

# Understanding the "Duty to Accommodate"

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## INTRODUCTION

The "duty to accommodate" has developed within the context of human rights legislation and has spawned a significant body of judicial and arbitral jurisprudence in recent years. The duty to accommodate in the workplace, that is, a requirement to take reasonable measures short of undue hardship to accommodate the particular needs and disabilities of employees, can arise in a number of different contexts. In almost every case, difficult questions arise about the interaction between employees' rights to protection from discrimination provided by the human rights legislation, and employers' rights to order the workplace and, in unionized settings, to bargain with the certified trade union regarding the terms and conditions of employment. Every employer faced with the termination of an employee must be keenly aware of its obligations under human rights legislation. At the core of any accommodation is the tailoring of a work rule, practice, condition or requirement to the specific needs of an individual or group. The need may be associated with their religion, gender, disability or other attribute enumerated in either the Canadian or B.C. human rights statutes. An in-depth analysis of the impact of the duty to accommodate on the workplace and on the actions of employers, unions, and employees is beyond the scope of this paper. (1a) Instead, we propose to set out an overview of the nature of the duty to accommodate, the extent of that duty, exactly when it arises, and how the duty is currently being applied by Canadian adjudicators.

## LEGISLATION

### Section 8 of the B.C. Human Rights Act, S.B.C. 1984, c.22 provides as follows

8 (1) No person or anyone acting on his behalf shall

- (a) refuse to employ or refuse to continue to employ a person, or
- (b) discriminate against a person with respect to employment or any term of employment, because of the race, colour, ancestry, place of origin, political belief, religion, marital status, family status, physical or mental disability, sex, sexual orientation or age of that person ...

(4) Subsections (1) and (2) do not apply with respect to a refusal, limitation, specification or preference based on a bona fide occupational requirement.

The Canadian Human Rights act, R.S.C. 1985, Chap. H-6 operates within the sphere of federal constitutional competence, and applies to federal institutions and federally governed institutions such as the federal government, banks, airlines, and the Canadian Armed Forces. The provisions dealing with discrimination in employment are substantively similar to those in the B.C. Human Rights Act:

7. It is a discriminatory practice, directly or indirectly, to refuse to employ or continue to employ any individual, or

- (b) in the course of employment, to differentiate adversely in relation to an employee, on a prohibited ground of discrimination.(1)

15. It is not a discriminatory practice if

- (a) any refusal, exclusion, expulsion, suspension, limitation, specification or preference in relation to any employment is established by an employer to be based on a bona fide occupational requirement;

Section 89(g) of the Labour Relations Code, S.B.C. 1992, c.82 gives arbitration boards the authority to interpret and apply any statute intended to regulate the employment relationship of the persons bound by a collective agreement, even if the wording of that collective agreement is inconsistent with the statute.

## When Does a Duty to Accommodate Arise?

The existence of a duty to accommodate in employment discrimination was first established by the Supreme Court of Canada in 1985 in Ontario Human Rights Commission and O'Malley v. Simpsons-Sears Ltd.<sup>(2)</sup> Since that time, the Court has drawn a vital distinction between cases of direct discrimination and those of adverse effects discrimination.<sup>(3)</sup> In the case of the former, the rule is simply struck down unless it is shown to be a BFOR. In the case of the latter, it need not be struck down, but the employer must make reasonable efforts to accommodate the affected employee(s).

### **(a) Direct Discrimination and the BFOR Defence**

Prohibitions against discrimination in s.8 of the Human Rights Act are waived by subsection (4) where there is a "bona fide occupational requirement" ("BFOR"). The significant words are "bona fide", which were discussed by Mr. Justice MacLntyre of the Supreme Court of Canada in Ontario (Human Rights Commission) v. Etobicoke <sup>(4)</sup>:

To be a bona fide occupational qualification and requirement a limitation, such as mandatory retirement at a fixed age, must be imposed honestly, in good faith, and in the sincerely held belief that such limitation is imposed in the interests of adequate performance of the work involved with all reasonable dispatch, safety and economy, and not for ulterior or extraneous reasons aimed at objectives which could defeat the purpose of the Code. In addition it must be related in an objective sense to the performance of the employment concerned...

Employers may defend a discriminatory work rule or practice as a BFOR in cases of direct discrimination, which occurs where a workplace rule is contrary on its face to a prohibited heading of discrimination. Examples of directly discriminatory workplace rules that were determined to be BFORs are a "male only" requirement for a position involving looking after the personal care needs, including toileting, of adolescent male handicapped students <sup>(5)</sup> ; a pulp mill's requirement that its employees not exhibit physical impairments such as muscular dystrophy when such impairment places both the employee and others at risk by nature of the work environment <sup>(6)</sup> ; and a hospital's requirement that a dietary aide be proficient in English <sup>(7)</sup> .

Where direct discrimination is found, and the employer is successful with its BFOR defence, the offending rule will be struck down. If a BFOR is established, then there is no duty to accommodate.

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(1a) See, for example, recent papers prepared for Continuing Legal Education Seminars: Heather J. Lain, "The Duty to Accommodate in the Workplace" (June 1993), Charles G. Harrison, "The Duty to Accommodate in the Arbitral Context: An Update" (June 1994). In addition, there are a variety of articles from different perspectives in Volume 1 of the Canadian Labour Law Journal (1992-3), pp.1-340.

(1) The prescribed grounds of discrimination in the Canadian Human Rights Act are: race, national or ethnic origin, colour, religion, age, sex, marital status, family status, disability, or conviction for an offence for which a pardon has been granted (s.3).

(2) [1985] 2 S.C.R. 536

(3) Central Alberta (Wilson), applied in Renaud (Sopinka) and Chambly (Cory).

(4) [1982] 1 S.C.R. 145 at 213.

(5) Board of School Trustees, School District No. 42 (Maple Ridge/Pitt Meadows) (1993), 33 L.A.C. (4th) 63 (Munroe).

(6) Crestbrook Forest Industries Ltd., unreported, (May 1, 1993) (Getz).

(7) Victoria Union Hospital and C.U.P.E., Loc.84 (1994), 39 L.A.C. (4th) 339 (Sask.).