommodation selected. . . Further, the placement of a disabled employee in a new position may adversely impact on the seniority rights of other employees. . . The Board also considers that the disabled employee has an obligation to communicate with the employer as to the type of work that they can perform. Simply put, we think that the success of a modified work program depends on input from all of the affected parties.

While the employer has an obligation to review all of its positions in order to determine if there can be an accommodation, it should nevertheless ask the union and the employee to identify the job or jobs which the grievor can perform, with or without accommodation.

Moreover, an employer may be required to survey its other employees to determine if they are prepared to assist in accommodating a disabled employee. Failure to address that issue with employees could conceivably result in a finding that the employer had failed in its duty to accommodate. While the refusal of such employees might not amount to a defence, it was a factor considered in Rothmans, Benson & Hedges Inc.⁴² There, the Board stated that it was up to the employer to determine whether one or more of the employee's workmates were willing to accommodate the employee. The Board concluded that "The employer is the logical one to make this determination." The employer had not done so. In finding that the employer had not met its duty to accommodate, the Board reinstated the employee conditional on the necessary accommodation being reached with her fellow employees so as to relieve her of her share of the heavy work.

9. **An Employee Who Fails to Disclose a Disability May Nevertheless Merit Accommodation**

In Ottawa Civic Hospital⁴³, the employee was terminated after having exceeded the allowable number of absences under a "last chance" reinstatement agreement. Subsequent to her termination, she advised the employer that her absences were due to a long standing abuse of alcohol and other drugs. The Board reviewed the approaches that had been taken regarding the relevance of an employer's knowledge of the disability at the time that an employee was terminated. It noted that even if the Code did not apply to a dismissal that occurred before a handicap was known, it would apply to a refusal to reinstate the complainant once the disability had been revealed.

⁴² Rothmans, Benson and Hedges Inc. and Bakery Confectionary & Tobacco Workers Union, Local 325-T (1990), 10 L.A.C. (4th) 18 (Brown)

⁴³ See f.n. 31: Ottawa Civic Hospital

In VIA Rail⁴⁴, the employee was terminated when his demerit points exceeded the trigger point under an industry demerit system. The Board accepted that the work-related offences (two successive instances of sleeping on the job) were in part related to the employee's diabetic condition. Consequently, the Board reinstated the grievor and in doing so, stated:

In particular, the extent of the accommodation required to permit the grievor to manage his condition will not be known until he has returned to the workplace and his circumstances have been assessed. Hence, this award is limited to an acknowledgement that the grievor is entitled to reinstatement, that he is entitled to be recalled to active employment if he can obtain medical certification of his fitness, and finally, to determination that the railway must provide reasonable accommodation of his condition, including the adjustment of shift times and work assignments, if and when he returns to active employment.

10. **Employees Seeking Accommodation Have an Obligation to Pursue Necessary Treatment**

An employee who is suffering from an illness that may be controlled by medication has a responsibility to ensure that the condition is controlled. Failure to do so may result in a termination being upheld. In Canadian Pacific Ltd.⁴⁵, the grievor was an epileptic. Some time after his hire, he disclosed his condition to the company, and he was, with the concurrence of the union, transferred to a position having less risk. Some time later, the grievor suffered an epileptic seizure and was found unconscious. It was later determined that the grievor had, on his own initiative, and without medical authorization, discontinued his use of the prescribed anticonvulsive medication. In upholding the termination, the arbitrator stated:

Once the grievor was reassigned to a position of less risk, he "then knew, or reasonably should have known, that his continued employment was predicated upon the expectation that he would discharge his responsibilities in respect of controlling his condition, both through periodic contact with his physician and the maintenance of appropriate levels of medication.

⁴⁴ VIA Rail and Canadian Autoworkers (1995), 51 L.A.C. (4th) 337 (Hope)

⁴⁵ Canadian Pacific Ltd. and International Brotherhood of Firemen & Oilers (1989), 7 L.A.C. (4th) 137 (Picher)

In Ottawa Civic Hospital⁴⁶, the arbitrator considered the grievor's failure to seek treatment as a factor in concluding that the employer had discharged its duty of accommodation. He stated:

As demonstrated by the grievor's experience after the dismissal, her handicap was not totally beyond her control. Her failure to seek treatment at an earlier date is one factor to be considered in deciding whether the employer has discharged its duty of accommodation. In Central Okanagan School District . . . Mr. Justice Sopinka said (at p.593):

To facilitate the search for accommodation, the complainant must do his or her part as well. Concomitant with the search for reasonable accommodation is a duty to facilitate the search for such accommodation. Thus, in determining whether the duty of accommodation has been fulfilled, the conduct of the complainant must be considered.

. . . In the context of a disability the extent of which can be mitigated by proper care, the duty of a complainant to do her part includes taking reasonable steps to obtain treatment. While recognizing denial is a barrier to recovery from addiction, we believe that the grievor bears some responsibility for not seeking help in response to her supervisor's repeated counselling.

11. **The Duty to Accommodate May Impact on an Attendance Management Program**

An attendance policy may be successfully challenged if it does not incorporate the employer's duty to accommodate a disabled employee.

The employer's attendance management program was considered in City of Scarborough⁴⁷, where the Board stated that the policy was deficient in that:

There was no explicit recognition of the scope and extent of the statutory duty of accommodation for a disabled or handicapped employee pursuant to . . . the Workers Compensation Act or the requirements of the Ontario

⁴⁶ See f.n. 31: Ottawa Civic Hospital

⁴⁷ City of Scarborough Public Utilities Commission and Utility Workers of Canada, Union 1 (1993), 35 L.A.C. (4th) 1 (Haefling)

Human Rights Code . . . , which are fundamental considerations for an employer intending to comply with the provisions of those employment related statutes.

