tell, this may signal the Supreme Court's turn toward a less deferential approach to the decisions of arbitrators.

That being said, as previously noted, lower courts wishing to intervene will do so, regardless of what standard of review is pronounced by the Supreme Court. In such cases, it becomes a simple matter of articulation. If the flavour of the day is patent unreasonableness, the lower court inclined to intervene will describe the decision as one involving patent unreasonableness. If "reasonableness simpliciter" is the current requirement, the decision will attract that label, and so on.

In conclusion, despite the deferential approach of the Supreme Court of Canada, it is not clear that arbitrators are or will continue to be afforded the high level of deference or exclusive jurisdiction over employment-related matters that they have historically enjoyed. Certainly, lower courts wishing to intervene in arbitral decisions will do so, regardless of the pronouncements of the Supreme Court. Notwithstanding, it is clear, as Professor Nadeau points out, that labour arbitrators will continue to be of central importance in the labour relations system in Canada.

III. Recent Developments in the Duty to Accommodate Employees With Disabilities in Canadian Arbitration Law

Brian Etherington*

Introduction

My purpose here is to focus on recent developments in areas of the accommodation of disability that have been identified as areas of controversy or disagreement in terms of the scope and limits of the duty to accommodate. The areas I have identified are as follows: the clash between the duty to accommodate and the rights of other workers, both within and outside the bargaining unit; the extent to which the duty to accommodate can be defined by agreement between the parties (accommodation and automatic termination clauses); the extent of the disabled employee's duty

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to cooperate in seeking an accommodation by participating in treatment and providing medical information (the clash between accommodation duties and privacy rights); and the duty to accommodate and the provision of personal assistive devices.

But before looking at cases arising in these four categories it is perhaps useful to make some reference to the leading case on general principles concerning the scope and extent of the duty to accommodate that will be applied to employers and unions in a collective bargaining context, *Central Okanagan School District 23 v. Renaud*.[1] In reviewing the numerous cases on accommodation of disability decided in recent years, it is quite remarkable how frequently arbitrators have returned to the guidelines provided in *Renaud* to define the limits of accommodation in the case before them, despite comments elsewhere in their decision to note that such determinations are extremely fact specific.

Although *Renaud* dealt with the duty to accommodate in a religious discrimination context, it was the first Supreme Court of Canada case to deal with the meaning of the duty to accommodate as a multi-party inquiry in a collective bargaining context, attempting to set out the respective rights and obligations of the employer, the union, the complainant, and the complainant's co-workers, and to explain how those parties' rights and obligations should interact with each other in the search for an appropriate accommodation. In essence it was an attempt to deal with the clash of values that can arise when the rights and obligations of the human rights regime intersect with those of the collective bargaining regime. For that reason, it has continued to have great significance in arbitral rulings that grapple with the scope and extent of the duty to accommodate in terms of discrimination on all grounds of prohibited discrimination, including disability.

Central Okanagan School District 23 v. Renaud– Key Rulings on the Duty to Accommodate

The Meaning of Undue Hardship

Sopinka J. noted that the use of the term "undue" itself infers that some degree of hardship must be acceptable in efforts to accommodate. The limitations on the duty were to be determined

[1] [1992] 2 S.C.R. 970 (hereinafter "*Renaud*"). *See also* Etherington, *The Human Rights Obligations of Unions: A Comment on* Central Okanagan School District v. Renaud (S.C.C.) (1994), 2 Can. Lab. Law J. 267–81.

by application of the criteria of "reasonable" measures "short of undue hardship" in the circumstances of individual cases. The Court also endorsed the non-exhaustive list of factors to appraise undue hardship proposed by Wilson J. in *Central Alberta Dairy Pool*:

> ....financial cost, disruption of a collective agreement, problems of morale of other employees, interchangeability of work force and facilities. The size of the employer's operation may influence the assessment of whether a given financial cost is undue or the ease with which the work force and facilities can be adapted to the circumstances. Where safety is at issue both the magnitude of the risk and the identity of those who bear it are relevant considerations.[2]

The Court recognized the impact of an accommodative measure on other employees as a factor to be considered in determining undue interference with an employer's enterprise, but held that more than minor inconvenience of others must be shown. To rely on this factor, an employer must show that actual interference with the rights of other employees, which is not "trivial but substantial," will result from the proposed accommodation.

The fact that the neutral rule or practice was in a collective agreement could not suffice to limit the duty of accommodation, because to do so would allow the parties to contract out of *Human Rights Act* requirements, a proposition long rejected by the Supreme Court of Canada.[3] This also meant that the threatened grievance or the cost of defending against such a grievance could not constitute undue hardship. However, the effect of collective agreement provisions could be relevant to the determination of undue hardship in individual cases. An accommodation requiring a "substantial departure from the normal operation of the conditions and terms of employment in the collective agreement" could constitute undue hardship for an employer.[4]

A Union's Duty to Accommodate

There are two ways in which the union might become subject to a duty to accommodate, with the manner of participation having important consequences for the extent of a union's accommodation obligations. First, the union "may cause or contribute

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[2]Alberta Human Rights Comm'n v. Central Alberta Dairy Pool, [1990] 2 S.C.R. 489, at 520–21.
[3]Ontario Human Rights Comm'n v. Etobicoke, [1982] 1 S.C.R. 202.
[4]*Renaud, supra* note 1, at 987.

to the discrimination in the first instance by participating in the formulation of the work rule that has the discriminatory effect on the complainant."[5] The Court will assume participation if the rule is a provision in the collective agreement on the premise that "all provisions are formulated jointly by the parties and that they bear responsibility equally for their effect on employees."[6]

However, a second category of union liability for a failure in the duty to accommodate may result even where the union did not participate in the initial formulation or application of the discriminatory rule. This can arise if the union impedes the reasonable efforts of an employer to accommodate the adversely affected employee. In this second category, "if reasonable accommodation is only possible with the union's co-operation and the union blocks the employer's efforts to remove or alleviate the discriminatory effect, it becomes a party to the discrimination."[7] Although the union was not initially a party and was under no initial duty to accommodate, it becomes subject to a duty not to contribute to the continuation of discrimination.

