CHAPTER 7

REASONABLE ACCOMMODATION IN THE WORKPLACE: NEW DEVELOPMENTS IN THE UNITED STATES AND CANADA

I. DISABILITY AND DISCRIMINATION IN CANADIAN LAW

KATHERINE SWINTON*

Accommodation for workers with disabilities is one of the most important issues in the workplace today. It is a matter of social justice for those seeking accommodation, allowing them to join or remain in a workplace despite a disability. Yet the duty to accommodate also generates uncertainty and, therefore, some concern among employers and co-workers as they adjust to their obligations and consider the costs and other burdens associated with accommodation that may constitute undue hardship for them.

Canadian law in this area is developing rapidly, yet to describe the legal obligations of employers and unions and the rights of workers with disabilities is not an easy task, given the realities of Canadian federalism. Currently, there are 13 human rights laws determining the rights of those with disabilities, with no umbrella legislation equivalent to the Americans with Disabilities Act[1] in the United States. Rather, the Canadian Human Rights Act (CHRA),[2] enacted by the federal Parliament, applies to the roughly 10 percent of workers who are under federal jurisdiction (for example, the federal public service, interprovincial and international transportation, broadcasting, and banks), while each province and territory has enacted its own legislation applying to those within its boundaries who do not fall under federal jurisdiction.

---

*Professor, Faculty of Law, University of Toronto, Toronto, Ontario.
[1]42 U.S.C.A. §§ 12101–12213.
[2]R.S.C. 1985, c. H-6, as amended.

Federal Law

Although there are similarities among these laws, there are also significant differences. Some, including the federal law, make no express reference to a duty to accommodate the needs of those with disabilities; others, such as Ontario, contain specific obligations with respect to disability.

Codes such as the CHRA prohibit discrimination in employment on a number of specified grounds and provide certain defenses, such as the bona fide occupational requirement, for some or all prohibited grounds of discrimination.[3] However, the Supreme Court of Canada has held that all human rights codes include both direct and indirect, or adverse, effects discrimination (the latter encompassing the concept of "disparate impact" discrimination in the United States, while the former is similar to the "equal treatment" concept). Whenever a rule or practice adversely affects a group protected by the legislation—for example, a requirement of heavy lifting that would bar a person with a back injury from a job—the employer has a duty to accommodate up to the point of undue hardship.[4] However, absent express language in the Act, the Court has held that there is no duty to accommodate in cases of direct discrimination if the employer has been able to demonstrate that consideration of the prohibited ground is a bona fide occupational requirement.[5]

Notably, the duty to accommodate in cases of adverse effects discrimination arises with respect to *any* ground of discrimination, not just disability, and the Supreme Court of Canada's cases to date have all arisen with respect to religious accommodation. The Court has rejected a de minimis standard of undue hardship,[6] although it has not given a lot of guidance as to the meaning of that term,

---

[3]Canadian Human Rights Act, s.15. The range of prohibited grounds varies somewhat, although all the codes prohibit discrimination in employment on the basis of race, sex (including pregnancy), national or ethnic origin, mental and physical disability, religion, and age (e.g., CHRA, s. 3). Most codes now prohibit discrimination on the basis of sexual orientation, either explicitly or through the effect of litigation under the Canadian Charter of Rights and Freedoms, which added that ground to the code in Newfoundland and federally.

[4]This concept first emerged in *Ontario (Human Rights Commission) v. Simpsons-Sears Ltd.* (1985), 23 D.L.R. (4th) 321 (S.C.C.) and then was further developed in *Central Alberta Dairy Pool v. Alberta (Human Rights Commission)* (1990), 72 D.L.R. (4th) 417 (S.C.C.).

[5]*Large v. Stratford (City)* (1995), 128 D.L.R. (4th) 193 (S.C.C.) at 204–05. This holding has been much criticized. *See, e.g.*, Molloy, *Disability and the Duty to Accommodate*, 1 Can. Lab. L.J. 23 (1992), at 35–36.

[6]In *Central Okanagan Sch. Dist. No. 23 v. Renaud* (1992), 95 D.L.R. (4th) 577, the Supreme Court of Canada expressly rejected that standard as set out in *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977) at 585.

explaining that the duty must develop on a case-by-case basis.[7] Factors to be considered include financial cost, the effect on other employees, interchangeability of workforce and conditions, and safety (including the magnitude of the risk and the identity of the risk bearer).[8]

With respect to the duty of unions to accommodate, the Court in *Renaud* held that undue hardship arises when there is significant interference with the rights of other employees. In the words of Sopinka J.:

> 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. 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.[9]

The Court also noted that a union's duty to accommodate will be shaped by the way in which the complaint arises. Where the union is a direct party to the adverse effect discrimination—for example, by including a work schedule in the collective agreement that prejudices a protected group—then it bears a joint responsibility with the employer to find an accommodation. However, where the union is not a co-discriminator, the employer must turn first to forms of accommodation outside the collective agreement and may disrupt its terms only if there are no reasonable alternatives.[10]

Ontario Human Rights Code

In contrast to the federal legislation and its counterparts, the Ontario Human Rights Code contains specific provisions respecting those with disabilities that are closer to the American model.[11] The Code explicitly includes the duty to accommodate with respect

---

[7] *See, e.g., Chambly, Commission scolaire régionale v. Bergevin* (1994), 115 D.L.R. (4th) 609 (S.C.C.) at 627.

[8] The federal Act makes explicit mention of undue hardship only as a remedial issue in relation to the modification of premises and operations after a finding of discrimination on the basis of disability (s. 53(4)). *See also* Saskatchewan Human Rights Code, S.S. 1979, c. S-24.1, as amended, s. 31(9) & (9.1).

[9] *Renaud, supra* note 6, at 590–91.

[10] *Id.* at 591–92.

[11] Ontario Human Rights Code (OHRC), R.S.O. 1990, c. H.19, as amended, ss. 5, 11, 17. The Manitoba Human Rights Code, C.C.S.M., c. H175, also contains an explicit duty to accommodate (ss. 9(1)(d) and 12), but without explicit details about the standard to be applied.

to both direct and indirect discrimination, while the statute states that the factors to be considered in determining undue hardship are cost, having regard to any outside sources of funding, and health and safety risks.[12]

Beyond these general provisions applying to all grounds of employment discrimination, section 17 of the Ontario Code specifically deals with disability. It prohibits discrimination against individuals with disabilities if they are able to perform the "essential duties" of the employment, with accommodation, if needed. Thus, the section imposes an obligation on an employer to remove marginal functions from a position if the employee is able to perform the major functions. It also requires a tailoring of accommodation for the disabled individual up to the point of undue hardship, in cases of both direct and indirect discrimination. Again, "undue hardship" is said to include considerations of cost and health and safety risks.

The Ontario Human Rights Commission has taken steps to clarify these obligations by issuing "Guidelines for Assessing Accommodation Requirements for Persons With Disabilities Under the Ontario Human Rights Code."[13] The Guidelines have generated some controversy because of the announced standard of undue hardship: costs of accommodation will not amount to undue hardship unless they are "so substantial that they would alter the essential nature of the enterprise" or "so significant that they would substantially affect the viability of the enterprise."[14] No reference is made to considerations such as business inconvenience or "undue interference" with operations. The test is indeed a stringent one, and I shall suggest later that it is not generally followed in arbitration or even all human rights decisions.

In addition, the Guidelines seem to reject consideration of the impact on other employees, stating that "third-party preferences" are irrelevant, and collective agreement terms are no defense to a refusal to accommodate.[15] As a result, the document contains no discussion of seniority or the impact of accommodation on other employees' morale, even though, from the employer's or co-workers' perspective, these are relevant concerns. Seniority is a contractual right found in most collective agreements, while

[12]OHRC, s. 11(2) (constructive discrimination). Section 24(2) provides a bona fide occupational qualification defense, available for age, sex, record of offenses, and marital status, subject to the duty to accommodate.

[13]Reprinted in 1 Can. Lab. L.J. 186 (1992).

[14]*Id.* at 193.

[15]*Id.* at 192.

morale problems can affect productivity and turnover, resulting in cost to the employer. The Supreme Court's acknowledgment in *Renaud* that significant interference with co-workers' rights could constitute undue hardship implies that the Ontario Guidelines should be reinterpreted in light of this broader notion of relevant costs.

In practice, the Guidelines are not binding on adjudicators, whether under the Code itself or in other forums, but they have been influential, as I shall show later in this paper.[16]

Duty to Accommodate

I now turn to some of the areas of contention in implementing the duty to accommodate for those with disabilities: the relevance of employer knowledge; the right of an employee to another position; and the controversial elements of the undue hardship standard, especially the cost and the treatment of other employees' interests, including seniority.

