Hicks Morley

HUMAN RESOURCES LAW AND ADVOCACY

Human Rights Update 2014: Accommodation and the Diverse Workforce

Recent Case Law on Key Principles of Accommodation

***Sugiono v. Centres for Early Learning – Seneca Hill*, 2013 HRTO 1976 (CanLII), request for reconsideration dismissed 2014 HRTO 72 (CanLII)**

The Applicant worked in the kitchen of a daycare centre. She provided the Respondent with medical notes indicating that she had heel pain, should avoid "prolonged standing" and, if possible, should work for six to eight weeks in another position that would allow her to sit for longer periods of time.

The Respondent asked the Applicant to obtain information from her doctor about what constituted "prolonged standing". The Applicant provided a further medical note that stated "modified duties for 8 weeks" but did not address the meaning of "prolonged standing" and did not specify any physical restrictions. Despite the lack of information, the Respondent temporarily arranged for the applicant to take breaks from the kitchen by going into a classroom to supervise children.

The Applicant subsequently advised the Respondent that her doctor said that she could no longer work in the kitchen. The Respondent requested information from the Applicant's doctor regarding the Applicant's restrictions, which the Applicant did not provide despite numerous follow-up requests by the Respondent. The Applicant then went off work and refused to return based on concerns about potentially exacerbating a past injury.

Eventually, the Respondent received information that the Applicant could bend, stand and walk for one hour and that her only restriction was not to lift more than seven pounds. The Respondent requested that the Applicant return to modified duties based on her restrictions. The Applicant refused to return until she received clarification of the modified duties and who would take responsibility for her workplace injury. The Respondent met with the Applicant to further explain the modified duties, yet the Applicant continued to refuse to return to work. The

Applicant believed the modified duties were unsuitable and continued to ask who would be responsible for her workplace injury.

After repeatedly requesting that the Applicant return to work or provide an updated medical note, the Respondent terminated the Applicant's employment. The Applicant alleged that her termination of employment was a breach of the *Human Rights Code* ("*Code*").

While the Tribunal was sympathetic to the Applicant's fear that returning to work could exacerbate her condition, there was no medical basis to support this fear and it did not relieve the Applicant of her obligation to participate in the accommodation process, which is collaborative. The Tribunal accepted that in this case, the Respondent made every effort to find an appropriate accommodation for the Applicant and the Applicant failed to provide the necessary information. The Applicant's "subjective feelings" that the modifications were unacceptable were insufficient to prove discrimination. The Applicant had a duty to try the accommodated work and failed to do so. The Applicant was uncooperative and had no evidence to support her concerns despite being given a number of opportunities to provide it.

Given the facts, the Respondent met both its procedural and substantive obligation to accommodate the Applicant's disability. The Tribunal held that the Applicant's termination of employment "…did not breach the *Code* because it was related to the applicant's intransigence and not her disability" (see paragraph 44). The application was dismissed, as was the Applicant's subsequent request for reconsideration of the Tribunal's decision.

***Sells v. Kawartha Pine Ridge District School Board and ETFO,* 2014 HRTO 760 (CanLII)**

The Applicant, a teacher, developed vision problems and migraine headaches that were triggered by excessive reading or computer work. The Respondent school board granted him sick leave that extended to the end of the school year.

Despite his sick leave, the Applicant wanted to go on the year-end class trip and be on stage during the year-end graduation ceremony. The Applicant provided the Respondent with a note from his doctor and later a more extensive letter from his doctor stating that the Applicant was medically able to go on the trip and attend the graduation ceremony. The Applicant also offered to have his daughter accompany him on the trip to assist him in any way required.

The Respondent did not permit the Applicant to go on the trip and invited the Applicant to attend the graduation ceremony but not on the stage. The Respondent's position was that the Applicant's medical condition prevented him from being in a position of responsibility on the trip and his lack of depth

perception would make navigating the stairs during the graduation ceremony difficult.

The Applicant argued that the Respondent was required to accept his doctor's opinion that he was capable of participating in both activities. The Applicant further argued that if the Respondent questioned the medical evidence, it was required to seek clarification or an independent opinion.