The general definition of the duty of accommodation as it applies to unions is the same regardless of the way in which it arises. The primary determinant of undue hardship in the impact of accommodative measures on unions would not be costs or disruption to the enterprise, as for employers, but would be the effects on other employees represented by the union:

> 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. . . . [T]his test is grounded on the reasonableness of the measures to remove discrimination which are taken or proposed.[8]

The significance of the two-category approach to instances of union involvement lies in its impact on the timing and manner of the union's obligations in terms of accommodation. In the second category, where the union is not found to be an initial contributor to the discrimination but is subsequently implicated for a failure

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[5] *Renaud, supra* note 1, at 990.
[6] *Id.* Sopinka J. rejected summarily arguments by the union that provisions should be examined to determine which party insisted they be in the collective agreement
[7] *Renaud, supra* note 1, at 991.
[8] *Renaud, supra* note 1, at 991–92. (emphasis added)

to cooperate, which impedes a reasonable accommodation, the employer must canvass other methods of accommodation before the union can be expected to assist. "The union's duty arises only when its involvement is required to make accommodation possible and no other reasonable alternative resolution of the matter has been found or could reasonably have been found."[9]

But if the case falls within the first category, where the union is found to be a "co-discriminator with the employer" as a participant in the creation or application of the offending rule,[10] it shares a "joint responsibility with the employer" for the accommodation of the complainant. If no action is taken, then both union and employer are equally liable. However, the Court is prepared to admit that the employer is normally in a better position to formulate accommodations due to its control of the workplace and can be expected in most cases to initiate the process. And the employer's obligation to adopt measures that are reasonable may mean that if it simply proposes measures that are the least expensive or disruptive for the employer but are disruptive of the collective agreement or otherwise affect the rights of other employees, this will usually lead to findings that the employer failed to act reasonably and the union acted reasonably in refusing to consent. But this would be the case only if other reasonable accommodating measures were available that did not involve the collective agreement or were less disruptive of it. Further, in this first category of cases, Sopinka J. is not prepared to hold that in every instance the employer must first exhaust all measures that do not involve the collective agreement before seeking cooperation from the union. If the union is found to be a co-discriminator, then a proposed accommodation may be the most sensible one despite the fact that it requires a change to the collective agreement and other measures do not. Nor is the union's duty of accommodation contingent upon it being called on by the employer in this category of cases.[11]

The Duty of a Complainant

Finally, Sopinka J. also held that the complainant has a duty to act reasonably to facilitate the search for an accommodation.

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[9] *Id.*, at 993.

[10] This finding may not be that difficult given the broad nature of the test apparently adopted by Sopinka J. for a finding of participation or contribution to the offending rule in the first instance.

[11] *Renaud, supra* note 1, at 992.

Although this does not mean that the employee has a duty to originate a solution, he or she should bring to the attention of the employer the facts relating to discrimination. If an employer has made a proposal that is reasonable and could fulfil the duty to accommodate, then the complainant has a duty to facilitate the implementation of the proposal. A failure on the part of the complainant to take reasonable steps towards implementation can result in dismissal of the complaint if it caused the proposal to fail.

The Scope of the Duty to Accommodate and the Rights of Other Workers

Accommodation Outside of the Bargaining Unit

There have been several decisions in the last 10 to 12 years in which arbitrators have ruled that the employer may be required to consider possibilities for accommodation by transferring the disabled employee to a position outside the bargaining unit.[12] However, because of the benefits that attach to membership in the bargaining unit, arbitrators have held that accommodation outside the unit should not be considered until the employer has first exhausted all reasonable possibilities for accommodation within the unit, including the possibility of restructuring jobs or bundling duties differently.

The situation becomes slightly more complex where the position being considered for accommodation of a disabled worker is not only outside the employee's current unit but is also within another bargaining unit that is subject to a different collective agreement. Although one Alberta arbitration board and an Alberta Queen's Bench judge have found that an arbitrator appointed under the disabled employee's collective agreement has no jurisdiction to consider accommodation remedies that could impact another bargaining unit,[13] there are several arbitration awards that have at least suggested that such a transfer may fall within the measures

[12]The idea of accommodation by placement in a position outside the bargaining unit was probably first broached in *Greater Niagara General Hospital and SEIU, Local 204* (1995), 47 LAC (4th) 366 (Brent), but resurfaced shortly afterward in *West Park Hospital and ONA* (1996), 55 LAC (4th) 78 (Emrich); *Mount Sinai Hospital and ONA* (1997), 66 LAC (4th) 221 (Emrich) and *Interlink Freight Services and TCU* (1996), 55 LAC (4th) 289 (M, Picher). For a more recent ruling that the employer is required to look at non-unit positions in seeking accommodation, see *Canada Safeway Ltd v. UFCW, Local 401 (Kemp)*, [2007] CLAD No. 269 (McFetridge).

[13]Canadian Health Care Guild v. Palliser Health Auth., [1999] A.J. No 169 (QL).

required to satisfy the employer and union's obligation to accommodate a disabled employee to the point of undue hardship.

Perhaps the leading decision on that issue is that of Innis Christie in *Queen's Regional Authority v. IUOE, Local 942 (Snow)*.[14] The employer had placed a disabled worker from another unit, represented by a different union, into a position in a unit represented by the grieving union without following proper posting procedures. The union grieved to have the appropriate member of its unit put into the position occupied by the transferred disabled employee. Arbitrator Christie held that the ruling in *Renaud* that the parties cannot use a collective agreement to contract out of their human rights obligations, combined with the quasi-constitutional status of human rights legislation, meant that the human rights act of Prince Edward Island did impose a duty on employers and unions to accommodate disabled employees across bargaining unit lines. However, he immediately acknowledged that the circumstances in which such an accommodation was likely to be reasonable would be rare and went on to impose stringent conditions for when such an accommodation would be required. He stated that the circumstances in which there would be a duty to accommodate across bargaining unit lines would be rare, because it would place the union in the receiving unit in a much more difficult position than that of deciding whether to waive agreement provisions to accommodate members of its own unit, and it was subject to a duty of fair representation to members of its own unit to protect them from any adverse effects that may arise from the accommodation. This meant there was likely to be much greater hardship that would result from requiring accommodation across bargaining unit lines. Ultimately Arbitrator Christie concluded that the employer's duty to accommodate the disabled worker could not override the seniority rights of casual employees in the receiving unit in that case, due in large part to the "inherent hardship" of cross-bargaining unit accommodation. He noted that the result might have been different if the employees had all been from the receiving unit.