Many of the examples are drawn from the arbitration jurisprudence, for arbitrators have been very active in dealing with discrimination disputes affecting those with disabilities. This is not surprising, in that many of the cases arise from work-related injuries or other physical or mental conditions affecting performance at work. In Canada, arbitrators have extensive jurisdiction to apply human rights precepts and jurisprudence. Sometimes they rely on nondiscrimination clauses within collective agreements; at other times, they use the human rights law to determine the meaning of just cause or other provisions, since existing jurisprudence requires an arbitrator to interpret the collective agreement consistent with the broader law.[17] Finally, some jurisdictions explicitly grant arbitrators the power to apply employment-related statutes, which include human rights legislation.[18] Given the perennial backlog and delay in human rights commissions and the unavailability of the courts to pursue antidiscrimination claims,

---

[16]Canadian human rights laws use an administrative model for enforcement, adjudicating disputes through administrative tribunals (e.g., the Canadian Human Rights Tribunal or ad hoc boards of inquiry under the Ontario Code). The courts have a supervisory role that varies from jurisdiction to jurisdiction (e.g., there is a right of appeal from a board in Ontario, but limited judicial review at the federal level).

[17]The leading case is *McLeod v. Egan* [1975] 1 S.C.R. 517.

[18]Labour Relations Act, 1995, S.O. 1995, c. 1, Schedule A, s. 48(12)(j); Labour Relations Code, S.B.C. 1992, c. 82, as amended, s. 89(g); Trade Union Act, R.S.N.S. 1989, c. 475, as amended, s. 43(e).

arbitration is an important source of protection for disabled workers.[19]

Employer Knowledge

In many cases, a person's disability will be visible to the employer, and the parties can focus on whether the employee feels some accommodation is necessary for the performance of the job. However, in a growing number of cases, the presence of a disability is unknown to the employer at the time of a job action such as discharge. The issue then arises as to whether the employer is liable for failure to accommodate. Most often, such cases are founded on a question of mental disability, sometimes a disability that was beyond the employee's knowledge as well. For example, in *Calgary Co-operative*,[20] a retail clerk was discharged for insulting customers. A previous head injury and his medication contributed to frontal lobe behaviour that unknown to him or the employer at the time of the discharge, affected his mental functioning. The requirement of tact in dealing with customers constituted adverse effects discrimination because of the disability, and the arbitrator stated that the grievor would be entitled to reinstatement with full backpay on this basis, even though the discrimination was unintentional.

In contrast, a human rights board of inquiry in *Bonner*[21] refused to hold the employer liable in similar circumstances, since the employer did not know that the probationary employee was suffering from serious depression at the time of release for substandard performance. In the alternative, the board stated that the employer is obligated to accommodate the employee at the point at which it had or should have had knowledge of the disability.[22]

This second approach seems more consistent with the Supreme Court's understanding of the duty to accommodate in *Renaud*,

---

[19]Individuals cannot litigate human rights complaints in the courts, and must proceed through a human rights commission, which has investigatory powers and often a requirement of mediation. The backlogs in processing these cases can often reach several years, making arbitration a very attractive alternative.

[20]*Calgary Co-operative Ass'n and Calco Club* (1992), 24 L.A.C. (4th) 308 (McFetridge) at 326. This problem also arises with dependency problems, such as alcohol, which is defined as a prohibited ground of discrimination federally and is included by interpretation in other codes.

[21]*Bonner v. Ontario Ministry of Health, Ins. Sys. Branch* (1992), 16 C.H.R.R. D/485 (Ont. Bd.).

[22]In *Re Canada Safeway Ltd. and United Food & Commercial Workers, Local 401* (1992), 26 L.A.C. (4th) 409 (Wakeling) at 445–46, the arbitrator reinstated a grievor with a mental disability and required that he be entered in the employee assistance programme. However, backpay was not awarded since the employer had not known of the disability.

where Sopinka discussed the duty of the affected employee to engage in a dialogue with the employer respecting his or her needs and the viability of various options: "Concomitant with a search for reasonable accommodation is a duty to facilitate the search for such an accommodation."[23] That process cannot begin without both parties' awareness of the scope of the disability and its impact on performance, which will then allow the parties to consider alternative methods of accommodation.

The Right to Another Position

The underlying rationale for the duty to accommodate is to create equal opportunity in the workplace for those with disabilities by removing arbitrary barriers to their participation.[24] Therefore, the ideal form of accommodation takes place within the employee's existing position and environment, and many accommodations are of this type, whether through adjusting job duties to remove nonessential tasks or changing equipment or processes to accommodate the disability.[25]

However, in a number of circumstances, the employee cannot be accommodated in his or her current position and requires something more (e.g., transfer to another shift, or, more problematically, transfer to another position, either in the form of an existing job or in the form of a newly created set of job duties).

Arbitrators and adjudicators are not in agreement on the issue of whether transfer to another job is required by the duty to accommodate. In Ontario, explicit statutory language stipulates a right to transfer for compensable injuries under the Workers' Compensation Act for workplaces of 20 employees or more and for injured workers who meet the qualifications. Section 54 provides for a right to return to the pre-injury employment or alternative

---

[23] *Renaud, supra* note 6, at 593. A similar conclusion is drawn by Arbitrator Mitchnick in *Re Pharma Plus Ltd. and United Food & Commercial Workers Union* (1993), 33 L.A.C. (4th) 1 at 11 and Arbitrator Brent in *Re Board of Education for City of Toronto and Canadian Union of Public Employees, Local 134* (1994), 39 L.A.C. (4th) 137 at 155.

[24] A major statement of this policy is found in the report of the Abella Royal Commission on Equality in Employment (Ottawa, 1984), at 8–9.

[25] *See, e.g.*, the discussion in *Rothmans, Benson & Hedges, Inc. and Bakery, Confectionery & Tobacco Workers' Union, Local 325-T* (1990), 10 L.A.C. (4th) 1 (R.M. Brown) and *Re York County Hosp. and Ontario Nurses' Ass'n* (1992), 26 L.A.C. (4th) 384 (Watters). Although I state that accommodation within one's position may be "ideal," this will not always be the case (e.g., if rearrangement of duties will create serious morale problems with other workers).

comparable work, if the employee is able to perform the essential duties with accommodation, or to return to "suitable work."[26]

Even in cases where the Workers' Compensation Act is not in issue, several arbitrators have required an employee to be moved from a position on one shift or in one setting to another, while continuing in the same type of work. For example, in *Marianhill*,[27] Arbitrator Brown ordered that a registered nursing assistant be moved to the night shift as a form of accommodation for her hypoglycemia. This would minimize patient risk that she might err in dispensing medicine. In other cases, an employer has been required to move an employee to a different type of position, or to allow the employee to work part-time.[28]

Other arbitrators have refused to find that the employer must either move an employee to another kind of work or create a new position from a variety of tasks. In *Canada Post (Godbout)*,[29] Arbitrator Jolliffe held that the employer did not have to create a position for a permanently disabled employee by cobbling together a number of duties, while in *Metropolitan Toronto*,[30] Arbitrator Fisher held that the employer was under no obligation to provide a vacant position to the grievor, a person with a disability, rather than award the job to a more qualified individual.

The debate in these cases is about whether the duty to accommodate is linked to a particular set of job functions for which the grievor was initially hired, or whether it encompasses a broader duty to maintain disabled workers in the workplace so long as there are jobs available that they can perform. When the disability is temporary, it seems clear that the employer is required to provide

---

[26]R.S.O. 1990, c. W-11. The section explicitly protects the seniority provisions of any collective agreement.

[27]*Re Marianhill and Canadian Union of Public Employees, Local 2764* (1990), 10 L.A.C. (4th) 201 (R.M. Brown).

[28]*Re United Air Lines and Int'l Ass'n of Machinists & Aerospace Workers* (1993), 33 L.A.C. (4th) 89 (McIntyre); *Re Air BC and Canadian Airline Dispatchers Ass'n* (1995), 50 L.A.C. (4th) 93 (McPhillips) at 117 (employer should consider other jobs in bargaining unit under the duty to accommodate); *Re Canada Post Corp. and Canadian Union of Postal Workers* (1993), 38 L.A.C. (4th) 1 (M. Picher) (requiring that an employee be transferred to another job in another local but within the region covered by the collective agreement). In *Worobetz v. Canada Post Corp.* (1995), 95 CLLC 230-006 (Can.) at 145,100, a tribunal expressed the opinion that reassignment to another position might sometimes be required.

[29]*Re Canada Post Corp. and Canadian Union of Postal Workers* (1993), 32 L.A.C. (4th) 289 (Jolliffe) at 323.

[30]*Metropolitan Toronto (Municipality) and CUPE, Local 79* (1994), 46 L.A.C. (4th) 110 (Fisher). *See also Re PanAbrasive, Inc. and United Steelworkers of Am., Local 8777* (1993), 38 L.A.C. (4th) 434 (Clement) at 438; *Re Fording Coal Ltd. and Alberta Strip Miners Union, Local 1595* (1991), 22 L.A.C. (4th) 109 (Power).

alternative employment, where available, if this can be done without undue hardship. This seems to be the message from the *Emrick Plastics*[31] case, where a board of inquiry had found the employer in violation of the human rights code for failing to provide alternative work for a pregnant woman to protect her from a potential reproductive hazard.