The Tribunal held that there were several problems with the Applicant's argument. First, "it relies on an incorrect understanding about the use and purpose of medical information about the restrictions and about the accommodation process" (para. 53). The accommodation process requires the workplace parties to cooperate and medical information is an essential ingredient in this process, but medical information does not necessarily resolve the accommodation process. While the medical information identifies an employee's restrictions and abilities, accommodation can involve a number of other considerations. The Tribunal stated:

> [56] The employer, in consultation with the employee, is in the best position to know the actual requirements of the essential duties associated with a job and what needs to be done to allow the employee to perform those duties. The person's doctor is not generally in a position to know whether a person can perform the essential duties of a particular job, or the other considerations that the employer may have to take into account.
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> [57] The applicant is correct that an employer cannot simply disregard information about an employee's restrictions and abilities. If an employer has doubts about the information provided, it is obliged to seek clarification. However, an employer is not required to simply accept a doctor's opinion about how the accommodation can be best accomplished.

The Tribunal held that the Applicant's doctor was not in a position to know all the relevant considerations about the trip. The question was not whether the Applicant could medically and safely go on the trip; the question was whether he was capable of performing the essential duties of a teacher on the trip. The Applicant's doctor had not commented on this issue. The Respondent had good reason to have concerns based on the Applicant's significant vision problems. In addition, the Applicant did not provide clear information about his abilities and restrictions until two days before the trip and by that time arrangements had been made for another teacher to go on the trip. The Tribunal decided that the timing of the Applicant's request and the point at which he gave supporting information provided a complete non-discriminatory explanation for the Respondent's decision regarding the trip.

The Tribunal also rejected the Applicant's argument regarding not being on the stage during the graduation ceremony. The Respondent's concern was that the Applicant may not be able to safely get on and off the stage and the Applicant therefore had been invited to attend the ceremony without being on stage. The Applicant had initially agreed and seemed satisfied with those arrangements but renewed his request to be on stage on the evening of the ceremony itself. The Tribunal ruled that the Respondent's refusal to rearrange the ceremony based on "a last minute proposal by the applicant" did not constitute a failure to accommodate (see paragraph 70).

***Taite v. Carleton Condominium Corporation No. 91,* 2014 HRTO 165 (CanLII)**

The Applicant was a retired firefighter with neck and back injuries. He drove a Ford F150 truck that did not fit in his condominium corporation's underground parking garage. The Applicant requested the Respondent, the condominium corporation, accommodate him by providing a designated parking spot in the above ground parking lot near the entrance to the condominium building. The Applicant provided a note from his doctor stating that "he needs this vehicle for medical reasons" and that the truck gives him better visibility and addresses his lack of neck movement.

The Respondent denied the Applicant's request and told the Applicant that he should purchase another vehicle that would fit in the underground parking garage or make other arrangements for parking. Eventually, the Respondent agreed to designate an above ground parking spot for the Applicant, but the Applicant was dissatisfied because the spot was not the closest one to the building entrance. Other issues arose in relation to vandalism and video surveillance of the Applicant's vehicle.

The Tribunal noted that the purpose of the *Code* is not to accommodate individuals' preferences and decided that the complaint had no reasonable prospect of success. Although the Applicant proved that he preferred to drive a Ford F150 truck, he did not provide evidence of a disability-related reason for his choice. The doctor's note stating "for medical reasons" was not born out by the doctor's evidence as he had not seen the vehicle or its specifications. The Applicant's own evidence supported the conclusion that he chose his vehicle based on his own preferences and perceptions of his needs, not based on medical direction. Even if the Applicant's disability meant that he should drive a large truck, there are a range of models to choose from, many of which would fit in the underground parking garage.

The Tribunal concluded that although the Applicant was entitled to purchase the vehicle of his choice, he was not entitled to have his choice of vehicle accommodated by the Respondent absent some evidence that this particular vehicle correlated to his *Code*-related needs. The application was dismissed.

***Nitta Gelatin Canada Inc. and UFCW-Can, Local 1000A (Katarzynski)* (2013), 230 L.A.C. (4th) 252 (Raymond)**

The Grievor's disability restricted his ability to use stairs. The Employer accommodated this restriction by assigning him to a position that limited his need to use stairs during his work day.