Christie relied heavily on the finding in *Renaud* that disruption of a collective agreement and actual substantial interference with the rights of other employees were important factors in determining undue hardship. It led him to conclude that, although the human rights legislation imposed a duty on unions and employers to accommodate disabled employees across bargaining unit lines,

[14] (1999), 78 LAC (4th) 269.

such accommodation would be required in only very limited circumstances. He found that the duty to accommodate across bargaining unit lines would override collective agreement rights of any significance only where the need to accommodate is clear, in that the claim of the person to be accommodated obviously outweighs the claims of those whose rights are displaced, and where there is no other reasonable way to fulfil it. The employer must prove that it has very seriously sought a less intrusive way to accommodate an employee under the *Human Rights Act*.

This position has apparently become the mainstream position in subsequent arbitral decisions and was more recently confirmed by the Ontario Court of Justice in *Hamilton Police Ass'n v. Hamilton (City) Police Services Board*.[15] In that case the Court quashed an arbitrator's award that had held that the employer was entitled to transfer disabled police officers into vacant positions in the force's civilian bargaining unit, in violation of the job posting provisions of the civilian unit's collective agreement. The Court found that the arbitrator erred in law by failing to first determine whether the disabled uniformed officers could have been accommodated without undue hardship within the uniformed bargaining unit, where in fact most of them had already been accommodated in non-patrol jobs prior to the transfer to the civilian unit. The Court held that before seeking an accommodation that affected the collective agreement rights of employees in the civilian unit, the employer had an obligation to show that there were no other reasonable alternatives to accommodate these officers within their own collective agreement.

Thus, although there are several decisions suggesting that duty to accommodate to the point of undue hardship imposed on employers and unions may require a cross-bargaining unit accommodation in appropriate circumstances, the restrictions imposed by arbitrators and courts on when such an accommodation will be reasonable, and not result in undue hardship, are so onerous that such accommodations are likely to be virtually unheard of in actual practice. It will be very hard to prove both that the claims of the disabled employee obviously outweigh the claims to interference with agreement rights by employees in the receiving unit and that there is no other way to fulfil the duty to accommodate to the point of undue hardship. I am not aware of any arbitral ruling where both criteria have been met.

[15] [2005] O.J. No 2357 (Div. Ct).

More recently there have been several cases in which unions have filed grievances alleging that employers have failed to live up to their duty to accommodate a disabled employee with functional limitations, by failing to assign the employee to perform work that is being contracted out that is within his or her functional abilities. In his 2003 decision in *Kelowna (City) v. CUPE, Local 338*,[16] Arbitrator Stan Lanyon, consistent with the cases discussed so far, held that the bargaining unit definition clause did not allow the employer to limit its duty to accommodate to consideration of bargaining unit positions. Thus the employer could be obligated to consider offering work to the disabled employee that had been contracted out. And in fact in the case before him the employer had offered to discontinue its current contractor and offer the contracted-out work to the disabled employee on the same terms as it was being done by the contractor. It also offered to pay for training for the disabled worker so that he could perform the contact duties. However, the union insisted that the employer's duty to accommodate to the point of undue hardship required it to bring the work back into the bargaining unit so that the grievor could continue to retain all his rights and benefits under the collective agreement. The employer had a clear right to contract out the work at issue under the agreement and the parties agreed that there were no bargaining unit positions suitable for accommodation.

Arbitrator Lanyon dismissed the grievance on the basis that the employer had satisfied its duty to accommodate by offering the contract work and the training to enable him to do it, to the disabled worker, and held that it did not require the employer to bring the contracted-out position back into the bargaining unit. He noted that it was the duty of all parties to make a sincere effort to find something similar to the pre-injury job within the bargaining unit, but that where such a job did not exist there was no obligation to create one, and no other person should lose their job in order to accommodate the disabled worker. But where there was alternative employment available that fit the employee's abilities, it must be taken based on its existing terms and conditions. The employer was not required to apply the terms of the collective agreement to the contract position, as under *Renaud* substantial departure from the normal operations of the terms and conditions of the collective agreement may constitute undue interfer-

[16] [2003] BCCAAA No. 272.

ence in the operation of the employer's business. To interfere with the employer's right to contract out would amount to undue interference in the operation of its business. However, he did find that during the time the grievor occupied the contract position outside the unit he would suffer no loss of seniority, and the automatic termination clause clock of 36 months of absence from the bargaining unit job would not run against the grievor.

The ruling in *Kelowna* that the terms and conditions of the collective agreement should not be applied to the disabled employee while he worked in the accommodation position outside the bargaining unit is consistent with other arbitral rulings on that issue.[17]

The notion that the employer can be required under its duty to accommodate to look at offering work that is being contracted out to a disabled employee was also supported in the more recent decision in *Eurocan Pulp & Paper v. CEP, Local 298*.[18] However, it was found that, given the temporary nature of the accommodation that was expected to be necessary, it would have been too much of an interference with the operation of the employer's business to require it to review and revise its contracting-out plans in order to find temporary work for the grievor. The arbitrator suggested that if the expected temporary nature of the accommodation had not turned out to be accurate, then the employer's duty to accommodate by arranging to take back some contracted work for the grievor would require further consideration.

Accommodation Requiring the Waiver of Collective Agreement Provisions Affecting the Rights of Other Workers Within the Bargaining Unit

There are numerous recent decisions concerning whether the duty to accommodate a disabled employee requires the union and employer to waive the enforcement of provisions of the collective agreement. Once again the basic principles established in *Renaud* tend to be applied with a fair degree of consistency. Although the parties cannot contract out of human rights code obligations, disruption of the collective agreement is an important factor in determining undue hardship, particularly where the disruption would constitute a significant interference with the rights of other workers. And arbitrators have been particularly reluctant to find

[17] *See, e.g., West Park Hospital and ONA,* (1996), 55 LAC (4th) 78 (Emrich); and *Interlink Freight Servs.*, (1996), 55 LAC (4th) 289 (M, Picher).

[18] [2007] BCCAAA No 252 (Germaine) (QL).

that the duty to accommodate requires or permits the parties to waive agreement provisions that would interfere with the seniority rights of other workers. Here are a few recent examples.