Similarly, in the Hamilton Street Railway⁴⁸ case, the Board commented upon the employer's Attendance Management System (AMS) in the following terms:

Most statutes require that there be an attempt to accommodate but recognize that this may not be possible. One of my concerns in this matter is that the AMS Code does not explicitly make reference to the Ontario Human Rights Code and make it clear that the employer recognizes its obligations under that statute . . . It should be clear from the above that I do not feel that the practice followed by the employer in the application of the AMS Code violates either statute. As indicated, however, I am very concerned that the AMS Code itself does not make this clear . . .

12. **The Duty to Accommodate Does Not Prohibit Termination for Innocent Absenteeism**

In Ball Packaging Products Inc.⁴⁹, the grievors were terminated for having been continuously absent on account of disability for a period of six years. The union took the position that the employees could not be terminated because they were suffering from a handicap as defined in the Human Rights Code. The Board found that there could be no accommodation in the circumstances and accordingly, the grievances were dismissed.

In the AirBC⁵⁰ case, the grievor was terminated due to excessive intermittent absenteeism attributable to several different medical conditions. The Board found that the employer had met the tests set out in arbitral jurisprudence to establish a case of non-culpable absenteeism. It then went on to consider whether or not the termination contravened human rights legislation.

The employer acknowledged that it had a duty to accommodate an employee, but it submitted that the grievor could not be accommodated short of undue hardship. In upholding the termination, the arbitrator stated:

⁴⁸ See f.n. 26: Hamilton Street Railway Co.

⁴⁹ Ball Packaging Products Inc. and Canadian Workers Federal Union, Local 35 (1990), 12 L.A.C. (4th) 145 (Davis)

⁵⁰ AirBC Ltd. and Canadian Airline Dispatchers Association (1995), 50 L.A.C. (4th) 93 (McPhillips)

. . . the existence of human rights legislation does not result in the eradication of the doctrine of non-culpable absenteeism. That doctrine affirms the right of an employer to receive its part of the employment bargain, namely, the employee's performance of her work. However, the right to terminate will be subject to the right of an individual to be free from discrimination as required in human rights legislation when the latter is applicable. The Ontario court (General Division) Divisional Court in Ontario (Human Rights Commission v. Gaines Pet Foods Corp. [(1993) 16 O.R. (3d) 290] seems to indicate that if a dismissal is due to in whole or in part an illness which comprises a disability then a termination can never be proper. However, that same court in O.N.A. v. Etobicoke General Hospital [(1993) 104 D.L.R. (4th) 379] indicated that where such an employment rule indirectly impacts on a disabled person, then an arbitrator must consider whether the grievor could be accommodated. In my view, the latter approach is the correct one to this type of problem.

In considering that the employer could not accommodate the grievor short of undue hardship, the Board noted the following factors:

- ! the grievor's absences had proved costly to the employer, disruptive to its scheduling operations and had a significant impact on other employees
- ! there was no basis to conclude that the grievor's attendance would improve if a different job was tried and/or a reduced schedule was implemented
- ! the nature of the job itself, the shift work or the length of the shifts had no direct causal link to the grievor's absences
- ! the grievor's absences were not predictable
- ! the employer had all of the medical evidence in its possession at the time of discharge

Although casual work may have been a possible solution, the evidence was that the grievor and the union had rejected that offer. The termination was upheld.

13. **The Duty to Accommodate May Invalidate the Operation of a Deemed Termination Clause**

An employee who has been absent and has been terminated pursuant to an automatic termination clause in a collective agreement may be reinstated if his absence was due to a disability.

In Babcock and Wilcox Industries Ltd.⁵¹, the grievor was terminated under an automatic termination provision that provided that his employment would be terminated if he was absent for longer than the defined period. The union alleged that the termination was contrary to the Code, in that the grievor was an alcoholic and was suffering from reactive depression. He was therefore disabled and could not be terminated unless he could not be accommodated short of undue hardship. The Board accepted the union's position and concluded that the effect of the deemed termination provision was to discriminate against a handicapped employee.

In Lancia-Bravo Foods⁵², the collective agreement provided that where there was a reasonable expectation that an employee who was ill would be able to return to active employment, seniority would continue to accumulate for a period of 30 months or the length of the employee's seniority, whichever was shorter. In rejecting the employer's right to automatically terminate the employee for having been absent beyond the permitted period, the Board stated:

Applying the same reasoning as in the "just cause" awards it seems to me that where a duty to accommodate exists in the statute, it must be assumed that the parties would have intended that the words "off work" in [the article] mean off work notwithstanding an attempt at reasonable accommodation.

In addressing the issue of reasonable accommodation, the arbitrator stated that any question as to what constituted reasonable accommodation could only be answered in the factual context that exists at the end of the 30 months.

14. **The Duty to Accommodate in Relation to Cases of Pregnancy, Alcohol and Drug Addiction and Psychiatric Illnesses**

(a) **Pregnancy**

An employer may be required to transfer a pregnant employee to a position that would minimize any risk during her pregnancy.

In the Orangeville Police Services Board⁵³ case, the two grievors were pregnant police officers who had requested that they be accommodated by being transferred to light duties. The police

⁵¹ See f.n. 39: Babcock and Wilcox Industries Ltd.