But reassignment on a permanent basis is more difficult to justify under the language of human rights codes, which speak of the duty to accommodate in relation to the essential duties of a position. The thrust of the codes is to make the work accessible for the disabled worker by adjusting the duties or the method of performance, rather than to guarantee ongoing employment.[32] In fact, arbitrators who require employers to consider alternative employment for disabled workers seem to be importing arbitral jurisprudence relating to nonculpable termination into the duty to accommodate in an effort to protect the job security of the disabled worker.[33] The goal is admirable but perhaps would be better achieved by a clearer mandate, as in the Ontario Workers' Compensation Act or the regulations of the Americans with Disabilities Act.

Cost, Seniority, and Undue Hardship

Many concerns about the duty to accommodate relate to cost, including the potential burden on other employees as a result of accommodation. This may take the form of reassignment of duties, shift changes, and, most significantly, challenges to the awarding of positions on the basis of seniority.

Often, the needed accommodation will not prove too costly, as various publications of the Job Accommodation Network attest.[34]

---

[31] *Emrick Plastics v. Ontario (Human Rights Comm'n)* (1992), 90 D.L.R. (4th) 476 (Ont. Div'l Ct.).

[32] A related debate has also emerged on the issue of whether seniority must accrue or other benefits continue during an absence due to a protected disability. Contrast *Re Metropolitan Gen. Hosp. and Ontario Nurses' Ass'n* (1995), 48 L.A.C. (4th) 291 (Kennedy) (seniority based on time actually worked) and *Re Versa Servs. Ltd. and Milk & Bread Drivers, Dairy Employees, Caterers & Allied Employees Union, Local 647* (1994), 39 L.A.C. (4th) 196 (R.M. Brown) (entitlement to benefit contributions requires attendance at work) *with Thorne v. Emerson Elec. Canada Ltd.* (1993), 18 C.H.R.R. D/510 (Ont. Bd.) (discriminatory clause in collective agreement that limited accumulation of seniority for those on long-term absence).

[33] Ironically, these arbitrators may be inviting a more activist form of judicial review when they rely on the human rights codes in their decisions, since review is then on a standard of correctness, rather than the more deferential "patent unreasonableness" standard.

[34] Discussed in Tompkins, *Tools That Help Performance on the Job*, Human Resources Magazine (April, 1993), 87.

Nevertheless, some adjustments can be particularly costly, if they involve significant changes to workplace facilities or equipment, excessive absences, or provision of extensive personal assistance, (e.g., in the form of an interpreter for a worker who is hearing disabled).

Generally, the arbitration cases have not demanded strict quantification of the costs of accommodation; indeed, many of the cases turn on the fact that the employer has not yet adequately considered forms of accommodation.[35] When determining whether there is undue hardship from proposed accommodations, arbitrators have not strictly followed the Ontario Guidelines described earlier, which ask whether the costs would affect the essential nature of the business or its continued viability.

This standard seems to go well beyond the Supreme Court of Canada's vision of undue hardship, which seems to use a "reasonableness" measure.[36] Arbitrators seem to follow the same course, for in a number of cases dealing with the employer's obligation to accommodate extensive absenteeism, the grievances were dismissed, even though many of the employers were large enough to be able to assume the cost of continued employment without threatening their viability.[37]

The contrast in approaches between the Ontario Human Rights Commission, on the one hand, and the Supreme Court and other adjudicators, on the other, seems to rest on different philosophies with respect to the duty to accommodate. The Commission places the highest priority on integrating the disabled and requiring employers to bear the resulting cost, even if those costs are very large. Many of the adjudicators and judges are more conscious of the many elements that go into a determination of the employer's interests and limit the application of the duty when it unduly affects productivity concerns.

---

[35] A number of cases have struck down automatic termination clauses that result in discharge after a specified absence as discriminatory on the basis of disability. The result is to require the employer to consider whether there is just cause for discharge, after fulfilling its duty to accommodate (e.g., *Re Glengarry Indus./Chromalox Components and United Steelworkers, Local 6976* (1989), 3 L.A.C. (4th) 326 (Hinnegan)).

[36] *Zurich Ins. Co. v. Ontario (Human Rights Comm'n)* (1992), 93 D.L.R. (4th) 346 (S.C.C.) at 382 (stating that a defence to discrimination in insurance plans required one to consider reasonable alternatives, not a determination whether the essence of the business would be undermined by a nondiscriminatory alternative).

[37] *See, e.g., Re Ottawa Civic Hosp. and Ontario Nurses' Ass'n* (1995), 48 L.A.C. (4th) 388 (R.M. Brown) (considering costs of absenteeism, as well as impact on other employees' morale); *Re Ball Packaging Prods. Canada, Inc. and Can Workers' Federal Union, Local 354* (1990), 12 L.A.C. (4th) 145 (Davis).

The courts will ultimately rule on whether the Ontario standard is too burdensome on employers. It certainly seems to go far beyond the American standards of "excessive" or "substantial" cost and "fundamental alteration of the nature or operation of the business." The latter term brings into consideration the nature of the business compared with the proposed accommodation and does not limit the inquiry to only the financial cost of the alteration. In contrast to the case under the Ontario Guidelines, American writers often illustrate this element of the undue hardship test with the example of a visually impaired waitress in a dimly lit night club who would be able to do the job with better lighting (a minimal cost), but with the result that the essential nature of the business would be impaired.[38] Under the Ontario Guidelines, which focus solely on cost, the business may be required to effect this type of accommodation, although I suspect that the employer might still win this case, arguing that an ability to work in the existing environment was an essential part of the job.

The difference in approach to the duty to accommodate between the Ontario Commission and other decisionmakers is also seen in relation to co-workers' interests. In contrast to the experience under the Ontario Guidelines, the Supreme Court has acknowledged the value of seniority and other contractual rights to other workers and includes them in the calculus of undue hardship. Seniority is not necessarily sacrosanct, but neither is it irrelevant to the duty to accommodate.

At the moment, a few cases have suggested that seniority does not curtail the duty to accommodate.[39] However, these cases fail to consider the significance of the Supreme Court's language in *Renaud*, which suggests that seniority rights will limit the duty to accommodate if the failure to respect those rights is a significant interference with another employee's rights. In contrast, the British Columbia Human Rights Council held in *Drager*[40] that the seniority provisions of the collective agreement should not be

---

[38]EEOC, *Technical Assistance on Title I of ADA*, in Fair Employment Practices Manual (BNA) 405:7006.

[39]*Re Union Carbide Canada Ltd. and Energy & Chemical Workers' Union, Local 593* (1991), 21 L.A.C. (4th) 261 (Hinnegan); *Re York County Hosp. and Ontario Nurses' Ass'n* (1992), 26 L.A.C. (4th) 384 (Watters) (relies on *Union Carbide*); *Re Better Beef Ltd. and United Food & Commercial Workers Int'l Union, Region 18* (1994), 42 L.A.C. (4th) 244 (Welling) at 256.

[40]*Drager v. International Ass'n of Machinists & Aerospace Workers, Automotive Lodge 1857 and Agrifoods Int'l Coop. Ltd.* (1994), 20 C.H.R.R. D/119 at D/134.

touched to accommodate the complainant, a member of a religion who required a change in evening scheduling. A similar result was obtained in *Boise Cascade*,[41] where Arbitrator Palmer refused to allow the employer to award a position to a disabled worker with one week's less seniority than the grievor.

The most likely result is that seniority will give way in some circumstances, as adjudicators try to balance the respective interests of the disabled worker, co-workers, and the employer. For example, in a large workplace, a more senior employee may sometimes be required to wait a little longer for a transfer or promotion, especially in the circumstance where the alternative is to put the disabled worker out of a job. Certainly, seniority will be eroded in relation to certain kinds of benefits, for example, access to a better-positioned locker if that is the only one accessible to a disabled worker.

Nevertheless, seniority rights should not be seen as irrelevant. They are contractual rights that employees earn and value, and to require longer-term employees to give up those rights is a cost imposed on them that should not be left out of the balance.

Conclusion

There is much still to learn about the meaning of the duty to accommodate, both in relation to disability and other grounds of discrimination in Canada. The underlying objective of increasing the accessibility of workplaces to those with disabilities or other characteristics that do not equate with some unstated concept of "normalcy"[42] is an important one in a society committed to true equality of opportunity. Yet the implementation of this objective can sometimes be costly and disruptive, and this requires difficult decisions on the part of key actors and ultimately adjudicators to determine the scope of the duty.

---

[41] *Re Boise Cascade Canada Ltd. and United Paperworkers Int'l Union, Local 1330* (1994), 41 L.A.C. (4th) 291 at 299.

[42] Rules or workplace design decisions are generally made with reference to an unstated premise of what it is to be a worker. Therefore, the rules often ignore the complexity of human characteristics, and do not take into account the different needs of women or those with disabilities, among other groups. *See* Minow, *Foreword: Justice Engendered*, 101 Harv. L. Rev. 10 (1987).