The decision of Arbitrator Ponak in *Canada Post Corp v. CUPW (Kalinowski),*[19] dealt with a claim by the union that the employer had violated the seniority provisions for reserve letter carriers by imposing an accommodation for a letter carrier with frostbite that would allow the disabled employee to perform the maximum percentage of his duties, and was most productive for the employer, but would interfere with the rights of coworkers to exercise their seniority rights in the selection of routes. The union was successful in arguing that the employer's chosen accommodation of allowing the disabled employee to have first selection of routes in all cases, even where there were several routes that would satisfy his disability limitations, was inconsistent with the principles set out in *Renaud* because of the degree of disruption to the seniority rights of other workers under the collective agreement and the fact that there were accommodation alternatives available that were less disruptive of the collective agreement. Arbitrator Ponak found that the accommodation alternative chosen by the employer and the disabled worker allowed the worker to perform 90 percent of his normal duties within his medical limitations, while the other alternative, preferred by the union, would see him work other routes that were within his medical limitations but would allow him to perform only two-thirds of his normal duties. However, the first alternative would interfere significantly with seniority rights of co-workers while the second would not. It was held that the one that least disrupted the agreement should be preferred, particularly where the disruption affects seniority rights.

Similarly, in *Cloverdale Paint Inc. v. Teamsters, Local 21*,[20] Arbitrator Dorsey rejected a grievance by a disabled employee alleging that the employer had failed to accommodate him to the point of undue hardship when it failed to accommodate his asthma condition by giving him a warehouse job in preference to a co-worker who had more seniority. The grievor had medical limitations concerning his inability to work in an environment with dust and paint fumes and claimed that only the warehouse would meet his needs. The employer contended that parts of the warehouse were dustier and had more fumes than parts of the factory. The employer

[19] (2005), 83 CLAS 166 (Ponak).
[20] [2006] BCCAAA No 29.

offered the grievor an accommodation position in the factory that was less exposed to dust and fumes than much of the warehouse. The grievor refused to try the accommodation offered to him. The arbitrator rejected his grievance, noting that the accommodation did not have to be the perfect solution for the disabled employee and that a workable accommodation must balance the rights of other employees. He further stated that seniority is a crucial collective agreement right and in most accommodation situations, seniority provisions should be respected and should not be overridden in the pursuit of accommodation unless no other, less intrusive option is available. In short, accommodation does not enable a disabled worker to have an employer disregard seniority rights in a job competition unless there is no other reasonable alternative that will accommodate the disabled employee.

More recently, the decision of the Saskatchewan Court of Appeal in *Westfair Foods Ltd. v. UFCW, Local 1400*[21] demonstrated a similar reticence to override seniority rights of co-workers in the same bargaining unit in an attempt to accommodate a disabled employee. The grievor was a long-time employee who had developed tendonitis, which prevented her from continuing as a cashier. She was accommodated for a number of years in another position in her department, but eventually her condition worsened to the extent that she could no longer work in any position in her department. As a result of an arbitration board ruling that the employer had to explore further accommodation measures, the grievor was transferred to a position in another department. Under the collective agreement, seniority was accumulated and recognized on a departmental basis so that normally this transfer would mean that her 11,000 hours of seniority would not be recognized in her new position for the purposes of benefits under the agreement. The union then insisted that the employer's duty to accommodate to the point of undue hardship required it to recognize her entire seniority for the purposes of work-related benefits in her new, accommodated position. The employer refused to do so, pointing to the fact that it would be unfair to the other 15 employees in that department who would all have less seniority than the disabled employee. The Board of Arbitration refused to order the employer to recognize the disabled worker's prior seniority in her new department. It noted that it would be contrary to the collective agreement to do so, would result in the grievor

[21] [2007] 6 WWR 59.

getting a benefit that no one else could get on a voluntary transfer in the store, and would adversely affect the accrued seniority rights of other employees in the receiving department. The Board's decision was quashed by the first level of judicial review, but ultimately it was upheld by the Saskatchewan Court of Appeal, relying heavily on the decision of the Supreme Court of Canada in *Renaud* once again.

Thus, despite the fact that there have been a number of decisions in which arbitrators have suggested that the duty to accommodate may require that seniority rights of co-workers may have to give way in order to arrive at an accommodation, in actual practice they have been very reluctant to uphold or approve of an accommodation that could have any kind of significant impact on the seniority rights of other employees. The single notable exception is the human rights Board of Inquiry (BOI) decision in *Bubb-Clarke v. TTC,*[22] where the union was found to have failed in its duty to accommodate by refusing to waive departmental seniority provisions in the collective agreement to recognize systemwide seniority for an employee who had to be transferred to an accommodation position in another department. In addition, the remedial order of the BOI required the union and the employer to grant any employee who transfers to a position in another department to accommodate his or her disability by recognizing his or her full seniority for his or her time with the employer.

Accommodation and Automatic Termination Clauses—To What Extent Can the Parties Define the Limits of Accommodation in Cases of Long-Term Absences Due to Disability?

In *McGill University Health Centre (MGH) v. Syndicat des employes de l'Hopital general de Montreal,*[23] the Court confronted directly the issue of the role of collective agreement termination clauses in the assessment of the employer's duty to accommodate employees who are absent for an indeterminate period owing to illness or disability. The case concerned a medical secretary who had to take sick leave in March 2000 due to a nervous breakdown. She had made some unsuccessful attempts to return to work on a gradual basis in the first year of her time off due to illness and had her

[22] [2002] OHRBID No. 6 (Rosenberg). It should perhaps be noted that although the complaint was initially filed against the employer as well, the employer came to an agreement with the Commission and complainant midway through the proceeding and presented no argument at the BOI hearing.

[23] [2007] 1 S.C.R. 161.

rehabilitation period extended at one point to give her more time to work on a reduced work schedule. However, the return-to-work program failed and she was required to stay home until ready to work full time. She was scheduled to return to work full time in September 2002, but she had a car accident in July 2002 and was not able to return to work. She was then given notice of termination in March 2003 under a collective agreement provision providing for automatic termination for employees who were absent by reason of illness or non–workplace accidents for a period of more than 36 months. Rehabilitation periods did not interrupt the period of absence due to illness or injury under the collective agreement. At the time of her termination, the grievor was still unfit for work with no prognosis for a return to work and by the end of the arbitration hearing her doctor still considered her to be totally incapable of performing the usual duties of her position or of any comparable position.

Given this medical evidence, Arbitrator Jean Sexton dismissed the grievance, which alleged that the employer had failed to meet its obligations to accommodate the grievor to the point of undue hardship. He found that the employer had discharged its duty to accommodate and that it had treated the grievor in a way that was "just and non-discriminatory in correctly applying an express rule set out in the collective agreement." A Superior Court judge upheld the arbitral award. But the Court of Appeal held that the arbitrator erred by failing to assess the reasonable accommodation issue on an individualized basis and instead applying the automatic termination provision of the collective agreement mechanically. It felt that the employer had not met its obligation to take reasonable measures to accommodate the grievor.

