

The Duty to Accommodate

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Under Human Rights legislation in Canada, employers, educational institutions and service providers have a duty to accommodate people with disabilities or chronic health conditions that impact their ability to access the service or perform the duties of their job. However, there is much confusion about the scope of that duty and the expectations of the person seeking accommodation and the entity obliged to provide it often don't align.

The rule is that where a person is entitled to accommodation, the entity must provide "reasonable accommodation to the point of undue hardship". What does this mean?

Often conflict arises between the accommodation that the person wants, and the accommodation that is reasonable or necessary in the circumstances. The duty is to provide reasonable accommodation sufficient to allow the person to do their job or access the service to a standard comparable to a person who doesn't require accommodation. Accommodation is about needs, not wants.

To determine what is reasonable, entities should seek the advice of experts. If the person has a back condition, for example, the advice of the person's orthopedist, an occupational therapist and/or physiotherapist should be sought to determine what accommodation is reasonable and appropriate in the circumstances. The expert will want to know the person's working conditions, the duties of the job, and will assess the person's physical limitations. The ultimate accommodation is customized to suit the reasonable needs of the person.

The ultimate limit of accommodation is undue hardship. Where the accommodations required exceed the limit beyond which an employer or service provider would face excessive difficulty or expense providing the accommodation an undue hardship exists and the entity is relieved of the duty to accommodate. Undue hardship is a very difficult test for entities to meet and the burden lies with the entity claiming it. Undue hardship is assessed, just like the accommodations themselves, on a case-by-case basis.

Undue hardship arises where the accommodation compromises the health and safety of others or the person seeking accommodation. Undue hardship may also arise where it would result in significant operational disruption or negatively impact the efficiency of the workplace. Finally, although financial cost alone is generally not sufficient to establish undue hardship, where the cost of accommodation imposes an unreasonable financial burden or is disproportionate to the relative resources of the organization, the accommodation may amount to an undue hardship.

The duty to accommodation also imposes certain duties on the people who seek accommodation. They are required to cooperate with the process of assessing accommodation, and that cooperation may include providing more medical information than would normally be expected of someone who is seeking a benefit such as sick leave.

The person seeking the accommodation is also required to participate in assessments by experts which may include physical examination or testing to ascertain their abilities and limitations. The entity receiving the information must treat it as confidential and use it only for the purpose of assessing the need for accommodation.

Human rights legislation imposes significant and often complex obligations on employers and service providers. It is important to engage someone who is knowledgeable as to those obligations when first confronted with a request for accommodation, or where the need for accommodation is identified. Legal counsel practicing labour, employment and human rights law have the background required to guide employers and service providers through the accommodation process.

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