II. THE ROLE OF UNIONS IN CASES INVOLVING THE ACCOMMODATION OF EMPLOYEES WITH DISABILITIES IN CANADA

ELIZABETH MCINTYRE*
SHEILAGH TURKINGTON

Although the primary obligation with respect to accommodating employees with disabilities falls on employers, the bargaining agents in unionized workplaces clearly have a critical role to play in virtually every case raising accommodation issues. This paper seeks to examine the role of unions in the accommodation of workers with disabilities, as well as to discuss processes that may facilitate the prevention and/or resolution of potential disputes between both the parties to a collective agreement as well as the members of the union's bargaining unit.

Union's Obligations

In responding to situations involving employees with disabilities, unions must be mindful of their duty to accommodate under the Ontario Human Rights Code[1] as well as their duty of fair representation under the Ontario Labour Relations Act.[2]

The Duty to Accommodate

Although it is the employer who initially and ultimately must achieve accommodation, the provisions of the Ontario Human Rights Code have also been held to require unions to accommodate workers with disabilities to the point of undue hardship. In the event that these obligations of the employer and the union under the Code conflict with the contents of a collective agreement, the provisions of the Code are paramount.

Neither the exact nature nor extent of a union's duty to accommodate nor the meaning of "undue hardship" in the case of a union's obligations has been clearly set out by Canadian arbitra-

*In the order listed: E. McIntyre, Partner, Cavaluzzo Hayes Shilton McIntyre & Cornish, Toronto, Ontario; S. Turkington, Associate Lawyer, Cavaluzzo Hayes Shilton McIntyre & Cornish, Toronto, Ontario.

[1]S.O. 1995, c. 1, Sch.A, s. 74.
[2]R.S.O. 1990, c. H.19.

tors or courts. The most detailed consideration of both the union's duty and the related issue of the relative liability of employers and unions in accommodating employees with disabilities is found in the *Renaud* decision of the Supreme Court of Canada.[3] The facts in that case involved a school custodian who refused to work a Friday afternoon shift as set out in the collective agreement because of his beliefs as a Seventh-day Adventist. Various alternatives for accommodation were discussed between the parties; ultimately, the employer was prepared to allow the employee to work a different shift. The members of the union perceived this shift as consisting of "prime positions" for which the employee lacked the requisite seniority. Other means of accommodation were attempted, but the employer eventually terminated the employee.

In *Renaud*, the Court held that the union may neither block accommodation on the basis of relatively minor inconvenience to other employees nor object to accommodation on the basis of disruption to the collective agreement while failing "to put forward alternative measures that were available which are less onerous from its point of view." On the other hand, the Court was also aware of the impact of accommodation on other employees:

> Substantial departure from the normal operation of the conditions and terms of employment in the collective agreement may constitute undue interference in the operation of the employer's business .... The duty to accommodate should not substitute discrimination against other employees for the discrimination suffered by the complainant. 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. Although the test of undue hardship applies to a union, it will often be met by a showing of prejudice to other employees if proposed accommodating measures are adopted.[4]

With respect to the union's obligations, the Court emphasized that unions bear a duty to accommodate if they have been a party to the discrimination at issue. That duty may arise in two separate ways. The first instance occurs where the union has participated in the formulation of the discriminatory work rule or collective agreement provision. In that instance, the union has a duty to accommodate by immediately taking reasonable remedial steps. The Court expressly assumed that employers and unions negotiate collective agreement provisions jointly and so share equally in the liability for any resultant discrimination flowing from those

---

[3] *Central Okanagan Sch. Dist. No. 23 v. Renaud* (1992), 95 D.L.R.4th 577.
[4] *Id.* at 588–91 (*per* Sopinka, J.).

provisions,[5] regardless of either the actual negotiating history or the relative bargaining power of the parties.[6]

The second instance occurs where the union has obstructed the employer's efforts to reasonably accommodate the employee subject to discrimination. The Court clearly indicated that a union's liability does not rise immediately. Initially, the burden rests with the employer to consider various means of accommodation. The Court did not require that the employer initially exhaust all possible forms of accommodation other than those requiring an effect on the collective agreement. However, the Court did emphasize that the employer could not simply choose the most inexpensive and least disruptive means of accommodation if such means would be disruptive to the collective agreement.[7]

The Duty of Fair Representation

The Ontario Labour Relations Act prohibits unions from acting in a manner that is arbitrary, discriminatory, or in bad faith in the representation of any of the employees in the bargaining unit for which it holds representation rights. The obligation on the union to act fairly extends not only to employees with disabilities but to all members of the bargaining unit who may be impacted by the accommodation of these employees.

The union typically retains control of the grievance procedure and, unless the collective agreement or union constitution provides otherwise, has the authority to determine which grievances will be pursued to arbitration. The duty of fair representation with respect to grievances essentially places on the union an obligation to consider whether or not to proceed with a grievance and to reach a reasonable decision in doing so. In considering whether to proceed with a particular grievance, in the current context, the union can and, in fact, must take into account its concurrent obligations under the Ontario Human Rights Code to accommodate employees with disabilities.

The union's obligation in this regard is reinforced by the Ontario Labour Relations Act, which itself recognizes the

---

[5] *Id.* at 589–90.

[6] A recent decision by an Ontario Board of Inquiry has suggested that a distinction is to be drawn between the Court refusing to examine negotiating history and requiring a demonstration showing that reasonable steps have been taken to eliminate the offending provisions. *Thomson v. Fleetwood Ambulance Serv. and OPSEU* (Nov. 10, 1995), Board Decision 95-050 (Katherine Laird).

[7] *Renaud, supra* note 3 at 591–92.

supremacy of obligations under the Code in mandating that collective agreements must not discriminate against any person if the discrimination is contrary to the Human Rights Code or the Canadian Charter of Rights and Freedoms.[8]

The extent of the union's duty of fair representation vis-à-vis its various members can be brought squarely into focus by cases of reasonable accommodation, particularly in cases where the employer acts unilaterally without consulting with the union. The union may then be confronted with grievances filed by other members of the bargaining unit who claim that their rights under a collective agreement have been violated by the employer's accommodation measures.

In several cases before the Ontario Labour Relations Board, employee complainants have attempted to intertwine the union's duty to accommodate in the human rights context with the element of the duty of fair representation prohibiting discriminatory actions. In these instances, the Board has applied a traditional labour relations analysis to the union's duty of fair representation and left open the issue of its link to human rights obligations.

In one such case,[9] the complainant suffered from alcoholism and had ultimately been terminated from his position for attendance-related issues. It would appear that the complainant attempted to increase the burden on the union in respect of fair representation by wholly incorporating the duty to accommodate and by suggesting that the union's failure to satisfy its duty to accommodate would necessarily result in discriminatory conduct for the purposes of the Labour Relations Act.

On the facts of that case, the Board maintained its more narrow approach to "discriminatory" conduct for the purposes of the duty of fair representation, having regard to the labour relations rationale for the prohibition of such conduct. The Board found that the duty of fair representation requires that the union refrain from "singling out . . . individuals for adverse treatment for reasons that bear no relation to legitimate labour relations objectives." Essentially, such irrelevant reasons would include, but would not be limited to, personal characteristics such as disability, which are protected by human rights legislation. The Board further held that the prohibition against discriminatory conduct further requires

---

[8]Section 54, *supra* note 1.
[9]*Steve Castle* [1994] O.L.R.D. No. 348 (unreported, File No. 1883-92-U).

that, in representing the interests of the bargaining unit, the union must consider and weigh the competing interests of minorities.[10]

The Board concluded on the facts that the union had treated the complainant no differently from other alcoholic members and that the union did not treat alcoholic members as a group any differently than the rest of the bargaining unit. Thus, the complaint was dismissed.

The Union's Duty to Accommodate Vis-à-Vis the Employer's Duty

Most cases have treated the obligation to accommodate as primarily belonging to the employer and have placed an initial onus on the employer to establish that it has discharged its duty to the point of undue hardship.[11] Consideration of the union's duty to accommodate generally arises as an incidental matter in assessing whether or not the employer has met its obligations to the employee.

Undue Hardship

As indicated above, the content of "undue hardship" in respect of the union's duty to accommodate has not been clearly addressed in either the arbitral or judicial context. In general terms, undue hardship must be evaluated on a case-by-case basis. However, the Supreme Court of Canada has identified the following specific factors as relevant to a determination of whether an employer has incurred undue hardship:

1. financial costs
2. disruption of a collective agreement
3. problems of morale of other employees
4. interchangeability of work force and facilities
5. size of the employer's operation (which 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)
6. safety[12]

---

[10] *Id.* at para. 34–35. *See generally Municipality of Metropolitan Toronto* [1978] OLRB Rep. Feb. 143.

[11] *See generally Renaud, supra* note 3; *Pharma Plus Drug Mart* (1993), 33 L.A.C.4th 1 (Mitchnick); and *Re Ontario (Human Rights Comm'n) and Simpson-Sears Ltd.* (1985), 23 D.L.R.4th 321 (S.C.C.).