The Supreme Court of Canada gave leave to appeal on the issue of the scope of the duty to accommodate and the possibility of the parties agreeing on it in advance in the context of a collective agreement clause for automatic termination. Writing for the majority, Deschamps J. began by noting that collective agreements often contain clauses providing for automatic termination after an absence for clearly specified periods of time. It was also acknowledged that such clauses are clearly aimed at ill or disabled persons. It reiterated the list of factors that will support a finding of undue hardship from its decisions in *Central Alberta Dairy Pool*[24] (cost of possible accommodation, employee morale and mobility,

[24]Alberta Human Rights Comm'n v. Central Alberta Dairy Pool, [1990] 2 S.C.R. 489.

interchangeability of facilities, prospect of interference with other employee rights, or prospect of disruption to the collective agreement). The employer argued that a collective agreement could, in advance, establish the scope of the duty to accommodate and provide for a maximum period of time beyond which any absence would constitute undue hardship. The union argued that the employer could not rely on employee benefits or automatic termination clauses as a substitute for the duty to accommodate and submitted that the duty arises only when the period justifying automatic termination under the agreement expires.

The majority concluded that although collective agreement benefits or termination clauses cannot be invoked as a substitute for the duty to accommodate, the parties had a right to negotiate clauses to ensure that sick employees return to work within a reasonable period of time, and as long as they have this valid objective, the establishment of a maximum period of time for absences should be viewed as a form of negotiated accommodation. It further contended that the consensus of the parties included in the agreement is significant because it was reached by people who are the most familiar with the circumstances of the enterprise. Looked at from the perspective of the duty to accommodate, the termination clause, like the right to return to work part-time on rehabilitation, is among the measures implemented in the workplace to enable a sick employee to be accommodated. Thus, although such clauses cannot definitively determine the specific accommodation measure to which an individual employee may be entitled based on her particular circumstances, they are an important factor to consider when assessing the duty of accommodation and whether it has been met in the particular case. However, the parties cannot contract out of their human rights code obligation and thus cannot definitively establish the length of the period of absence in advance. But termination clauses that meet minimum employment standards are a priori not suspect and the parties can refer to them to determine the individual accommodation that might be appropriate in individual cases. Although the duty of accommodation required for an individual employee's specific circumstances cannot be determined by blindly applying a clause of the collective agreement, the arbitrator can review the standard provided for in the collective agreement to ensure that applying it would be consistent with the employer's duty to accommodate.

The majority concluded that a termination of employment clause will be applicable only if it meets the requirements that apply with respect to reasonable accommodation, in particular the requirement that the measure be adapted to the individual circumstances of the specific case. If the period provided in the clause is less generous than what the employee is entitled to under human rights legislation, then it will have no effect. The periods set out in termination clauses should not be viewed as a threshold representing a minimum period of entitlement, but rather these clauses should provide for a generous accommodation likely to meet the needs of as many employees as possible. By providing for the most demanding of circumstances the employer grants employees whose needs are less acute a period more generous than would be required by human rights legislation.

Finally, although an automatic termination clause is not determinative, it gives a clear indication of the parties' intentions with respect to reasonable accommodation. It is therefore a significant factor that an arbitrator must take into account in considering a grievance. Thus, depending on the duration of the authorized period of absence, such a clause can serve as evidence of the maximum period beyond which the employer will face undue hardship. This evidence may prove very useful, especially in the case of a large organization, where proving undue hardship resulting from an employee's absence could be complex.

Here the arbitrator gave proper consideration to whether application of the termination clause was consistent with the employer's duty to accommodate when all the circumstances, including the absence of any prognosis for return to work, were considered. Most important as well was the majority's rejection of the Court of Appeal finding that the duty to accommodate must be assessed as of the time when the employee was denied any additional measure at the end of three years. Instead, undue hardship resulting from the employee's absence must be assessed globally starting from the beginning of the absence, not the expiry of the three-year period of absence. Here the arbitrator did not just automatically apply the termination clause, but rather regarded it as an important piece of evidence that had a particular significance in demonstrating the employer's willingness to accommodate the grievor during her rehabilitation periods. The employee also had an obligation to act reasonably in seeking reasonable

accommodation, and if she felt that the collective agreement clauses providing for accommodation were insufficient, then she had to provide the arbitrator with evidence of an ability to return to work within a reasonable time.[25]

The concurring opinion of Abella J. (writing for MacLachlin and Bastarache), took the position that the issue of the duty to accommodate did not even arise because there was no prima facie discrimination when the employer refused to continue employing someone who, after three years of absence due to illness, is still deemed incapable of returning to work by her own doctor. Abella J. concluded that although the automatic termination clause may provide for a distinction, the union was unable to prove that it was prima facie discriminatory, in that the grievor was disadvantaged by the employer's conduct based on stereotypical or arbitrary assumptions about persons with disabilities. In her view we should not accept the conclusion that automatic termination clauses always represent prima facie discrimination requiring a justification as a BFOR. To do so would render presumptively vulnerable, no matter the reasonableness of their length, all time-limited legislated employment protections for absences due to illness, disability, or pregnancy. Abella J. simply could not see how three years of job protection for a disabled employee constitutes an arbitrary disadvantage merely because it sets out a finite limit. To hold that such clauses are presumptively discriminatory could remove the incentive for parties to negotiate mutually acceptable absence clauses because it shifts the onus to the employer to prove why it was reasonable to terminate. This ultimately would leave disabled employees without the lengthy guarantee of job and seniority protection offered by such clauses.