The grievance related to the Employer's arrangements for a lunch/break room for the Grievor. The lunch/break room for the bargaining unit employees was located on the second floor of the facility. The Grievor found it difficult to get to the room for his breaks and lunches because of his disability. The Employer gave the Grievor the choice of using the management lunch room (which the Grievor rejected) or using another room on the first floor of the plant as a lunch/break room.

Although the Union and the Grievor initially agreed that the Grievor would use the room on the first floor, over time the Grievor made a number of complaints about the condition of the room, including that there was an odour, the heat was insufficient, the paint on the walls was peeling, there was no fridge for his food, there was no lock on the door and unlike the main lunch/break room there was no changing area nearby. Although the Employer addressed many of these issues, the Union alleged that they were not addressed in a timely manner and the overall substandard condition of the Grievor's lunch/break room compared to the main lunch/break room constituted a failure to accommodate the Grievor's disability.

After emails were exchanged between the Grievor and the Employer that escalated the situation, the Grievor left work saying that he felt upset and devalued. He did not return to work for seven weeks. The Grievor's family doctor diagnosed him as suffering from anxiety and insomnia as a result of the failure to accommodate. The Union sought compensation and $10,000.00 in general damages.

Arbitrator Raymond denied the grievance. The Employer had no obligation to provide a lunch/break room equal to that enjoyed by the other employees. The Employer's duty was to provide a room suitable for the use of the Grievor, and the Grievor, the Union and the Employer had all initially agreed the room was suitable. The Arbitrator was satisfied the Employer was addressing the concerns raised by the Grievor. Even if those concerns were addressed too slowly, the timing was not a breach of the duty to accommodate.

The Arbitrator held that the Grievor left the workplace because he was upset with how he was being treated, not because his right to reasonable accommodation was denied. Being upset at the Employer's response to his concerns did not

justify the seven week absence and certainly did not warrant compensation. The grievance was dismissed.

***Remtulla v. The Athletic Club (Trainyards) Inc.,* 2013 HRTO 940 (CanLII)**

The Applicant was diagnosed with multiple sclerosis (MS). Her symptoms included problems with her balance. Prior to joining the Respondent's athletic club, she identified that she had a disability and required accommodation. The Applicant testified that exercise was an important component of managing her disease and she preferred to attend group exercise classes rather than work out alone. The Applicant asked the Respondent to make a number of accommodations, including not using reduced lighting during a particular type of group exercise class, keeping the back area of each studio clear for the Applicant to use the wall as an assistive device and installing a grab bar on the back wall of each studio as a second assistive device. The Applicant alleged that the Respondent failed to accommodate her and retaliated against her by threatening to remove her membership.

The Tribunal noted that the search for accommodation is a collaborative process to find a solution that may not be perfect but is reasonable. This principle applies whether the request for accommodation arises in the context of employment or the delivery of services that were at issue in this case.

The Applicant's allegation regarding lighting during a particular type of class was dismissed. The Respondent had marked on its class schedule which classes used regular or reduced lighting and asked the Applicant to provide her anticipated attendance schedule so it could consider its ability to accommodate. The Applicant did not do so and was confrontational. She attended classes and made her own changes to the lighting even after being instructed not to do so. The Tribunal found that the Respondent acted reasonably in trying to balance the Applicant's attendance with wanting to offer reduced lighting classes to its broader membership and took the first step of seeking information from the Applicant. The Applicant did not engage in a discussion of her accommodation request in good faith.

The Tribunal also rejected the Applicant's allegation that the club failed to accommodate her request for the back area of each workout studio to be kept clear for her use. The Respondent sent a memo to its staff instructing them to ensure that the area was kept clear. The Tribunal ruled that the Respondent was not to be held to a standard of perfection and it could not control the actions of all of its members. The Tribunal was satisfied that the Respondent took the Applicant's concerns seriously and made reasonable efforts to keep the areas clear, which satisfied the *Code*.