⁵² Lancia-Bravo Foods and United Food and Commercial Workers, Local 530P (1990), 11 L.A.C. (4th) 59 (Burkett)

⁵³ See f.n. 27: Orangeville Police Services Board

force took the position that there were no acceptable alternative assignments available and that the creation of any such alternate assignments would impose undue hardship on the police force. The Board disagreed, concluding that it would have been possible to accommodate the grievors by making temporary transfers that would not have lessened the effectiveness of the police force.

In the Emrick Plastics⁵⁴ case, the employee was a spray painter who asked to be reassigned upon learning that she was pregnant. After temporarily reassigning the grievor to the packing area, the company then put her on an involuntary leave of absence because her doctor would not provide the company with a letter absolving it of responsibility for any injury to her health or to that of her foetus.

The court upheld the Board's decision and concluded that the company had failed to make reasonable accommodation. It stated that the company had a duty to take reasonable steps to accommodate the employee once her doctor had advised that she could no longer spray paint for the duration of her pregnancy. Accommodation was possible, and it was "paternalistic, patronizing and unreasonable" for the employer to refuse to accept the opinion of the employee's physician and to then demand that the employer be absolved from all responsibility for the health of the employee and her unborn child.

In the Escada⁵⁵ case, the employer transferred a department head from one department to another when it learned that she was pregnant and planning on taking maternity leave. The complainant suffered no loss of seniority, but she alleged that the transfer was a demotion, and that it created loss of status and responsibility.

The tribunal found that "the impact of the transfer, to the extent it was based on pregnancy-related absence, was such as to impose some disadvantage on [the complainant] and therefore constituted adverse effect discrimination." However, the tribunal went on to acknowledge that the transfer decision "was rationally connected to the employment," for there was a need to maximize continuity and accountability in management personnel. The tribunal noted that by transferring the complainant to the new department, the employer had in effect accommodated the complainant by maintaining her in employment that was comparable in terms of job description, duties and salary. After considering a number of factors, including flexibility and the allocation of management personnel, the tribunal concluded "that accommodating [the complainant] in the manner she desired would have constituted an undue interference in the operation of [the employer's] business." In the result, the tribunal found that the employer "took reasonable steps to accommodate [the complainant's] pregnancy to the point of undue hardship.

⁵⁴ See f.n. 28: Emrick Plastics

⁵⁵ Escada and Bonetti (1995) 25 C.H.R.R. 148

The complainant had resigned her employment after having been transferred. The tribunal found that in resigning her employment, the complainant did not act reasonably and did not fulfil her obligation to accept the reasonable accommodation provided by the employer.

(b) **Alcohol and Drug Addiction**

An addiction to alcohol or drugs constitutes a disability, and as such, requires accommodation on the part of the employer.

The Canadian National Railway and Niles⁵⁶ case establishes that an employee who is seeking accommodation for a drug or alcohol addiction must be actively and earnestly participating in a program of treatment. In that case, the employee had been suspended to enable him to participate in an alcohol dependency program. He was advised that he would not be reinstated until he satisfied the employer that he had acknowledged his problem and was dealing with it in a tangible manner. Although the employee eventually submitted letters in support of his assertion that he had his problem under control, the employer took the position that he was not rehabilitated because he was not engaged in follow up treatment. His employment was therefore terminated.

Experts who were subsequently called by the employer testified that the employee was not rehabilitated at the time of his dismissal because he was not seriously participating in the aftercare which was a vital and necessary component of rehabilitation. In accepting that proposition, and in concluding that the employer had met its duty to accommodate, the Federal Court of Appeal noted that the employer's accommodation consisted of, among other things, allowing the employee to claim 29 days of absenteeism as vacation notwithstanding that such was contrary to the company policy, tolerating damage done to a vehicle including a failure to report such damage, charging of personal trips on the employee's expense account, and suspending the employee at a time where the employer would probably have been justified in terminating him.

In the Ottawa Civic Hospital⁵⁷ case, the employee was terminated for excessive absenteeism that had arisen due to a long standing abuse of alcohol and drugs. In following the approach taken by the Federal Court of Appeal in Canadian National Railway and Niles⁵⁸, the Board stated:

In deciding whether the accommodation of an employee has reached the point of undue hardship, every accommodative measure taken throughout

⁵⁶ See f.n. 30: Canadian National Railway Co. v. Niles

⁵⁷ See f.n. 31: Ottawa Civic Hospital

⁵⁸ See f.n. 30: Canadian National Railway and Niles

the period of handicap should be considered. The assessment should include the burden of all absences caused by the disability. We see no sound basis for distinguishing between absences which occur before an employee's disability is known to management and those occurring after the employer is aware of the problem.

In considering the issue of accommodation, the Board noted the following:

- ! the grievor's excessive use of paid sick leave imposed a significant expense on the employer
- ! the grievor's absences had an inverse impact on the morale of her fellow nurses. That concern was not "inconsistent" with human rights values, for the fellow workers were bothered not because of the grievor's handicap, but because she gave little or no advance notice of her absences
- ! in addition to the cost of accommodative measures to date, there would be the additional costs of accommodation if the grievor was reinstated. That would include the burden which the employer would bear if a relapse occurred, as well as the cost of monitoring the grievor's compliance with any of the conditions of reinstatement that would be necessary

The Board noted that the grievor's failure to seek treatment at an earlier date was one factor that had to be considered in deciding whether the employer had discharged its duty of accommodation. It stated:

In the context of a disability, the extent of which can be mitigated by proper care, the duties of a complainant to do her part includes taking reasonable steps to obtain treatment. While recognizing denial is a barrier to recovery from addiction, we believe the grievor bears some responsibility for not seeking help in response to her supervisor's repeated counselling.