According to Abella J., although such clauses may be arbitrary in picking a finite duration, they do not unfairly disadvantage disabled employees because of stereotypical attributions of their

[25]The fact that *McGill University Health Centre* does not allow employers to forgo an individualized assessment of the duty to accommodate was driven home in a recent decision where the employer tried to rely on the Supreme Court of Canada decision to support its termination of an employee who had exceeded a two-year automatic termination clause due to kidney failure. In *Masonite Int'l Corp. v. UBCJA*, Local 1072 (2007), 161 LAC (4th) 426 (Reilly), despite the fact the employee was totally disabled and could only hope to return to work after a successful kidney transplant, for which the waiting list was at least five years (although he had made some arrangements to try to get a donor from Sri Lanka into Canada, which would take at least another year and may not be legal), the arbitrator found that the employer had not established undue hardship on the basis of a health benefits premium of approximately $340 per month that resulted from the grievor continuing to be an employee.

ability. Rather, they acknowledge that employees should not be at unpredictable risk of losing their jobs when they are absent from work due to disability. In the minority's view, automatic termination clauses of reasonable length represent a trade-off for employees between their right to be dismissed for just and sufficient cause (if there is not a prospect of return to work in a reasonable period) and the certainty that the employment relationship will be maintained for a fixed period. There is nothing inherently discriminatory in such a trade-off, especially if the resulting protection is significantly longer than the applicable employment standards legislation.

For the minority the first step is to try to decide on a case-by-case basis if the particular termination clause is prima facie discriminatory. This will be determined largely by the length of the leave allowed without termination, a short one tending to be discriminatory. Here the length of this termination clause represents, both in purpose and effect, extensive protection from job loss due to disability so there is no prima facie discrimination. For Abella J., such clauses do not target individuals arbitrarily and unfairly because they are disabled. Rather, they balance an employer's legitimate expectation that employees will perform the work they are paid to do with the legitimate expectations of employees with disabilities that those disabilities will not cause arbitrary disadvantage.

The Disabled Employee's Duty to Cooperate in Seeking an Accommodation by Providing Medical Information or Participating in Treatment—the Clash Between Accommodation Duties and Privacy Rights

The cases on the disabled employee's duty to provide relevant medical information in both arbitration and human rights board settings in recent years are quite numerous. One of the best articulations of the scope of the disabled employee's duty of disclosure is *Capital Health Authority (Royal Alexandra) v. UNA, Local 33 (Schram)*.[26] The grievor was a nurse with 30 years of service who grieved that the employer had failed to accommodate her disability to the point of undue hardship by continuing to schedule her on a 2/3 shift schedule when it converted to a new 4/5 schedule. The grievor had provided medical notes, from both her family

[26][2006] AGAA No. 60 (Ponak); upheld on judicial review *UNA, Local 33 v. Capital Health Authority*, [2008] AJ No. 202 (QB).

physician and an occupational health specialist, indicating that she suffered from unidentified medical conditions that made it advisable that she not work more consecutive day shifts than what she had been working in her 2/3 schedule, because moving to the new schedule could upset her ability to manage her current ailments. However, despite repeated requests from the employer for additional medical information concerning the nature of her illnesses and the limits they imposed on her functional abilities, and her prognosis, the grievor and the union refused to comply with the requests for further information or provide consent to contact her two physicians.

After an exhaustive review of the jurisprudence on this subject, Arbitrator Ponak denied the grievance alleging a breach of the employer's duty to accommodate by keeping her on her old work schedule. He noted that arbitrators in several recent cases had taken the position that employees seeking accommodation for medical reasons must be very forthcoming in providing their employers with full medical disclosure, such as diagnosis and treatment, even at the expense of privacy.[27] However, he went on to note that the better view of the extent of the employee's duty to cooperate in accommodation by providing medical information was that the requested medical information must be relevant for the purposes for which it is sought. Provided that the test of relevance to the purpose of finding a reasonable accommodation was met, the employee could be held to be in breach of her duty to accommodate by refusing to provide the information. Thus, although it was found that the employer could have been a bit more specific concerning some of the information it required, it did not violate its agreement or statutory obligations by refusing to accommodate the grievor without more medical information being provided by her. After noting that each accommodation situation is unique, the board suggested for the parties' future guidance that the following types of medical information could be required by the employer as relevant to the accommodation inquiry:

- Nature of the illness (i.e., blood disorder or degenerative disc in neck, not necessarily the diagnosis itself).

[27] *See, e.g.*, City of Toronto and CUPE, Local 79 (2002), 110 LAC (4th) 403 (Barrett); Surrey Sch. Dist. No 36 and CUPE, Local 728, [2006] BCCAAA No. 47 (Lanyon).

- Permanent or temporary: Is the condition likely to stay the same, improve, or worsen over time? If expected to get better, what is the estimated time frame (similar to prognosis)?
- Restrictions and limitations, in as much detail as possible, regarding current and alternative job duties.
- How were medical conclusions reached (i.e., were diagnostic and other objective tests used or is it based on self-reporting)?
- Treatment or medication that might impact the accommodation or the employee's ability to perform his or her job.

This general principle that employers should not be found to be in breach of their duty to accommodate where the disabled employee has failed to provide them with medical information that is relevant to the search for reasonable accommodation has been applied with great consistency by both arbitrators and human rights tribunals.[28]

However, there are also several cases in which it has been submitted that the employer breached its duty to accommodate despite the fact the employee refused to provide information concerning his or her medical condition or need for accommodation prior to the employee's termination for failure to perform his or her workplace duties. These cases typically involve grievors with disabilities such as substance abuse or depression, which often feature denial of any illness or disability as a main symptom of the illness itself. In such cases the employer will often argue that it would be unfair to hold it responsible for a failure to accommodate because the employee has failed to live up to his or her accommodation obligations under the principles set out in *Renaud*. The employer will also assert that the privacy rights of its employees prevent it from intruding when the employee denies having any problem. In such cases the arbitrator will generally consider whether the employer

[28] *See, e.g.,* Halliday v. Michelin North Am. (Canada) Ltd., [2006] NSHRBID No. 6 (QL); Lowe v. Landmark Transp., Inc., [2007] FCJ No 284 (QL); Besner v. Canada (Corr. Serv.), [2007] FCJ No. 1391 (QL); Markham (Town) v. CUPE, Local 905 (Cook), [2006] OLAA No. 674 (Barrett); Dashwood Indus. Ltd. v. USWA, Local 1-500 (Ellis) (2007), 161 LAC (4th) 124 (E Newman). Although *Ottawa (City) v. Ottawa-Carleton Public Employees' Union, Local 503*, [2007] OJ No. 735 (upholding arbitration decision to reinstate an employee discharged for breach of last-chance agreement on absenteeism on basis of undisclosed disability of anxiety disorder being the cause of much of the absence) appears to be inconsistent, it can be explained by the fact that the employer did not make submissions on the duty-to-accommodate issue at arbitration (arguing simply no discrimination and breach of last chance agreement). This was noted by the Divisional Court in upholding the decision and refusing to hear argument from the employer on that issue on judicial review.

has acted reasonably given the circumstances known to it at the time. If there were circumstances that would have caused a reasonable employer to be aware that the employee may be suffering from a disability and caused it to do further investigation, then the employer may be found to be in breach of its duty to accommodate. This was found to be the case in *Canada Safeway Ltd v. UFCW, Local 401*.[29] However, in *Ontario Power Generation v. SEP (Stroud)*,[30] arbitrator Shime held that there was insufficient evidence of substance abuse to find that the employer had breached its duty to accommodate by not investigating further prior to termination. It did so on the basis that two medical examinations conducted prior to termination did not reveal the illness and the union did not raise any concerns of illness until several months after the termination. However, the arbitrator did recognize that where there is knowledge or an indication of this kind of problem, an employer has a duty to take reasonable steps to ascertain the nature and extent of an employee's illness before either disciplining or terminating the employee.