The Applicant's third allegation was that the Respondent installed a grab bar in the wrong position to make it a useful assistive device for her. The Tribunal's interpretation of the evidence was that the Respondent believed the Applicant was being vexatious, was pushing the Respondent around and the Respondent decided to push back on this issue by refusing to move the grab bar. Although the Tribunal found that the Applicant's approach was "demanding", "not conducive to constructive dialogue" and "needlessly aggressive", her request was a legitimate one. The placement of the bar was linked to the Applicant's ability to fully participate in the class and was a genuine need related to her disability rather than a mere preference.

The Tribunal rejected the Respondent's argument that because the Applicant had used the grab bar in its current positioning, even if the placement was not perfect, it should not be required to move the bar. The Tribunal noted that "where the optimal form of accommodation can be achieved through minimal effort, then it should be achieved" (para. 109). In this case, the cost of moving the bar a few feet was insignificant. The Tribunal ruled that the Respondent had breached the procedural component of the duty to accommodate by refusing to engage in discussion with the Applicant regarding the position of the grab bar and had breached the substantive component of the duty to accommodate by not moving the bar. The Respondent was ordered to move the grab bar, ensure that one particular employee completed human rights training, post *Code* cards in its facility and pay the Applicant $3,000.00 as compensation for injury to dignity, feelings and self-respect.

Recent Case Law on Disability Accommodation

***Campbell v. Revera Retirement LP*, [2014] O.J. No. 2859 (QL) (Div. Ct.)**

The Applicant was a Health Care Aide for the Respondent retirement residence. She applied for judicial review of a decision by the Human Rights Tribunal of Ontario awarding her $5,000.00 for discrimination. She had been employed by the Respondent for 20 years. Due to medical issues, she was unable to continue in her position as a Health Care Aide. She sought an alternate position and was offered a position in laundry. The Applicant felt that the physical demands of this position were outside her medical restrictions. She also provided a letter from her physician in support of this contention. The Respondent nevertheless took the position that it could accommodate her restrictions within the role of laundry attendant. The Applicant did not accept the position and was terminated from employment.

The Tribunal found that the Respondent's decision to insist that the Applicant report to work to attempt the laundry aide job, against the advice of her doctor, was problematic. Given the role her disability played in her termination, it was

determined that the Respondent had failed to meet its procedural obligations with respect to the duty to accommodate. The Tribunal found no fault with the Respondent's accommodation efforts up to the point that it made the decision to terminate the Applicant.

The Divisional Court dismissed the application for judicial review, noting that awards made in response to a discrimination finding were founded in the harm caused by the discrimination and were not to be assessed on the basis of some common law cause of action that might appear to be related. The Tribunal, as it was entitled to do, found that the discrimination was limited to a procedural failing that came after a proper and comprehensive effort was made to accommodate the Applicant through the Respondent's efforts to find her alternate employment. It was on this basis that the Tribunal concluded that the award for the discrimination should be $5,000.00. A complaint made pursuant to the *Code* did not stand as a replacement or substitute for all other claims or actions that might arise in a given circumstance.

***Perron v. Revera Long Term Care Inc*., 2014 HRTO 766 (CanLII)**

The Applicant was a Personal Support Worker ("PSW") for the Respondent nursing home. She ceased working in April, 2012 due to a back injury. She asked to return to work in November, 2012 and provided the Respondent with medical documentation outlining her restrictions. The Respondent determined that the Applicant could not do the essential duties of any of the three jobs it canvassed for her. Upon receiving further medical documentation, the Respondent once again concluded that the Applicant could not be accommodated in the relevant jobs. The parties scheduled a future functional abilities evaluation for the Applicant as she felt her condition was improving. The Applicant then filed this Application alleging the employer discriminated against her by not allowing her to return to work and failing to accommodate her.

The Tribunal was satisfied that the Respondent met its procedural duty to accommodate by obtaining relevant information about the Applicant's disability and by considering and exploring options to accommodate the disability. The Tribunal accepted that there were not enough tasks to bundle into one job for the Applicant. As a result, bundling tasks would require the Respondent to have an extra PSW on shift which was operationally not required.

The Tribunal also accepted that the relevant jobs could not be modified to coincide with the Applicant's lifting capabilities because such lifting was an essential requirement of the jobs. There was no way to alter such requirements without adding extra staff. Furthermore, even if the Applicant was capable of performing other jobs, such as housekeeping or laundry aide jobs, there were no such positions available to someone with the Applicant's seniority. Ultimately, the Tribunal held that the Respondent did not discriminate against the Applicant.