In concluding that the cumulative burden of any past and future accommodation would constitute undue hardship, the Board noted that if the grievor's doctors prognosis was correct:

... Most of the cost of accommodation resides in the past and the burden of employing the grievor in the future, viewed in isolation, might not amount to undue hardship. However, the Human Rights Code on its face draws no distinction between past and future accommodation and we think none should be drawn. To apply the standard of undue hardship by

ignoring accommodative measures already taken and considering only those yet to be implemented would be to require an employer who has done a great deal to assist a disabled person to bear a far heavier burden than another employer who has done nothing to help. Past and future accommodation both are to be weighed in the balance.

In Samuel, Son & Co.⁵⁹, the employee reported to work under the influence of alcohol. The employer had accommodated the employee by permitting the employee to be absent for alcohol-related treatment or rehabilitation on twelve occasions during his fourteen-year course of employment. Approximately three and one-half years prior to his termination, the employee, the union, and the employer had entered into an agreement that set forth the conditions for the employee's continued employment. The employer characterized that as an agreement to accommodate the grievor rather than a disciplinary document. The agreement provided that the employee would be terminated if he did not fulfil all of its conditions, one of which was that he would not report for work under the influence of alcohol. There was no evidence that the agreement had been violated during the three and one-half year period between the date that the agreement was signed and the date that the employee arrived at work under the influence of alcohol.

The employer terminated the employee pursuant to the terms of the agreement. The termination was characterized as a non-disciplinary termination.

The union had submitted that instead of terminating the grievor "the employer should have insisted upon the grievor's further assessment and treatment and put him into the weekly indemnity program which for some years was the pattern followed by the employer with the grievor".

After considering all of the evidence, "including the employer's treatment of the grievor over a fourteen year period", the Board concluded that the employer had accommodated the grievor. It stated:

This Board must reluctantly conclude that the grievor was incapable of performing his tasks for the employer bearing in mind the grievor's long work history with alcohol, the accommodation provided to him by the employer over this time frame, and the safety requirements of the workforce employed within the plant.

In at least one case, a Board has determined that an addiction to nicotine did not constitute a handicap, and consequently, the employer was not obligated to accommodate any employees who were

⁵⁹ Samuel, Son & Co. and United Steelworkers of America, Local 6398 (1995), 50 L.A.C. (4th) 321 (Clement)

so addicted.⁶⁰ In that case, the Board stated that even if it was wrong in its conclusion and that an addiction to nicotine did constitute a handicap, then the employer had accommodated that handicap because it provided outdoor smoking facilities for its employees.

(c) **Psychiatric Conditions**

A psychiatric condition should be treated much the same as any other illness, with the one distinguishing factor being that an employee's psychiatric condition may deprive the employee of the rational ability to seek or pursue a course of treatment.

In Canadian National Railway Co.⁶¹, the grievor had a psychological hoarding compulsion, and over a fourteen-year period, had filled his garage with items that had been stolen from the employer. The items were of little use to the grievor and were not stolen for financial gain.

The grievor acknowledged the thefts and professed a willingness to cooperate with any therapeutic procedure or any surveillance that might be instituted by the company. Although the Board noted that the thefts were prompted by an illness that was beyond the grievor's control, it stated that this factor would be significant only:

... to the extent that the grievor's condition could be shown, on the balance of probabilities, to be at present reasonably under control so that, to adopt the principles governing the employment of the disabled under the Canadian Human Rights Act... , his condition could be accommodated through his continued employment, without undue hardship to the company.

The grievor's doctor had recommended that the employer institute measures to constantly observe and regularly search the grievor following his return to work. The arbitrator concluded that these measures would constitute an undue hardship:

Very simply, it is, in my view, beyond the standard of undue hardship to ask the employer to return an individual to the workplace who will, in all probability, steal again and whose day-to-day employment will involve changing a largely unsupervised work setting to require continual vigilance on the part of supervisors, fellow employees and security personnel.

⁶⁰ Hamilton - Wentworth (Regional Municipality) and Canadian Union of Public Employees (1994), 44 L.A.C. (4th) 257 (Stewart)

⁶¹ Canadian National Railway Co. and C.A.W. - Canada (1994), 43 L.A.C. (4th) 129 (Picher)

C. APPLICATION OF THE CONCEPT OF UNDUE HARDSHIP⁶²

The question of “What constitutes an undue hardship?” requires a consideration and a balancing of all of the relevant factors. The answers will vary from one employee to another, from one employer to another, and from one economic climate to another.

In the Mount Sinai Hospital⁶³ case, the Board considered the approach that must be taken in balancing the various factors. It stated that:

In a disability case, this balancing exercise should be conducted by comparing the cost of accommodation with the benefit resulting from it in the particular circumstances. Consider a disabled employee who is at a very large disadvantage caused by his or her handicap, and assume all of the employment-related burdens of this person’s disability could be eliminated at very little cost to the employer. In this scenario, the hardship imposed by accommodation would not be undue because the benefit greatly exceeds the cost. Consider the foregoing example with another where the disadvantage removed by accommodating an employee would be very small in relation to the cost of eliminating it. In this context, the hardship of accommodation would be undue because the cost far exceeds the benefit.

The Board then stated:

The general principle of proportionality which emerges from the foregoing analysis is that the burden which an employer should be required to bear varies inversely with the consequential relief flowing to a disabled employee. One corollary of this principle is that more should be done to provide work to someone who otherwise would remain outside the active workforce, without any of the rewards of employment, than to place a person in one job rather than another. By the same token, if a handicapped employee wishes to perform the type of work done before being disabled, more should be done to achieve this result in cases where the alternative job is very inferior than in cases where this alternate assignment is only slightly less advantageous to the individual.