[12] *Central Alberta Dairy Pool* (1990), 72 D.L.R.4th 417 (S.C.C.) at 439.

We should point out that the Court found these factors relevant to considering undue hardship in the context of a matter arising in the province of Alberta where the legislation was silent on the content of undue hardship. The Ontario provisions setting out the duty to accommodate already include a statutory list of factors that is narrower than the list identified by the Supreme Court.[13] Although it is not yet clear how this issue will be reconciled, most decisionmakers have tended to follow at least the tone and thrust of the Supreme Court of Canada's consideration of relevant factors.

To date, the two factors particularly relevant to determining the extent of the "undue hardship" defense in limiting a union's duty to accommodate have been the disruption of the collective agreement and the effect on other employees represented by the union. These factors will be examined more closely.

The Collective Agreement

The Supreme Court of Canada has held unequivocally that where disruption of the collective agreement is relevant in assessing undue hardship, neither an employer nor a union may rely on the terms of the collective agreement to shelter themselves from any duty they bear to accommodate an employee with a disability.[14]

With respect to employer's obligations, the Court set a relatively high standard to be met before disruption of the collective agreement becomes relevant: "Substantial departure from the normal operation of the conditions and terms of employment in the collective agreement may constitute undue interference in the operation of the employers' business."[15]

There would likely be little debate over the premise that parties cannot use the collective agreement to hide from liability. Similarly, there is no question but that cooperation between management and unions is necessary to successfully accommodate the needs of employees with disabilities. In the context of unions, in particular, there is clearly a role that unions have yet to fully

---

[13]Ontario Human Rights Code, *supra* note 1, at sections 11(2) and 17(2) ("cost, outside sources of funding, if any, and health and safety requirements, if any").

[14]*See generally Renaud, supra* note 3, at 586–87.

[15]*Id.* at 587. Note that the Ontario Human Rights Commission and some arbitrators have applied a similar test in respect of costs, requiring that financial costs become relevant to a determination of undue hardship only where they affect the viability of the employer's enterprise. *See generally* Ontario Human Rights Commission, *Guidelines for Assessing Accommodation Requirements for Persons With Disabilities* (1989); *York County Gen. Hosp.* (1992), 26 L.A.C.4th 382 (M.V. Watters).

develop in terms of garnering the support of their members for accommodating efforts in the workplace.

However, what must be remembered is that collective agreements are fundamentally swords in the hands of unions and workers, not shields. Concerted attempts by unions to protect the negotiated interests of all employees should not be readily characterized as attempts to hide from liability. Accordingly, where various modes of accommodation short of undue hardship are possible, a union is entitled to press the employer to first attempt those that will least affect the rights under a collective agreement.

Effect on Other Employees

The effect of accommodation on other employees is a separate though potentially related factor concerning the effect of accommodation on an existing collective agreement. The distinction has been made in the Supreme Court's nonexhaustive enumeration of relevant factors.

One way to approach this factor is suggested in the Ontario Human Rights Commission's "Guidelines for Assessing Accommodation Requirements for Persons with Disabilities," which emphasize that "third-party preferences do not constitute a justification for discriminatory acts."[16] In this vein, the effects on other employees would be analogous to customer preferences. As such, the Guidelines would apply as follows, for example: an employer cannot refuse to accommodate an employee who has sustained a facial disfigurement on the basis that other employees prefer not to see it, because such preferences are, in themselves, discriminatory.

The Court's analysis of the effect of accommodation on other employees is more comprehensive. The Court initially considered this factor as a matter of creating morale problems for other employees.[17] The Court later conceptualized this factor more broadly as a question of the general effect on other employees, including effects arising out of the collective agreement. In the context of employers' obligations, the Court considered the employer's concern about reprisals from other employees by way of grievances over the means of accommodation.

---

[16]Ontario Human Rights Commission, *Guidelines for Assessing Accommodation Requirements for Persons With Disabilities* (1989), 7.

[17]*Central Alberta Dairy Pool, supra* note 12, at 439 (per Wilson J.).

The Court has limited the overall relevance of the impact on other employees in two ways. First, the Court intimated that the general evidentiary requirements will continue to apply such that speculative concern regarding the effects on other employees would not be relevant; the Court sought evidence that such effects would be *likely*.[18] The Court emphasized that this factor would be relevant only where there was proof of the possibility of objections from other employees "based on well-grounded concerns that their rights will be affected" by the accommodating action: "objections based on attitudes inconsistent with human rights are an irrelevant consideration."[19] As such, the Court, like the Human Rights Commission, clearly rejects the relevance of mere employee preferences. Second, the Court will not consider relevant any employee objections grounded in the assertion that the integrity of the collective agreement is paramount regardless of its discriminatory effect on other employees.[20]

It has been the experience of unions that other employees will sometimes react negatively to efforts to accommodate employees with disabilities. This is particularly true where the disability is not readily perceptible, as in the case of a back injury or stress-related disabilities. Accommodated employees returning to modified duties frequently encounter both a degree of hostility from management who originally resisted the accommodation and a degree of hostility and cynicism from employees who resent having to give up the lighter portion of their duties or assist the employee with the disability, sentiments frequently associated with suspicions of possible malingering.

This type of reaction must be addressed in the workplace, perhaps most appropriately through the joint management/union educational efforts directed at creating an accommodating environment that will foster an understanding of the issues and reflect the mutual commitment of the parties to achieving equality for disabled workers. As recognized by many arbitrators, the successful reintegration of an employee with a disability will most often require the cooperation of the employer, the union, the particular employee, and the employee's colleagues.[21] Although this issue must be addressed through sound principles in labour relations,

---

[18] *Renaud, supra* note 3, at 588.
[19] *Id.*
[20] *Id.*
[21] *Id. See also Re United Airlines and I.A.M.* (1993), 33 L.A.C.4th 102 (MacIntyre).

perhaps with some guidance from arbitrators,[22] it should not become a relevant factor in determining undue hardship. There is little difference between factoring in discriminatory employee preferences and factoring in employee disgruntlement based on speculative assumptions about the employee's disability.

Where the effect on other employees is likely to involve problems with morale, this factor must be established through objective evidence, and it must be assessed in terms of the relative hardship involved. We would go further to suggest that the employer cannot rely on such a factor until it has attempted to mitigate through, for example, training other employees in such matters.

Application by Arbitrators

The application of the concepts of reasonable accommodation and undue hardship by arbitrators as they impact on unions has been, so far, inconsistent, making outcomes unpredictable and impeding resolution between the parties. The development of a more consistent approach to these issues by arbitrators would be of great assistance to the parties in dealing with issues that are complex factually, emotionally, politically, and legally.

In cases where other employees are directly affected, undue hardship is usually found. For example, accommodation requiring other employees to make schedule changes creates undue hardship. In *MacEachern*,[23] a case under the Nova Scotia Human Rights Act, accommodation that would have instituted broken shifts, unequal number of days, irregular shift patterns, and days followed by nights for other employees "did not treat everyone in a fair and equal manner and imposed genuine burdens on [the complainant]'s co-workers" and therefore constituted undue hardship for the union.

Similarly, some cases suggest that bumping one employee out to accommodate another would constitute undue hardship for the union. In *Better Beef*,[24] it was held that the duty to accommodate

---

[22]Arbitrator Christie, in *Re T.C.C. Bottling and R.W.D.S.U., Local 1065* (1993), 32 L.A.C.4th 73, recognized that accommodating the needs of an epileptic employee in the face of safety concerns would likely be facilitated by ensuring the presence of co-workers experienced in administering first aid for seizure disorders by providing training to some of the grievor's fellow workers. Although he did not make this a specific order per se, he established it as a parameter within which the parties would be negotiating the appropriate accommodation and indicated that the employer would be responsible for providing them with training.

[23]*MacEachern v. St. Francis Xavier Univ.* (1994), 24 C.H.R.R. 226 at D/237.

[24](1994), 42 L.A.C.4th 244 (Welling) at 256.

"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." In contrast, in *Canada Post Corporation (Lascelles)*,[25] in order to accommodate an employee with less seniority than the grievor, the grievor was transferred from his normal mail route without the consent of the union and given "other, less desirable duties." Because there was nothing to indicate that the transfer was only a minor inconvenience to the grievor, the *Renaud* test for undue hardship to the union was found to be met.

Accommodation affecting job security and the integrity of the bargaining unit is also usually found to create undue hardship. In *MacEachern*, a proposed waiver of a collective agreement provision prohibiting foremen and supervisors from performing bargaining unit work was found to create undue hardship.[26] Similarly, in *Greater Niagara General Hospital*,[27] where the union had waived certain collective agreement provisions to allow a disabled employee into the bargaining unit, accommodation that allowed her to retain all her seniority was undue hardship on the union because of the interference with seniority rights, and hence the job security of other employees.