There are also a significant number of decisions in which a disabled employee has been found to have failed to live up to his or her accommodation obligations by refusing to facilitate his or her own recovery. In *Canada Post Corp v. CUPW (Usman)*,[31] Arbitrator Gordon refused to find that the employer had breached its duty to accommodate a grievor with cocaine addiction by terminating him for a lengthy absence and his dishonesty in giving a false reason for his absence. Despite finding that the employer was subject to a duty to accommodate the grievor's illness because this was a case of a hybrid termination (resulting from both culpable and nonculpable misconduct), the arbitrator found that the employer had met its duty to accommodate to the point of undue hardship. In doing so the arbitrator pointed specifically to the absence of cogent evidence that the grievor had taken all reasonable steps to recover from his illness and concluded that the grievor had failed to live up to his corresponding duty to facilitate his own recovery and cooperate in the accommodation process. A similar analysis was applied to the discharge of a grievor for testing positive for crack cocaine in contravention of a last-chance agreement provid-

[29] [2007] CLAD No. 269 (McFetridge).
[30] [2006] OLAA No 169 (Shime).
[31] [2007] CLAD No 154 (QL) (Gordon).

ing for treatment and drug testing in *Molson Canada v. Brewery, Winery and Distillery Workers, Local 300*.[32]

The Duty to Accommodate and the Provision of Personal Assistive Devices

The decision in *Toronto District School Board v. ETFO (Mootilal Gr)*[33] by Arbitrator Pam Picher provides us with what appears to be the first reported arbitration award concerning whether an employer can be found to be in violation of its duty to accommodate an employee with disabilities by refusing to provide that employee with personal bodily assistive devices to enable her to better perform her regular workplace duties. The case involved a special education teacher who had a congenital condition resulting in a permanent 70 percent hearing loss. The grievor had worn hearing aids since childhood and possessed a pair of old and worn out analog hearing aids that enabled her to perform her teaching duties at a satisfactory level for the employer. She had used her lifetime maximum allowance of $400 for hearing aids provided under the collective agreement when she bought the analog aids in 1997. By 2002 her analog aids needed replacing and she tested digital hearing aids and found that they made it much easier to filter out white noise and thereby allow her to hear the one student she wanted to focus on and hear other students who were seeking her assistance as well. She believed she could be a much more effective teacher in providing her special needs students with individualized attention with the digital hearing aids. But the digital aids cost approximately $3,500 and she could not afford them, so she returned them when the school board refused to pay for them.

In the grievance, the union sought an accommodation by providing digital aids to the grievor only, and did not seek to include other employees with eyesight or hearing loss. The union argued that the situation was unique because the only practical and effective form of accommodation for the grievor was to change her person as opposed to making changes in the workplace. Because she performed her teaching duties at several different locations in the school, it was not practical to try to modify all of her teaching locations. The union argued that to provide the digital aids

[32] [2007] BCCAAA No 197 (Ready).
[33] [2007]162 L.A.C. (4th) 385 (P. Picher).

to the grievor would not cause undue hardship to the employer. The grievor offered to leave her digital aids in the school at the end of the workday, and to apply for government grants to defray costs as well. The union argued that the grievor was being discriminated against because, by failing to provide her with digital aids in the face of her disability (and without undue hardship), the employer was essentially denying her the ability to perform her job because of the inordinate interference of white noise that can be easily eliminated by digital hearing aids. The union relied on *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees' Union (B.C.G.S.E.U.) (Meiorin Grievance)*[34] (*Meiorin*) to argue that the employer could justify its policy of not providing digital aids only if it could establish it is a BFOR by proving undue hardship if required to provide the aids. The union in effect argued that the policy of refusing to provide hearing aids to a teacher beyond the $400 lifetime benefit was a discriminatory policy and the school board had failed to prove it was a BFOR because it failed to show that it was impossible to accommodate the grievor without undue hardship.

The employer argued that to refuse to pay for hearing aids beyond the $400 cap was not discriminatory because she was being treated the same as all other employees who have health care benefits, including all other disabled employees, noting that other employees who require personal assistive devices such as wheelchairs do not have the full cost paid by the school board. The school board further argued that providing personal assistive devices is not an appropriate or required form of accommodation in order to better enable an employee to perform her job. It argued that hearing aids are personal assistive devices that enable people to function in society generally outside the workplace and providing of such devices does not fall within the employer's obligations under its duty to accommodate. The employer argued that the duty to accommodate properly focuses on modification to the workplace and/or job and not to the provision of personal assistive devices that permit an individual to better function outside the workplace. It also argued that the duty to accommodate does not oblige the employer to provide for the perfect accommodation, as long as the accommodation provided enables the

[34]British Columbia (Pub. Serv. Employee Relations Comm'n) v. British Columbia Gov't and Serv. Employees' Union (B.C.G.S.E.U.) (Meiorin Grievance), [1999] 3 S.C.R. 3.

disabled employee to function effectively in the workplace. It submitted that in its view the grievor was performing her duties well using her analog aids and did not require accommodation of her disability.

The arbitration board agreed that the $400 lifetime hearing aid benefit clause could not relieve the employer of its human rights code obligations. However, it went on to hold that the *Meiorin* three-step test for a BFOR is not intended to apply to an employer's policies respecting the appropriate form of accommodation of an employee with a disability. But it also held that, even if *Meiorin* did apply, the employer's stance against supplying personal bodily assistive devices as a means of accommodation was not discriminatory.