⁶² This section will consider the arbitral and tribunal decisions that consider the factors that have been set out in the Supreme Court decisions discussed at pages 1 to 11 of this paper.

⁶³ Mount Sinai Hospital and Ontario Nurses Association (1996), 54 L.A.C. (4th) 261 (Brown)

The Board went on to recognize the importance of work in terms of a disabled person's self respect. It stated:

In assessing the relative benefit to an employee of various jobs, consideration should be given not only to wages and other financial benefits but also to the non-monetary rewards of employment. The importance of these non-pecuniary matters was acknowledged by Dickson C.J.C. in Reference re Public Service Employee Relations Act (Alta.) (1987), 87 C.L.L.C. 14,021 (S.C.C.) in the context of litigation under the Canadian Charter of Rights and Freedoms (at p.12,180):

In the present case, however, we are concerned with interests which go far beyond those of a merely pecuniary nature.

Work is one of the most fundamental aspects in a person's life, providing the individual with a means of financial support and, as importantly, a contributory role in society. A person's employment is an essential component of his or her sense of identify, self worth and emotional well being. Accordingly, the conditions in which a person works are highly significant in shaping the whole compendium of psychological, emotional and physical elements of a person's dignity and self respect.

The remainder of this section considers the manner in which the various factors have been applied.

1. **Financial Costs May Constitute an Undue Hardship**

The threshold of undue hardship would clearly be crossed if an employer was required to maintain an employee in a position that was not useful or productive. As the Board stated in the Hamilton Civic Hospitals⁶⁴ case:

The thrust of the authorities is that at the end of the day and with whatever reasonable accommodation can be achieved without undue hardship to the employer, the employee must nonetheless still be able to perform a useful and productive job for the employer.

⁶⁴ Hamilton Civic Hospitals and Canadian Union of Public Employees (1994), 44 L.A.C. (4th) 31 (Kennedy)

The extent of the financial cost of accommodation required in order to constitute an undue hardship will differ from one employer to another and from one economic climate to another. As noted earlier, in Commission Scolaire Regionale De Chambly⁶⁵:

The situations presented will vary endlessly. For example, in a large concern, it may be a relatively easy matter to replace one employee with another. In a small operation replacement may place an unreasonable or unacceptable burden on the employer. The financial consequences of accommodation will also vary infinitely. What may be eminently reasonable in prosperous times may impose an unreasonable financial burden on an employer in times of economic restraint or recession.

In the foregoing case, the court concluded that it did not constitute an undue hardship to require that particular employer to accommodate an employee's religious needs by granting a paid leave for such purposes. It is quite possible that in the circumstances of a different employer, the employer's duty to accommodate would extend only to providing an unpaid leave of absence for such purposes.

The cost of accommodation must be more than a de minimis cost. In the Rothmans, Benson & Hedges⁶⁶ case, the Board directed the employer to consider the question of accommodation. It stated that in the circumstances of that particular case, accommodation having a cost of at least \$10,000 would pose an undue hardship on the employer, but less expensive modifications having a minimal cost would not.

Excessive use of sick leave is an employer cost that has been considered in the context of an employer's duty to accommodate.⁶⁷

Distinctions have been drawn between the cost of temporary as opposed to ongoing permanent accommodation. In Canada Post Corp.⁶⁸, the Board began by accepting the principle that "the productivity aspect is fundamental to a consideration of the financial cost of the accommodation." It went on to state:

⁶⁵ See f.n. 11: Commission Scolaire Regionale De Chambly

⁶⁶ See f.n. 42: Rothmans, Benson & Hedges Inc.

⁶⁷ See f.n. 31: Ottawa Civic Hospital

⁶⁸ Canada Post Corp. and Canadian Union of Postal Workers (Godbout) (1993), 32 L.A.C. (4th) 289 (Jolliffe)

I do not understand that the issues of productivity and ability to perform should be considered quite in the same light as with temporarily disabled employees who are expected to recover to the point of full capacity. It is one thing to structure temporary light duties to assist a person toward recovery where the emphasis need not be on the economic worth of the activity to much or any degree. The alternative, after all, is to place the employee on paid injury/illness leave for a time while recovery continues. It is quite a different issue when structuring duties suitable for a disabled person on a permanent basis which I suspect invites more weight to be placed on the productivity/ financial cost side of the equation. There might be any number of temporary modified duties situations which can develop which do not bear up well under the scrutiny of undue hardship when it is a matter of accommodating an employee on a permanent basis.

2. An Accommodation Which Impacts on Employee Morale and/or Interferes With Established Rights May Constitute Undue Hardship

Any impact on employee morale must be considered within the context of employee objections that are consistent with human rights. Any employee “objections” based on attitudes that are inconsistent with human rights are an irrelevant consideration.⁶⁹

A union will not necessarily be in breach of its duty to accommodate where it refuses to waive the terms of a collective agreement to permit a disabled employee to carry existing seniority into a new bargaining unit. In the Greater Niagara General Hospital⁷⁰ case, the grievor was, with the concurrence of the union, transferred from the nursing unit into the clerical bargaining unit in order to accommodate her disability. However, the union refused to permit the grievor to be credited with the seniority that she had accumulated in the nursing unit.