Essar Steel Algoma Inc and United Steelworkers, Local 2251 **(10 November 2014, Parmar)**

Arbitrator Jasbir Parmar concluded that the Employer had taken all appropriate steps to deal with the Grievor and his return to work issues from 2003 to 2006. Accordingly, the Arbitrator dismissed a grievance alleging that the Employer had failed to accommodate the Grievor.

The Grievor had commenced a Labour Market Re-Entry ("LMR") program with the WSIB. Pursuant to an agreement between the Union and the Employer, the Employer was not required to take any further action to accommodate the Grievor while he was in that program.

The Arbitrator noted that the duty to accommodate is a process involving the Employer, the Grievor, and the Union. She stated:

> [39] In this case, the Employer followed the agreed process for returning employees to work. It consulted with the Union and the employee, as contemplated. It reached an agreement with the Union and the Grievor that a return to work was premature on July 30, 2003 and that further medical information was required. It took steps to obtain that medical information. It followed its long-standing agreement with the Union to not approach the Grievor about a return to work once he commenced the LMR process. It made arrangements to return him to work to a suitable position upon completion of the LMR process.
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> [40] In these circumstances, having not advised the Employer of any different expectations, it does not lie with the Union or the Grievor to say some ten years later "you should have done something different". The tri-partite obligation requires that the Union and the Grievor facilitate the process for accommodation. Remaining silent about expectations, particularly when they are different from an agreed practice, does not meet that obligation.

Among other things, Arbitrator Parmar rejected the Grievor's argument that he only participated in the LMR because of a lack of other options. The Grievor was a prior Union steward and knew how to assert his rights. The Arbitrator was "confident that if he had questions about what was going on with his accommodation, he knew how to ask them. He chose not to." Moreover, there was no evidence of bad faith on the part of the Employer.

***Buttar v. Halton Regional Police Services Board*, 2013 HRTO 1578 (CanLII)**

The Applicant in this case suffered from Obsessive-Compulsive Disorder ("OCD"), specifically a phobia about coming into contact with the bodily fluids of others. This condition surfaced after he had commenced employment as a probationary police constable. His disability made it impossible for him to participate in the training and evaluation that was central to the probationary process. Moreover, his extreme reactions to exposure to such bodily fluids (a predictable feature of police work), created safety risks during the training process, since he might (depending upon the circumstances) become incapacitated and, therefore, a liability rather than an asset to his training officer. The training was with a view to becoming a full-fledged police officer, at which point he would be expected to patrol on his own.

Under the *Police Services Act*, police officers undergo a 12-month probationary period. When it became clear that he could not function as a probationary constable, the Applicant was re-assigned to desk work in a station. Even that environment gave rise to medical issues, and so he was relieved of duty with pay in order that an Independent Medical Examination could be performed. As all this was occurring, the Applicant declined to participate in the generally recommended treatment for OCD, namely Cognitive Behaviour Therapy ("CBT"), insisting instead on using herbal remedies and meditation to reduce his anxiety.

The IME Report, received at the mid-way point of the Applicant's probationary period, indicated that although his condition might improve with treatment, there would always be a significant risk that his OCD would reappear unexpectedly at any time, and that relapse was more likely when he was exposed to stress. These conclusions were shared by the Applicant's family physician.

The Respondent considered its possible legal obligation to extend the Applicant's statutory probationary period due to s. 47(2) of the *Code*, which states:

> 47(2) Where a provision in an Act or regulation purports to require or authorize conduct that is a contravention of Part I, this Act applies and prevails unless the Act or regulation specifically provides that it is to apply despite this Act.

However, this approach was ultimately rejected because there was no medical evidence to suggest that he would ever be able to perform police duties without an unacceptably high risk of unpredictable failure. Instead, the Respondent offered the Applicant an opportunity to convert to a civilian role, failing which his termination would be recommended by the Chief to the Police Services Board. The Applicant was specifically invited to provide any new medical information, but had none to offer. By letter, he accepted the civilian position with enthusiasm.