On the other hand, undue hardship was not established where accommodation for scheduling needs of an employee required waiving a provision of the collective agreement for an overtime premium for Sunday work and, therefore, the union was obliged to do so.[28] In that case, the waiver would not have affected the rights of other employees directly. Similarly, a disabled employee may be accommodated in a vacant position even though he had less seniority, skill, and ability than another employee.[29]

Furthermore, outcomes may be different if the accommodation is only temporary. The issue of temporary accommodation has been explored with respect to an employer's obligation to accommodate, and it has been found that the negative impacts on an employer's interests are less significant factors in determining undue hardship where accommodation is a temporary measure.[30]

---

[25](1993), 33 L.A.C.4th 279 (Adell).
[26]*Supra* note 23, at D/238.
[27](1995), 47 L.A.C.4th 378.
[28]*Gohm v. Domtar* (1990), 12 C.H.R.R. D/161.
[29]*Union Carbide Canada* (1991), 21 L.A.C.4th 261 (Hinnegan).
[30]*Canada Post Corp. and C.U.P.W. (Godbout)* (1993), 32 L.A.C.4th 289 (Jolliffe).

A recent case has considered the issue of balancing the effects on other employees in terms of collective agreement protections in the context of an employee who was laid off because he was placed, as a result of accommodating his disability, in a lower job rate group despite his relatively higher level of seniority.[31] The employer sought to lay off the grievor pursuant to the terms of the collective agreement rather than have the grievor displace an employee with less seniority but in a higher job rate. The union argued that the grievor had to be accommodated by way of such a displacement. The arbitrator held that it was unreasonable for the employer to balance the interests of the grievor and the other employees by favouring the less-senior employees and, therefore, that the effects on the less-senior employees did not constitute undue hardship.

The Standard for Unions

The emerging standard appears to be one where the union is required to consider both the interests of the person to be accommodated and those of the other employees, and to attempt to balance these interests, using the measures of "substantial departure" from the collective agreement, "significant interference" with the rights of other employees, and "showing of prejudice" to them.

To achieve the balancing act, the union must persuade employers, and ultimately arbitrators, that the statutory obligations of accommodation remain squarely with employers and should not be transferred to other employees. This is perhaps best achieved by advocating the approach taken by the Ontario Human Rights Commission Guidelines[32] and the case law, such as *York County Hospital*,[33] which suggest that the duty to accommodate to the point of undue hardship requires the employer to consider the following hierarchy of alternatives in order to return the grievor to work:

1. Offer the grievor the first vacant position for which he or she is qualified.
2. Failing that, create or modify positions, equipment, or shifts to account for his or her restrictions.
3. Train the grievor to qualify for other available work.

---

[31] *Re Lever Brothers Ltd. and Teamsters, Local 132* (1995), 51 L.A.C.4th 373 (D.A. Harris).
[32] *Supra* note 15.
[33] *Re York County Hosp. and ONA* (1992), 26 L.A.C.4th 384 at 404–05 (Watters).

4. In collaboration with the union, alter the duties of other employees.
5. Accept some less-than-substantial safety hazards to employees or the public.
6. Incur a degree of administrative inconvenience.
7. Incur costs as long as they do not alter the essential nature or viability of the enterprise.

In *York County Hospital*, a nurse who injured herself while at work was refused a position as a regular ward nurse. Although the employer had placed her in a temporary modified position upon her return to work, it did not consider a permanent modification of the duties of ward nurse. Instead, the nurse was offered several clerical positions with lower wages, which she refused.

The Board ruled that providing the employee with alternative lower paying work did not satisfy the employer's duty to accommodate to the point of undue hardship.[34] The Board held that the employer failed to meet its duty because:

> The Employer failed to properly consider how it might modify existing nursing jobs to meet the restrictions imposed upon this grievor. On the evidence, it would seem that the Employer focused primarily on identified vacancies. This enabled costs to be charged to a specific position. Unfortunately, this focus may have deflected the Employer away from what we see as a contractual obligation to find or create suitable modified work should vacancies not exist at the time.[35]

Moreover, the Board held that, although this would possibly result in an increase in costs:

> . . . the Board is of the view that costs may have to be incurred in the process of accommodating a disabled employee. . . . More particularly, evidence was not led to establish that accommodation would alter the essential nature or would substantially affect the viability of the Hospital.[36]

The Board stated that the grievor has an obligation to inform the employer of the type of work she can do, but that the employer should also consult with the union "as other employees may be affected by the particular accommodation selected. For example, the job duties of other employees may change as a result of another nurse being accommodated."[37] Ultimately, the Board ruled that it

---

[34] *Id.* at 35–36.
[35] *Id.* at 38.
[36] *Id.* at 37.
[37] *Id.* at 38.

was inappropriate for the employer to offer the grievor work at a significantly lower rate than that of her former job. It therefore ordered the employer to create a position of modified duties that offered the grievor comparable hours, wages, and benefits to the job she had before she was injured.

Processes for the Resolution of Reasonable Accommodation Disputes

Because of the complexity of these cases, it is in the interest of all stakeholders, including the employer, the union, the employee with the disability, and all other affected employees, to have disputes resolved as expeditiously as possible when they arise. What follows are three suggested processes for preventing or facilitating the resolution of disputes in this area.

Negotiations

To the extent that parties can define their respective obligations through the negotiating process for the collective agreement, the potential for conflict when a particular fact situation arises is reduced. Sentiments of retaliation or resentment toward the individual employee with a disability are also minimized if rights and obligations are spelled out in advance. If those rights can be seen as collectively bargained for the protection of all employees rather than an imposition occasioned by the disability of one employee, obligations will be substantially objectified. Collective agreement provisions that can be negotiated include:

- an antidiscrimination clause that either adopts or exceeds statutory standards;
- an explicit recognition of the duty to accommodate to the point of undue hardship, which specifically provides that employees who have sustained or developed disabilities shall be returned to work;
- a provision allowing the parties to waive posting, classification, and other provisions of a collective agreement to achieve accommodation;
- a requirement to consult with the union prior to reinstating employees with disabilities;
- a special process for resolving reasonable accommodation disputes.

During bargaining for the renewal of a collective agreement, the parties arguably have an obligation to remove from the collective agreement provisions such as automatic termination provisions, which may be discriminatory. This obligation arises from the reasoning of the Supreme Court as well as the prohibition found in the Ontario Labour Relations Act precluding collective agreement provisions that discriminate contrary to the Human Rights Code or the Canadian Charter of Rights and Freedoms.

Return-to-Work Plans

Unions have a very useful role to play in discussing return-to-work arrangements with the employer to prevent subsequent disputes from arising. In an unfortunate number of cases, unions become involved in responding to unilateral employer decisions only through, for example, grievances from either the employee with a disability or by another employee who is being displaced by the returning employee. Smart labour relations strategy would involve the union at a much earlier stage.

In this regard, some collective agreements have provisions mandating the union's involvement at the planning stage. At this early stage, the union can counsel the returning employee about his or her obligations to provide information about the disability and any relevant information regarding performance restrictions or accommodation needs, which would then ensure that the employer is in the best position to determine the degree of accommodation required. If the union is involved prior to the employer making its decision, it can also play a role in advocating to the employer options that accommodate the employee with the disability in a manner that least interferes with the rights of other employees under the collective agreement. Finally, when potential alternatives have been investigated with the employer, the union can play an important role in meeting with other employees in the workplace to explain the arrangements and to facilitate acceptance of those arrangements by the disabled workers' colleagues. All of the above steps should reduce the potential for conflict between the parties and in the workplace generally.

Mediation/Arbitration

In the event that a dispute in this area does require arbitration, it is advisable to consider an alternative dispute resolution (ADR)

process as an alternative to formal arbitration. In particular, we would recommend a mediation/arbitration approach as being particularly appropriate for disputes in this area. Given the complexity of these cases from a factual, legal, and political perspective, formal arbitration proceedings are often protracted and costly. This often aggravates feelings of resentment toward the grievor, whose ultimate return to work is then less likely to be successful. Finally, while formal arbitration is well-suited to determine whether the employer has met its obligation to accommodate a grievor, it is less helpful in determining what accommodation is available or required. This latter issue requires a factfinding exercise and an exploration of alternatives, both of which are better suited to an ADR approach.

The Advantages of ADR Strategies in Reasonable Accommodation Cases

- *Expedition.* Mediation or ADR procedures save time by offering an immediate forum for parties to explore a settlement. With respect to reasonable accommodation cases in particular, it is often essential that the window of opportunity for returning an employee to the workplace be utilized to the best advantage.
- *Consensual Solution.* Rather than having the decision imposed, unions and employers can often agree on a solution that is acceptable to everyone.
- *Flexibility.* The process can be negotiated to meet the particular needs of the parties and address the particular issues raised by the dispute in question.
- *Informality.* The parties can create a more comfortable and informal climate for resolving disputes without having to follow the formal rules of hearings and evidence.
- *Confidentiality.* Instead of a public hearing and decisions, unions and employers can speak confidentially about issues and, if necessary, keep the terms of settlement confidential.
- *Enhanced Communications.* Some disputes originate or escalate due to communication problems, which can arise on either side of the table. A process aimed at ensuring that the real issue is identified and remedied will reduce such miscommunications.