The Board found that to accommodate the grievor with full seniority would impose an undue hardship upon the union and its members. While the bargaining unit members had been prepared to accommodate the transfer to a vacant full time position and to waive the job posting provisions of the collective agreement, they were not prepared to provide the grievor with seniority for purposes of promotions, lay-off and recall, because to do so would leap frog the grievor over others and have a negative impact on bargaining unit members in respect of lay-off. There was particular concern among the members because there were significant lay-offs in the hospital field, and the nature of the work done by

⁶⁹ See f.n. 6: Central Okanagan School District No. 23 v. Renaud and the discussion at page 9 of this paper

⁷⁰ Greater Niagara General Hospital and Service Employees International Union, Local 204 (1995), 47 L.A.C. (4th) 366 (Brent)

the unit made it particularly vulnerable to having to receive employees from other bargaining units whose disabilities had to be accommodated.

However, it may not be an undue hardship to obligate an employer to suspend a job posting clause in order to accommodate a disabled employee. In Union Carbide Canada⁷¹, the grievor claimed a position that was filled by a disabled employee pursuant to a job posting. On the basis of the provisions of the collective agreement, the grievor should have obtained the position based on his seniority, but the job was given to a less senior employee who had been injured and was no longer capable of performing his former job.

The Board concluded that there was no question on the facts that the disabled employee required the particular position in order to accommodate his disability and carry on with regular full time employment. It found that in these particular circumstances, the provision of the clause dealing with the awarding of positions “must be deemed temporarily inoperative or suspended in order to permit the required accommodation . . .” The grievance was dismissed.

Furthermore, it may not be an undue hardship to permit an employee who has been absent due to a disability to accumulate seniority for the period of absence even though such accumulation is contrary to the terms of the collective agreement. In Golden Manor Home⁷², the grievor sought to be credited with all seniority that she would have earned had she been able to work during her period of disability. The Board accepted that it would not constitute an undue hardship for the employee to be accommodated by being credited with seniority for certain limited purposes. It stated:

We have concluded that [the grievor] cannot be “credited” with seniority for all purposes, nor can the seniority list be corrected for all purposes. Instead we find that, when it comes to matters of remuneration, compensation or monetary benefits, the narrower notion of equal treatment applies and [the grievor] cannot expect to be treated any more or any less favourably than other non-handicapped part time employees. Thus, for example, for purposes of calculating her wage rate, her placement on the wage grid, her entitlement to vacation with pay and any other “compensation” type matters, her seniority is to be calculated in accordance with [the collective agreement] and is based on actual hours worked.

⁷¹ Union Carbide Canada Ltd. and Energy & Chemical Workers Union (1991) 21 L.A.C. (4th) 261 (Hinnegan)

⁷² Golden Manor Home for the Aged and Ontario Nurses Association (1996), 53 L.A.C. (4th) 353 (Davie)

When it comes to matters involving [the grievor's] participation in the workplace or the job participation opportunities of which she can avail herself, the broader notion of equal treatment applies and [the grievor's] handicap is to be accommodated without undue hardship to the employer. As accommodation, [the grievor] seeks to be credited with the seniority she would have accumulated but for her involuntary absences from work because of her handicap. Can the employer take this accommodative measure without undue hardship? We think so.

In coming to this conclusion, the Board noted that there was little evidence to support the contention that the grievor could not be accommodated without undue hardship. There were no financial costs associated with crediting the grievor with seniority so as to enable her to fully participate in the workplace. Although crediting the grievor with seniority might impact on other employees, the Board noted that the union had obviously countenanced that type of impact for it had taken the grievance forward. Furthermore, the accommodation would not cause significant interference to the employer's interest, for the collective agreement provided that qualifications and ability were to be considered along with seniority in determining matters such as promotion, lay-off and recall.

It may not pose an undue hardship to require an employer to ignore the provisions of a collective agreement in order to retain a disabled employee who would otherwise be laid off when the employee's exposure to lay-off arises as a result of the employee's disability. In the Lever Brothers⁷³ case, a disabled employee with significant seniority had been transferred to the "labour group" in order to accommodate his disability. Although the collective agreement provided that employees in the labour group were the first to be laid off, the Board held that the grievor's accommodation would not constitute an undue hardship because there would be labouring work that would continue to be performed.

An employer may be obligated to retain an employee in a full time bargaining unit even though the employee is unable to work the minimum number of prescribed hours to remain in that unit.

3. **Interference With the Organization of the Workplace May Constitute an Undue Hardship**

An interference with the organization of the workplace will generally raise questions of employee morale, increases in direct costs and a loss of efficiencies. Consequently, this factor is one that is frequently considered within the context of other factors.

⁷³ See f.n. 32: Lever Brothers Ltd.

⁷⁴ See f.n. 37: Riverdale Hospital

In Stelco Inc.⁷⁵, the grievor was suffering from an eye condition that was aggravated by working as a crane operator in certain pits. As a result of a recent reorganization, crane operators were required to rotate through all of the pits. The union alleged that rather than demote the grievor, the employer was obligated to accommodate the grievor by relieving him of the requirement to work on those cranes that operated in the offending pits. The Board concluded that there was no duty to accommodate, in that “an employee’s capability to participate fully in the rotation system is an essential feature or requirement of the charging and pits craneman position” and that the grievor’s handicap rendered him “incapable of performing an essential feature or requirement of the charging and pits position.”

Although the case was decided on the basis that there was no duty to accommodate, it could just as easily have been decided on the basis that such accommodation would have constituted an undue hardship.