As matters unfolded, the Applicant found the available civilian position demeaning. When he indicated he would not continue in it, the Respondent advised him that he would be considered AWOL and would be dismissed for not performing available work within his restrictions. The Applicant then went off work, suffering from anxiety and depression, returning several months later to another civilian job.

At the time of the hearing, the Applicant produced a medical report suggesting that he had fully recovered, and insisted that he should be accommodated at the very least by immediate re-instatement as a probationary police officer.

The Tribunal first rejected the claim that the Respondent had acted discriminatorily in "forcing" the Applicant to resign "prematurely" from his position as a police constable. The Tribunal agreed that even a statutory probationary period might have to be extended as a form of accommodation, but that this would be so only if such an extension could realistically lead to satisfactory performance and confirmation in employment.

In this case, the medical evidence indicated either that the Applicant would never be able to pass probation or, if he did, that employing him permanently as a police constable would, in itself, create undue hardship in the form of unacceptable, unpredictable safety risks. Consequently, any perceived threat of termination associated with the information regarding the Chief's intended recommendation was excusable since his actions would not have violated the *Code*.

For the same reason, the Tribunal rejected the claim that the Respondent was obliged to send the Applicant for re-assessment after six-months. This finding was reinforced by the Applicant's decision to forego CBT, which was held to be inconsistent with his obligations to participate constructively in the accommodation process. The Tribunal also rejected the assertion that the Respondent was legally obliged as a matter of accommodation to pay for CBT therapy (which is not covered by OHIP).

The Tribunal rejected the Applicant's assertions that he had been improperly accommodated in a civilian position. The Tribunal noted that it was doubtful that, as a probationer, he was entitled to accommodation in any other position to begin with. It also rejected his claims of the harassment he had received upon his return to the workplace, noting that these concerns had never been expressed to the Respondent at the time they allegedly occurred.

Finally, and without having to resolve the conflicting medical evidence at the time of the hearing, the Tribunal rejected the submission that immediate re-instatement was called for. The Tribunal held that by accepting the offer of a

civilian job many months earlier, the Applicant had given up any right to accommodation in his original position as a probationary police officer.

Recent Case Law on Family Status Accommodation

Canada (Attorney General) v. Johnstone, 2014 FCA 110 (CanLII)

This decision of the Federal Court of Appeal was an appeal of the Federal Court's judicial review decision of the Canadian Human Rights Tribunal's decision in *Johnstone v. Canada Boarder Services Agency*, 2010 CHRT 20 (CanLII).

Fiona Johnstone was an employee who worked rotating shifts for the Canada Border Services Agency ("CBSA") at Pearson International Airport in Toronto. Both she and her husband worked for the CBSA on unpredictable, variable, rotating shifts with six potential start and end times. Following the birth of her second child, Ms. Johnstone requested that the CBSA provide her with a scheduling accommodation in the form of three fixed daytime shifts of 13 hours each. This schedule would have enabled Ms. Johnstone to secure childcare for her two children while allowing her to maintain full time employment status and pension and benefits entitlements.

The CBSA denied Ms. Johnstone's request in accordance with an unwritten policy which required employees seeking childcare accommodation to transfer to part-time status. In doing so, employees would relinquish some benefits and pension entitlements and would be entitled to fewer work hours per week.

Ms. Johnstone complained to the Canadian Human Rights Commission ("CHRC") and her complaint was ultimately heard by the Canadian Human Rights Tribunal ("Tribunal"). Consistent with its earlier decisions on the issue, the Tribunal found that the "family status" protections of the *Canadian Human Rights Act* ("Act") included parental obligations like childcare. The Tribunal concluded that Ms. Johnstone had established a *prima facie* case of discrimination, and that the CBSA had failed to consider accommodation of Ms Johnstone's childcare needs. Further, the Tribunal found that accommodation of Ms. Johnstone's needs would not have caused the CBSA undue hardship.

The Tribunal ordered the CBSA to pay Ms. Johnstone lost wages and special compensation, and to establish policies to address family status accommodation requests.