To be effective, ADR needs to be informal, impartial, and flexible enough to address the particular issues facing a union, its members, and the employer. ADR can be an overall general procedure negotiated into the collective agreement for resolving some or all disputes prior to a hearing, or it can be arranged on a case-by-case basis.

Although there are numerous ways in which ADR can be structured, section 50 of the Ontario Labour Relations Act sets out a consensual mediation/arbitration process that has been used effectively in a number of cases, particularly those raising human rights issues. The essential elements of the section 50 process require that:

- All parties participate in the process.
- Prior to arbitrating the dispute, an attempt is made by the mediator/arbitrator to assist the parties in reaching a settlement.
- In the event that a settlement is not possible, the mediator/arbitrator seeks to have the parties agree upon the material facts.
- The mediator/arbitrator is given the jurisdiction to limit the nature and extent of evidence and submissions in the hearing phase.
- A succinct decision is required to be given within five days of completion of the proceedings.

In those cases where parties have agreed to enter into a section 50 process, the first step typically involves disclosure by both parties of all relevant information, including documentation. The mediator/arbitrator then engages in a factfinding exercise through either receiving written statements of fact from each party or informal meetings. The mediation stage is then undertaken. If mediation is unsuccessful, the mediator/arbitrator who has already been apprised of the factual context is in a position to give the parties direction as to what, if any, further evidence is required before making a decision. Through the mediation process, the factual and legal issues between the parties are usually very much narrowed if not completely resolved.[38]

---

[38]For a discussion of the merits and pragmatics of this process, *see Royal Victoria Hosp. and O.N.A.* (May 24, 1996), unreported (D.A. Harris).

The ultimate decision is often succinct and written in such a way as to be of limited precedential value. The results, however, tend to be much more pragmatic, expeditious, and of real assistance to the parties in resolving disputes while at the same time reducing tensions in the workplace.

Conclusion

Most of the arbitral deliberation over human rights issues generally has occurred in the context of grievance arbitrations concerning employees with disabilities who can no longer perform all of the requirements of their pre-injury positions but who are seeking to be accommodated in their return to the workplace. Given the predominance of these cases in arbitration, it is anticipated that unions will continue to be called upon to respond to these complex issues. It is hoped that the arbitral jurisprudence in this area will evolve into a consistent, principled analysis that makes outcomes more predictable. This, together with ADR processes, will assist all stakeholders to resolve potential disputes in a manner consistent with the important social values reflected in human rights legislation.

III. Management Perspective: A Process for Defining Reasonable Accommodation

Marc Jacobs*

Reasonable accommodation—whether under the Americans with Disabilities Act (ADA),[1] the Rehabilitation Act,[2] the various disability laws that have been enacted in Canada,[3] or the disability discrimination laws enacted in state and local jurisdictions throughout the United States[4]—is an elusive concept. The ADA generally obligates an employer to reasonably accommodate the known physical or mental disabilities of a qualified individual with a disability.

---

*Partner, D'Ancona & Pflaum, Chicago, Illinois.

[1]42 U.S.C. § 12101 et seq.

[2]29 U.S.C. § 791 et seq.

[3]Discussed in Swinton, *Disability and Discrimination in Canadian Law* in Arbitration 1996: At the Crossroads, Proceedings of the 49th Annual Meeting, National Academy of Arbitrators, ed. Najita (BNA Books 1997), 164.

[4]Every state in the United States currently has some provision regarding disability discrimination in employment. *See* Bureau of National Affairs, Fair Employment Practices Manual (BNA 1996), 451:105 [hereinafter FEPM].

Hence, at first blush, it seems important to determine what the courts and regulatory agencies enforcing the ADA have determined as constituting reasonable accommodation. However, new court decisions are announced weekly and are often in conflict with one another; in addition, each decision, by the very nature of the inquiry, is fact-specific. Rather, what is needed is for parties to focus on the process of evaluating the accommodation needs of the particular individual at issue.

The "Legal" Definition of Reasonable Accommodation

At one end of the spectrum, reasonable accommodation might be defined in the same way as former Supreme Court Justice Potter Stewart described pornography: "I shall not attempt to further define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it. . . ."[5] At the other end of the spectrum, the ADA provides the following definition of reasonable accommodation:

> The term "reasonable accommodation" may include—
>
> (A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and
> (B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modification of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.[6]

Neither of these definitions is particularly satisfying or helpful for an employer (or union, individual, or arbitrator) faced with the obligation to provide or analyze a reasonable accommodation for a specific individual in a particular employment situation.

Between these two extremes, the Equal Employment Opportunity Commission (EEOC), which is charged with enforcement of the ADA's employment provisions, has offered the following definition in its regulations for implementing the ADA:

> The term *reasonable accommodation* means:
>
> (i) Modifications or adjustments to a job application process that enable a qualified applicant with a disability to be considered for the position such qualified applicant desires; or

---

[5] *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964).
[6] 42 U.S.C. § 12111(9).

(ii) Modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable a qualified individual with a disability to perform the essential functions of that position; or

(iii) Modifications or adjustments that enable a covered entity's employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities.[7]

Similarly, the U.S. Court of Appeals for the Seventh Circuit has stated, "It is plain enough what 'accommodation' means. The employer must be willing to consider making changes in its ordinary work rules, facilities, terms and conditions in order to enable a disabled individual to work."[8]

These definitions go only so far. Rather, from the literature and case law regarding reasonable accommodation and from our own experiences, we quickly realize that every situation is different and that for every accommodation listed, many other possible accommodations are not. One of the purposes of the ADA is to eradicate "stereotypic assumptions not truly indicative of the individual ability of [disabled] individuals to participate in, and contribute to, society."[9] Similarly, the EEOC's regulations and its *Technical Assistance Manual*[10] state that responding to work issues of individuals with disabilities, especially the issue of reasonable accommodation, must be done on a case-by-case basis. Therefore, reasonable accommodation can be defined only within the context of the specific qualified individual with a disability and the position at issue.

Obligations Imposed on the Parties Related to Reasonable Accommodation

By its very definition, a process centered upon case-by-case analysis requires all relevant parties to participate. Especially in the situation that will present itself to a labor arbitrator, each of the three parties central to the labor arbitration—the employer, the

---

[7]29 C.F.R. § 1630.2(o).

[8]*Vande Zande v. State of Wis. Dep't of Admin.*, 44 F.3d 538, 543, 3 AD Cases 1636 (7th Cir. 1995).

[9]42 U.S.C. § 12101(a)(7).

[10]Printed in FEPM, *supra* note 4, at 405:6981 et seq.

employee, and the union—has certain obligations relating to the reasonable accommodation analysis.

The Employer's Obligations

The first obligation on which we generally focus is the central duty of the employer to provide a qualified individual with reasonable accommodation unless the accommodation would cause an undue hardship.[11] However, it is important to note that the ADA requires reasonable accommodation only "to the *known* physical or mental limitations of an employee."[12] As the Seventh Circuit stated in *Beck v. University of Wisconsin Board of Regents*,[13] "By the statutory language, 'reasonable accommodation' is limited by the employer's knowledge of the disability."

Although an employer is required to provide reasonable accommodation, it is not obligated to provide an employee or applicant with the "best" reasonable accommodation or the one requested by the individual. As the EEOC stated in the *Technical Assistance Manual*, "If more than one accommodation would be effective for the individual with a disability, or the individual would prefer to provide his or her own accommodation, the individual's preference should be given first consideration. However, the employer is free to choose among effective accommodations, and may choose one that is less expensive or easier to provide."[14] Similarly, as stated by Arbitrator Thornell, "Neither the contract nor the ADA give Grievant the right to pick and choose what her accommodation will be. So long as a reasonable accommodation is provided, an employee may not dictate the terms of what work she will or will not accept."[15] Simply put, the employer must provide reasonable accommodation that will grant equal employment opportunity to the individual at issue.

---

[11]42 U.S.C. § 12112(b)(5)(A). The meaning and applicability of undue hardship is a topic unto itself and is easily the subject of its own presentation. For general information, *see* 29 C.F.R. § 1630.2(p) and the EEOC's Technical Assistance Manual in FEPM, *supra* note 4, at 405:6981 et seq.

[12]42 U.S.C. § 12112(b)(5)(A) (emphasis added).

[13]75 F.3d 1130, 1134, 5 AD Cases 304 (7th Cir. 1996) (citation omitted).

[14]FEPM, *supra* note 4, at 405:7004. *See also Fedro v. Reno*, 21 F.3d 1391, 1395, 3 AD Cases 150 (7th Cir. 1994) (decided under the Rehabilitation Act but applying the same principles and analysis as that under the ADA); *Vande Zande*, 851 F. Supp. 353, 359–60 (W.D. Wis. 1994), *aff'd*, 44 F.3d 538 (1994).

[15]*Consentino's Brywood Price Chopper*, 104 LA 187, 190 (Thornell 1995).