4. **Safety Risks May Constitute an Undue Hardship**

In T.C.C. Bottling Ltd.⁷⁶, the grievor was an epileptic who had suffered and would likely continue to suffer further seizures in the workplace. He worked on a bottling line where there was considerable danger to his personal safety. The Board stated that:

Generally, “safety” in this context is a question of the safety of the public, of the grievor’s fellow workers and of the grievor himself. There is no issue in this case of public safety.

The Board considered that the danger to fellow employees could be minimized by prohibiting the grievor from working in certain types of situations. While fellow employees might suffer some risk if they had to come to the assistance of the grievor if he fell into moving machinery, the risk would be no greater than had those employees been attempting to dislodge a bottle on the production line. The Board noted that the grievor was a danger to himself and that the employer could not, at reasonable cost, cover or guard the machinery to the point that there would be no real danger of the grievor being injured. However, the Board went on to consider the issue in the following terms:

The fundamental issue, though, is whether a person with the grievor’s disability is to be so insulated from physical danger that he or she is injured in another way, which, while not so obvious, may be more serious. Is the danger to the disabled person so great that he or she is to be denied the right to equality of opportunity to work? The determination of the limits

⁷⁵ Stelco Inc., Hilton Works and United Steelworkers of America, Local 1005 (1995), 50 L.A.C. (4th) 301 (Marcotte)

⁷⁶ T.C.C. Bottling Ltd. and Retail, Wholesale and Department Store Union (1993), 32 L.A.C. (4th) 73 (Christie)

of the employer's duty to accommodate to the point of undue hardship necessarily involve that balance.

Although the case was subject to New Brunswick legislation, the arbitrator considered guidelines that had been published by the Ontario Human Rights Commission, and in particular, those portions of the accommodation guidelines dealing with the willingness of the disabled person to assume the risk in circumstances where there was a risk to his or her own safety. The Board then stated:

On the basis, not of these guidelines, but of the consideration so clearly expressed in them, I have concluded that the grievor must, in the end, be the one who decides whether to run the risks associated with even the safest jobs that he is qualified to do in the employer's plant. Every day in his off work life he faces the possibility that if he has a seizure he will fall on his face on the sidewalk, fall in front of a car, or bump into something hard or sharp and injure himself. He decides how to limit his activities because of those possibilities. The effect of the collective agreement and the New Brunswick Human Rights Act is that the employer does not have just cause to dismiss him because of his disability, if doing so denies him the right to make those same choices about his work, provided that by choosing to work, he will not endanger his fellow workers significantly or cause his employer undue expense.

The Board concluded that the employer could accommodate the grievor without undue hardship by reinstating him. In reinstating the grievor, the Board imposed certain conditions, including the type of material that the grievor could handle, the extent to which the employer should modify the workplace (by the expenditure of hundreds rather than thousands of dollars), the wearing of a hard hat with a chin strap and other appropriate safety clothing (with the cost to be borne by the grievor), the requirement that on each shift the grievor would work with at least one other employee trained to administer first aid to a person with a seizure disorder, and a condition whereby the grievor was to be paid no more than for the actual work that he was doing at any point in time.

In the Calgary District Hospital⁷⁷ case, the Board concluded that "in a health care setting, adjustments that clearly jeopardize patient safety will constitute undue hardship . . ."

5. **Existing Employer Programs and the Terms of the Collective Agreement May be Relevant in Determining Undue Hardship**

⁷⁷ See f.n. 19: Calgary District Hospital Group

In Commission Scolaire Regionale De Chambly⁷⁸, the court concluded that certain aspects of the employer's past practice and the provisions of its collective agreement supported a finding that it would not constitute an undue hardship for the employer to be required to grant a leave with pay for Yom Kippur. The employer had in years past granted a paid leave for such purposes, and the provisions of the collective agreement could reasonably be interpreted to provide for such an accommodation. As the court stated:

It is not necessary that a collective bargaining agreement specifically provide for the observance of a holy day of a religious minority. Its provisions are simply a factor to be considered in determining whether the employer can reasonably accommodate the religious observances of the minority. In this case, the collective agreement provides a flexibility that demonstrates that reasonable accommodation could be made.

Similarly, the employer's past practice in granting certain requests for medical transfers resulted in a Board concluding that such a request in the case under consideration would not amount to an undue hardship.⁷⁹

⁷⁸ See f.n. 11: Commission Scolaire Regionale De Chambly

⁷⁹ Metropolitan Toronto (Municipality) and C.U.P.E., Local 43 (1991) 22 L.A.C. (4th) 216 (Brown)

D. APPLICATION OF THE DUTY TO ACCOMMODATE IN CASES OF DISCRIMINATION BASED ON RELIGION OR CREED

The duty to accommodate as it relates to religion or creed most often arises in circumstances where the employee's Sabbath falls on a regular workday. In the O'Malley⁸⁰ case, the complainant became a member of the Seventh Day Adventist Church, and as a result of her religion, could no longer work from sundown Friday to sundown Saturday. As a consequence, she was reclassified from full time to part time employment with a resultant loss in hours and benefits. The court found that the employer had a duty to accommodate. The employer had called no evidence on the issues of reasonable accommodation or undue hardship, and accordingly, the employee was ultimately compensated for lost wages.

In the Central Alberta Dairy Pool⁸¹ case, the employee worked in a Monday to Friday position. He subsequently became a prospective member of the Worldwide Church of God. That church recognizes a Saturday Sabbath, a five-day Fall Feast of the Tabernacle, and five other holy days during the year. It was expected that religious adherents would not work on those days.