The Federal Court upheld the Tribunal's decision on judicial review, finding that it was reasonable. Of particular note in the Federal Court's decision was its consideration of the reasoning from the British Columbia Court of Appeal in

Health Sciences Assoc. of B.C. v. Campbell River North Island Transition Society ("*Campbell River*"), which held that a *prima facie* case of discrimination on the basis of family status could only be established where there was a "serious interference" with a substantial parental or other family obligation. The Federal Court found instead that "the childcare obligation arising in discrimination claim[s] based on family status must be one of substance and the complainant must have tried to reconcile family obligations with work obligations." The Federal Court expressly rejected the notion that there has to be a "serious interference" with the family obligation in order to trigger the protections of the Act.

The CBSA appealed the Federal Court's decision, challenging the Court's findings concerning the content of the "family status" protections under the Act, as well as the legal test for establishing a *prima facie* case of discrimination.

The Court of Appeal considered the nature and content of the protection of family status, and whether the Federal Court was correct in finding that this protection includes childcare obligations. The Court of Appeal rejected the CBSA's argument that family status is to be given a literal interpretation and only concerns the immutable characteristic of being in a parent-child relationship. The Court of Appeal stressed that such an interpretation was contrary to the findings of most courts and tribunals which have considered this issue.

In finding that family status includes an individual's childcare obligations, the Court of Appeal made certain to address one of the more pressing concerns raised by the Federal Court's decision: that all forms of childcare obligations, even if trivial, would be subsumed by the protection against family status discrimination. The Court of Appeal stressed that prohibited grounds of discrimination generally address "immutable characteristics," and thus the sorts of childcare obligations considered under family status must likewise be immutable. The Court of Appeal stated that the childcare obligations that will be considered are "those that form an integral component of the legal relationship between a parent and child…[T]he childcare obligations at issue are those which a parent cannot neglect without engaging his or her legal liability." The Court of Appeal stressed that the protection against family status discrimination would not be extended to personal family choices, such as participation in extra-curricular activities or family trips.

In considering the proper test to be applied in order to determine whether discrimination has occurred, the Court of Appeal agreed with the Federal Court's rejection of the approach from *Campbell River*, stating that there should be no hierarchies of human rights, and that the test applied to family status should be substantially the same as that applied to all other protected grounds. However, the Court of Appeal clarified that a *prima facie* case "must be determined in a flexible and contextual way." With respect to the ground of family status, this would include a consideration of the steps taken by the employee to self-

accommodate. The Court of Appeal noted that "[i]t is only if the employee has sought out reasonable alternative childcare arrangements unsuccessfully, and remains unable to fulfill his or her parental obligations, that a *prima facie* case of discrimination will be made out."

Having concluded that an employee's own efforts to self-accommodate must be considered as part of the *prima facie* case test for family status discrimination, the Court of Appeal then set out the following four elements that a claimant must demonstrate in order to establish a *prima facie* case of discrimination on the basis of family status, where the issue is accommodation of childcare needs:

(i) that a child is under his or her care and supervision;

(ii) that the childcare obligation at issue engaged the claimant's legal responsibility for that child, as opposed to a personal choice;

(iii) that he or she has made reasonable efforts to meet those childcare obligations through reasonable alternative solutions, and that no such alternative solution is reasonably accessible; and,

(iv) that the impugned workplace rule interferes in a manner that is more than trivial or insubstantial with the fulfilment of the childcare obligation.

Based on the application of this test, the Court of Appeal found that the Federal Court had not erred in its determination of Ms. Johnstone's case.

The Court of Appeal found that Ms. Johnstone clearly had a legal obligation to care for her two children, and that she had made significant efforts to find childcare providers who would be able to provide services that would fit her unpredictable rotating shift schedule, without success. The Court of Appeal further found that this shift schedule interfered with Ms. Johnstone's fulfillment of her childcare obligations in more than a trivial or insubstantial way. Thus, a *prima facie* violation of the Act was established, and the decision of the Tribunal was upheld.

Recent Case Law on Religious Accommodation

Religious Accommodation Refresher

One of the Supreme Court of Canada's first pronouncements on the issue of religious accommodation was in the context of a school board case in Québec. In

Commission scolaire regional de Chambly v. Bergevin, [1994] 2 SCR 525, 1994 CanLII 102, the Supreme Court of Canada had occasion to address the issue of whether or not a school board's decision to grant Jewish teachers a leave of absence without pay for Yom Kippur was discriminatory. The Union filed a grievance claiming that it was discriminatory for the leave not to be paid. The school calendar, which is part of the collective agreement, fixed the teachers' work schedule. The collective agreement also contained other forms of paid leave (e.g. special leave) that could have been used by the teachers in these circumstances.