On the first holding, the board found that the *Meiorin* three-step test for a BFOR was intended to apply only to standards governing the performance of work. In the grievance before them the policy that was challenged was the decision that providing personal assistive devices such as hearing aids is not an appropriate form of accommodation for an employee with a disability. This policy was not a standard governing the performance of work and thus was not the type of policy to which *Meiorin* applies. It was not a barrier to employment or continued employment. It was not a norm, benchmark, measure, or criterion that has been imposed by the employer as a requirement for employment or continued employment for a given type of work. So the *Meiorin* three-step test was not applicable to the employer policy that the provision of personal assistive devices is not an appropriate form of accommodation for hearing disabled employees. The policy's justification was not dependent on the employer proving that it would endure undue hardship if required to provide the grievor with digital hearing aids.

But the board went on to find that even if *Meiorin* were intended to apply to this type of policy, the policy itself was not discriminatory as it did not discriminate against disabled employees. The policy covered all disabled employees alike and the employer would not provide personal assistive devices of any kind, such as wheelchairs, prosthetic limbs, or eyeglasses, to any employees. Also it found that the policy did not set up a barrier based on disability against the disabled employee's entitlement to work, nor did it refuse accommodation to a protected group under the *Human Rights Act* or deny accommodation to the point of undue hardship

to any employee. Nor was the school board's decision to provide one form of accommodation by modifying the workplace but not another, by modification of the person, discriminatory. The school board's decision to accommodate to the point of undue hardship by providing external assistive devices such as ramps, handrails, elevators, and special bathrooms, but refusing to accommodate by providing personal assistive devices, did not set up any barrier against any disabled group or against disabled employees generally. On this view, there was no discrimination warranting application of the duty to accommodate.

The board went on to consider the issue of whether the employer could be required to provide personal assistive devices like hearing aids as a means of accommodating a hearing-disabled employee under its general obligation to accommodate persons with disabilities under the human rights legislation. It noted that it was impossible to view the grievor as an isolated group of one, and felt it had to address the broader question of whether the duty to accommodate requires the employer to provide modification to the employee's body, or whether it is entitled to limit its accommodation to modification to the employee's workplace and job. The larger issue was whether the employer, pursuant to its duty to accommodate, is required to provide personal bodily assistive devices (like eyeglasses or hearing aids), or prostheses (like arms, hands, or legs), or medication, where the employee demands such as her preferred means of accommodation but where the employee has not equipped him- or herself with such devices for functioning for everyday life.

The board concluded that the employer, for its part, to fulfil its duty to accommodate, is responsible only for working with the employee and the union to modify the workplace, including such factors as the work environment, the job assignment, and the work methods or tools, to the point of undue hardship, in accordance with established jurisprudence, in order to minimize the negative impact of the employee's disability on the employee's ability to perform his or her job. It does not require the employer to provide modification to an employee's person, by supplying such things as personal bodily assistive or prosthetic devices when requested by the employee as her preferred means of accommodation. The responsibility of the employer in meeting its duty to accommodate is properly focused on the workplace and not on the

employee's body. Providing personal bodily assistive devices is not a job-related obligation that goes to the duty to accommodate.

The board went on to hold that generally the employee's body is not the employer's business and issues of personal adjustment to a disability and issues of workplace adjustment should not be confused. It is for the disabled employee to choose whether to use medications, prosthetic devices, or assistive devices to perform life's functions. Those decisions are life-related, not work-related. They are decisions that may impact on a person's ability to work, with or without accommodation, but they are not decisions that involve the employer. It is not for the employer to provide better personal devices any more than it would be for the employer to direct that the employee requires them in the first place. An employee's personal decision respecting his or her personal bodily integrity does not become work-related merely because he or she enters the workplace. The union's argument about the duty to accommodate until undue hardship missed the preliminary question about whether the providing of digital hearing aids was an appropriate obligation in relation to the employer's duty to accommodate—and providing personal bodily assistive devices is not a job-related obligation that goes to the employer's duty of accommodation. According to the board, we never get to the issue of whether the cost of such devices constitutes undue hardship. In its view, paying for a bottle of aspirin is not undue hardship, but it is simply not the employer's obligation to be the provider of such medication for an employee who suffers from migraine headaches. In short, it is the employee's responsibility to provide such personal assistive devices if she chooses to use them, and if they are beyond her financial means that is not a matter to be corrected by the duty of accommodation.

The board appears to attempt to establish a new bright-line division between appropriate measures of employer accommodation that will be subject to the test of undue hardship and those that are not appropriate for employer accommodation that are not part of the statutory duty to accommodate, the bright-line being whether the suggested measure involves modification of the workplace environment or job duties or modification of the employee's body. It may be difficult to maintain such a bright-line distinction between what constitutes a personal assistive device as opposed to modification of the workplace environment, particularly with

technological advances that allow for new forms of interaction and communication between persons and machines. It also may be difficult to come up with a sustainable legal rationale for such a distinction that is consistent with the general principles of equality that have evolved rapidly in recent years to impose greater accommodation obligations on employers in the interest of providing for greater equality of opportunity in the workplace for persons with disabilities. The ethos of inclusion that is symbolized by rulings such as *Renaud* and *Meiorin* may not allow the bright-line distinction imposed in *Toronto District School Board* to survive.

Conclusion

As the group of cases analyzed in this paper indicate, the scope and limits of the duty to accommodate, as it applies to employees with disabilities, have continued to develop and evolve in recent years. Arbitrators and judges have continued to grapple with the difficult issues that arise inevitably when rights and obligations under individualistic human rights legislation intersect and interact with rights and obligations negotiated under our collective bargaining regime.

What is perhaps most notable in reviewing cases that involve difficult or controversial conflicts between the individual rights of human rights complainants and collective agreement rights and obligations is the extent to which the principles identified in *Renaud* more than 15 years ago have continued to be applied and proven to be quite effective in pointing the way toward appropriate resolutions of what may at first appear to be irreconcilable differences. The cases have demonstrated that the principles espoused in *Renaud* to allow for a balancing of competing rights and interests between human rights complainants, employers, unions, and co-workers have been applied with a great deal of consistency in some fairly diverse situations, and have even been effective in dealing with issues of accommodation of employees to positions outside their bargaining units. In short, the *Renaud* principles have generally proven to be up to the task for which they were developed, as is evidenced by their longevity and the general respect shown for them by adjudicators and litigants in the years since their declaration.