The complainant requested to work the early shift on Fridays in order that his work schedule would not conflict with the onset of the Sabbath. That request was granted. He expressed a desire to schedule his vacation time to coincide with the Fall Feast of the Tabernacle. However, he was terminated prior to that time as a result of having been absent without permission on one of the five holy days. The employee had requested permission to take an unpaid leave on two holy days. The employer granted the absence on the first holy day (a Friday) but denied the second which fell on a Monday, for Mondays were a particularly busy processing day in the dairy plant. The employee was terminated due to his unauthorized Monday absence. Given that it was an isolated Monday, and not every Monday of the week, Wilson J. commented that

If the employer could cope with employees being sick or away on vacation on Mondays, it could surely accommodate a similarly isolated absence of an employee due to religious obligation . . . There is nothing in the evidence to suggest that Monday absences of the complainant would have become routine or that the general attendance record of the complainant was a subject of concern. The ability of the respondent to accommodate the complainant on this occasion was, on the evidence, obvious and, to my mind, incontrovertible.

⁸⁰ See f.n. 1: O'Malley

⁸¹ See f.n. 2: Central Alberta Dairy Pool

The court held that the employer had failed to discharge its burden of establishing that it had accommodated the employee to the point of undue hardship.

In MacEachern⁸², the grievor was a stationary engineer who worked a twelve-hour shift. He subsequently became a member of the Worldwide Church of God and advised the employer that he could not work from sundown Friday to sundown Saturday.

The employer, the union and the other employees attempted to work out some measure of accommodation. In the beginning, the employee was allowed to use his banked time and to swap shifts with other operators to observe his Sabbath. However, over time, the shift swapping became increasingly difficult. Alternative schedules that were proposed would have had the impact of reducing the weekend time off for other engineers. An unsuccessful attempt was made to hire an extra relief engineer and to find a different job for the employee. The employee was subsequently terminated after refusing to work on a shift which conflicted with his Sabbath.

In finding that reasonable accommodation of the employee's religious beliefs was not possible, the Board of Inquiry considered the small number of employees, the essential service that was being provided, and the fact that the required absences were routine rather than occasional. Changes to the shift schedule would have eroded the regularity and equality of shifts and would have had a significant impact on employee morale. The complainant was dismissed, with the Board of Adjudication concluding that the employer and the union had accommodated the complainant to the point of undue hardship.

In Canadian Forest Products Ltd.⁸³, the grievor was a Seventh Day Adventist, and as such, observed a Sabbath running from sundown Friday to sundown Saturday. He was allowed to work a schedule which did not require him to work on a Sabbath. However, he then successfully bid on an apprentice sawfiler position. The employer refused to accommodate the grievor by allowing him to work a flexible schedule in the sawfiler position.

The work of the sawfiler was critical to the productivity of the saw mill. The sawfiler apprentice position had been created in an effort to alleviate work pressures in the sawfiling department. The employer had contemplated "that the apprentice would fit into the shift schedule, help with the workload, contribute to flexibility particularly in relief situations, and be a resource for Saturday work.

In finding that any scheduling accommodation in the new position would constitute an undue hardship, the Board considered the employer's production requirements, the purpose underlying the

⁸² MacEachern v. St. Francis Xavier University (1994) 24 C.H.R.R. D/226

⁸³ Canadian Forest Products Ltd. (Polar Division) and I.W.A. - Canada, Local 1-424 (1995), 50 L.A.C. (4th) 164

creation of the position, the need for flexibility, the need for an apprentice to work with experienced trades persons, and the impact that the accommodation would have had on the morale of others in the department.

In Roosma⁸⁴, the two complainants had become members of the Worldwide Church of God, and as members, were expected to observe the Sabbath from sundown Friday to sundown Saturday.

The collective agreement required the complainants to work Friday evenings twice a month. Although some temporary shift swapping was effected in order to provide temporary accommodation, no permanent accommodation was made and the two complainants were eventually terminated for absenteeism on the Friday evening shift. In concluding that a permanent Friday accommodation would constitute an undue hardship on the employer, the Board of Inquiry considered the employer's concerns with regard to cost of production and quality of product along with a plant pattern of high absenteeism on the Friday evening shift. Replacing the complainants for two shifts per month with students would constitute an undue hardship in that such accommodation would have a significant impact on quality. The Board of Inquiry also found that the idea of hiring part time workers to replace the complainant on the Friday evening shift was not an option short of undue hardship, nor was moving the complainants to other jobs, for both of these options would either infringe on the rights of regular workers or would have contravened the seniority provisions in the collective agreement. In the result, the complaints were dismissed, with the Board of Inquiry finding that the accommodation that was sought would have constituted undue hardship.

In the Renaud⁸⁵ case, the employee's religion also prevented him from working sundown Friday to sundown Saturday. The employer was prepared to accommodate the employee by creating a Sunday to Thursday shift, but that accommodation involved an exception to the collective agreement and required union consent. The union refused. The court found that the accommodation would not impose an undue hardship on the union or its members. There was no issue of undue hardship as it related to the employer, for the employer had been prepared to accommodate the employee.

In Commission Scolaire Regionale De Chambly⁸⁶, the court concluded that it would not constitute an undue hardship to require the employer to grant a paid leave for Yom Kippur. However, it recognized that such accommodation might not be possible where an employee's religious beliefs required that the employee be absent from work every Friday throughout the year.

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⁸⁴ Roosma v. Ford Motor Co. of Canada (No. 4) (1995), 24 C.H.R.R. D/89

⁸⁵ See f.n. 6: Central Okanagan School District No. 23 v. Renaud

⁸⁶ See f.n. 11: Commission Scolaire Regionale De Chambly

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