The Employee's Obligations

The employee at issue has an affirmative obligation to participate in the accommodation process and to provide information to the employer regarding his or her disability and the necessary (or possible) accommodations. In *Beck*, the plaintiff alleged that her employer failed to reasonably accommodate her known disabilities (osteoarthritis and depression). The record showed that the parties initially met and discussed the accommodation issue but that the plaintiff's requests for accommodation were unclear and plaintiff would not provide her employer (the defendant) with the necessary medical information to allow her employer to accommodate her further.[16] The general issue considered by the Seventh Circuit was whether "the employer or the employee bear[s] ultimate responsibility for determining exactly what accommodations are needed."[17] The central inquiry, however, was to "isolate the cause of the breakdown [in the interactive process] and then assign responsibility."[18] The Seventh Circuit held, "Where the missing information is of the type that can only be provided by one of the parties, failure to provide the information may be the cause of the breakdown and the party withholding the information may be found to have obstructed the process. The determination must be made in light of the circumstances surrounding a given case."[19] Based on its analysis of the facts, the Seventh Circuit affirmed a ruling of summary judgment in favor of the defendant employer, concluding as follows:

> In this case, the interactive process broke down. The employer was left to guess what actions it should take, and the employee was left frustrated that her disability was seemingly not accommodated. Liability for failure to provide reasonable accommodations ensues only where the employer bears responsibility for the breakdown. But where, as here, the employer does not obstruct the process, but instead makes reasonable efforts both to communicate with the employee and provide accommodations based on the information it possessed, ADA liability simply does not follow. Because the University was never able to obtain an adequate understanding of what action it should take, it cannot be held liable for failure to make "reasonable accommodations."[20]

---

[16] *Beck*, *supra* note 13, at 1135.
[17] *Id.* at 1134.
[18] *Id.* at 1135.
[19] *Id.* at 1136.
[20] *Id.* at 1137.

The Union's Obligations

Under the ADA, a labor organization is a "covered entity" subject to the ADA's obligations and can be liable for violations.[21] In a unionized workforce where ADA issues arise in the traditional labor arbitration setting, this point can be of critical importance. In many situations, the collective bargaining agreement at issue will provide some language relative to nondiscrimination in general or the ADA in particular. According to survey data from the Bureau of National Affairs 1996 report on employer bargaining objectives, out of the 228 employers who responded to a June 1995 survey, 57 percent of the responding companies stated that their existing collective bargaining agreements contained a provision regarding compliance with the ADA, and an additional 7 percent would attempt to obtain such a clause during 1996 negotiations.[22]

Often, the contractual language regarding the ADA will acknowledge merely that both parties have unspecified responsibilities under the ADA. Although such language does not provide any guidance for the arbitrator to decide how to handle the reasonable accommodation issue in any case, the language certainly can be used to determine whether a union or employer has violated its duties vis-à-vis one another, the individual at issue, and the ADA when a reasonable accommodation issue arises.

The Interactive Process

According to the EEOC and the courts, "appropriate reasonable accommodation is best determined through a flexible, interactive process that involves both the employer and the [employee] with a disability."[23] The EEOC suggests the following four-step approach to determine reasonable accommodation in a specific situation:

1. Analyze the job at issue, its purpose, and its essential functions.

---

[21]42 U.S.C. § 12111(2).

[22]Bureau of National Affairs, Collective Bargaining Negotiations and Contracts (BNA 1996), 19:67. For sample collective bargaining agreement clauses regarding general antidiscrimination pledges and clauses relating specifically to the ADA, *see id.* at 95:481–95:485.

[23]*Beck, supra* note 13, *quoting* 29 C.F.R. § 1630 app. *See also Grenier v. Cyanamid Plastics, Inc.*, 70 F.3d 667, 677, 5 AD Cases 75 (1st Cir. 1995).

2. Consult with the individual with a disability to determine the individual's job-related limitations.
3. Discuss potential accommodations with the individual, specifically their effectiveness in assisting the individual to perform the essential functions of the job.
4. Select and implement a reasonable accommodation, taking into consideration the individual's preference.[24]

The EEOC admits in the *Technical Assistance Manual* that this proffered process will not fit every situation.[25] Relevant to the issues discussed earlier, it lacks two elements. First, the EEOC's recommended procedure does not go far enough regarding the necessary exchange of information. As discussed earlier, courts see this issue as critical. The ADA states that an employer has an obligation to accommodate only known disabilities. Under the case law that has developed to date, an employer is not liable for failing to provide a reasonable accommodation when the individual does not provide the information necessary to determine what, if any, accommodation is needed.

In this regard, as the Seventh Circuit in *Beck* indicated, medical information is often needed. Similarly, arbitrators faced with reasonable accommodation decisions have reached the same conclusion. In *Cessna Aircraft Co.*,[26] Arbitrator Thornell determined that the employer "was within its management rights to require Grievant to submit to a functional capacity examination so it could determine what work Grievant was fit for."

Conversely, an employer seemingly ignores medical reports at its peril. In *Hughes Asphalt Co.*,[27] the employer refused to reemploy a seasonal employee because it was concerned about his heart condition, despite the release that the individual received from his physician. The employer did not send the individual for a medical evaluation but determined on its own that reemploying the individual would pose a safety risk. Arbitrator Donald stated as follows:

> The action by management officials that is most disturbing to the Arbitrator is the second-guessing of medical opinions by management officials based on their lay views of the Grievant's health. . . . Medical

---

[24]FEPM, *supra* note 4, at 405:7003. *See also San Francisco Unified Sch. Dist.* 104 LA 215 (Bogue 1995) (discussing application of this process in the labor arbitration setting); *Consentino's Brywood Price Chopper*, 104 LA 187 (Thornell 1995).

[25]FEPM, *supra* note 4, at 405:7003.

[26]104 LA 985, 987 (Thornell 1995).

[27]99 LA 445 (Donald 1992).

> opinion must be accorded very substantial preference over any contradictory position by the Company that amounts to no more than unsupported opinion.... If management officials were indeed skeptical of the medical release then they should have obtained an independent medical evaluation.[28]

The clear import of these cases is that the employee must provide necessary information and, if necessary, submit to an appropriate medical evaluation so that the parties engaged in the process of determining a reasonable accommodation have full and complete information relevant to the issue.

Second, the EEOC discusses the interactive process in terms of only the employer and the individual with a disability, seemingly ignoring the possible role of the union in this process. As discussed earlier, the union must play an active role in these matters. The union's role is especially important when the potential accommodation will impact on the contractual rights (often seniority rights) of other employees.

In a closely followed case, on April 5, 1996, the Seventh Circuit heard oral argument in *Eckles v. Consolidated Rail Corp.*[29] as to whether the ADA requires an employer and union to grant an accommodation that conflicts with the collective bargaining agreement's seniority clause. When this issue has arisen in other legal contexts—specifically accommodation of religious beliefs under Title VII of the Civil Rights Act of 1964[30] and accommodation of disabilities under the Rehabilitation Act[31]—the courts have almost unanimously held that those statutes "did not require an employer and union to accommodate an employee by violating the seniority rights of other employees."[32] Against this backdrop of substantial case law are the ADA's guiding principles that each situation should be considered on its own merits, that a per se rule regarding seniority systems is inappropriate, and that language in the ADA's legislative history indicates that these prior cases do not apply to the ADA.[33] Additionally, numerous commentators have discussed this general issue without reaching consensus.[34] The

---

[28] *Id.* at 451.

[29] The district court decision is reported at 890 F. Supp. 1391, 4 AD Cases 1134 (S.D. Ind. 1995). For an article discussing the oral argument, *see* 1996 Daily Lab. Rep. (BNA) (Apr. 9) No. 68: A-3.

[30] 42 U.S.C. § 2000e et seq. *See Trans World Airlines v. Hardison*, 432 U.S. 63 (1977).

[31] 29 U.S.C. § 791 et seq. *See Eckles, supra* note 29, at 1404, and cases cited therein.

[32] *Eckles* at 1405.

[33] *Id.* at 1406.

[34] *Id.* at 1403, n.6.

Seventh Circuit decision in *Eckles* should provide significant guidance. Nevertheless, union participation is essential when collective bargaining rights may be affected.

[**Editor's Note:** On August 14, 1996, the Seventh Circuit issued its decision in *Eckles*.[35] In its decision, the court affirmed the district court's grant of summary judgment in the defendant's favor and held as follows: "After examining the text, background and legislative history of the ADA duty of 'reasonable accommodation,' we conclude that the ADA does not require disabled individuals to be accommodated by sacrificing the collectively-bargained, bona fide seniority rights of other employees."[36]]

Conclusion

The interactive process is central to determining a reasonable accommodation on the required case-by-case basis. Often, it will be critically important for an arbitrator to analyze the conduct of each party in the process of determining a reasonable accommodation and possibly to determine fault. As the law continues to develop in this burgeoning area, this approach will assist neutrals in properly ruling in cases that present reasonable accommodation issues.

---

[35]94 F.3d 1041, 5 AD Cases 1367 (7th Cir. 1996).
[36]*Id.* at 1051, 5 AD Cases at 1375.