The Supreme Court of Canada concluded that, although neutral or non-discriminatory on its face, the school calendar was discriminatory in its effect. Teachers who belong to most of the Christian religions do not have to take any days off for religious purposes (since the calendar is based on their holidays), yet members of other religions must take days off work in order to celebrate their holidays. Accordingly, in the absence of some accommodation by their employer, the Jewish teachers would have had to lose a day's pay to observe their holy day.

Moving on to the accommodation analysis, the Supreme Court of Canada's pronouncements were strong but nonetheless helpful to employers by injecting flexibility into the analysis. Specifically, the Court found that:

> It is not necessary that a collective bargaining agreement specifically provide for the observance of the holy day of a religious minority. Its provisions are simply a factor in determining whether the employer can reasonably accommodate the religious observances of the minority. In this case, the collective agreement provides a flexibility that demonstrates that a reasonable accommodation could be made […].
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> Freedom of religion is of fundamental importance to Canadian democracy. If reasonable accommodation of religious beliefs can be undertaken by an employer, it should be.

Although the Court was clear about the significance of respecting religious beliefs, its emphasis on flexibility constituted the beginning of a trend that has continued in the case law.

Six years later, the Ontario Court of Appeal dealt with this issue in ***Ontario (Ministry of Community and Social Services) v. Grievance Settlement Board****,* 2000 CanLII 16854 (ON CA) ("*Tratnyek*"). The dispute on appeal centred around the employer's "Religious Observance Policy" and its impact on public service employees of minority religious faiths who seek time off work to observe their religious holy days. At issue was whether the policy had a discriminatory

effect on an employee who requested eleven days off with pay to fulfil his religious obligations and if so, whether the employer took reasonable steps to accommodate the employee in the circumstances. The policy only allowed for two paid days off for religious observance purposes but it also provided for scheduling changes, where possible, if further accommodation was needed. Pursuant to the policy, the employer granted the employee two paid days off and also provided several options to the employee for the remaining time, including the use of paid days available to him through the compressed work week scheduling option. By working a compressed work week, the employee had been able to bank fifteen paid days in that year.

The Court of Appeal made two findings which are very helpful to employers. First, it concluded that the policy itself showed that the employer was mindful of its obligation to recognize and respect the right of every employee to practice his/her religious without discrimination and the policy did provide for measures designed to accommodate individual needs. Second, the Court found that the compressed work week option was an acceptable and viable means of accommodation because it permitted employees to use their earned days for religious observance purposes. This form of accommodation was appropriate because it enabled employees to schedule their required hours of work in a way that relieved them from having to choose between losing wages or encroaching on pre-existing earned entitlements in order to observe religious days.

The Court concluded that the jurisprudence supported the proposition that employers can satisfy their duty to accommodate the religious requirements of employees by providing appropriate scheduling changes, without first having to show that a leave of absence with pay would result in undue hardship. In fact, the Court went so far as to say that in some instances, scheduling changes may provide the fairest and most reasonable form of accommodation.

***Smith v. Network Technical Services Inc.,* 2013 HRTO 1880 (CanLII)**

The Applicant was fired for refusing to work scheduled Sunday shifts on the basis that he was an Evangelical Christian who was very involved with his church on Sundays. During the interview process, the Applicant was asked about his availability to work Sundays and while hesitant because of his religion, he ultimately agreed to work one Sunday, possibly two, per month. Once the Applicant started working he was frequently required to work on Sundays for a variety of reasons. As a result, he wrote to the Respondent indicating that he had the right to decline Sunday work for reasons of religious belief. The Applicant was fired shortly thereafter, ostensibly for a number of reasons. The Respondent admitted that at least one of the reasons was due to his refusal to work Sundays.

The Tribunal referred to a quotation from an earlier case, *Markovic v. Autocom Manufacturing*:

> [19] […]
>
> Sometimes the requirements of employment conflict with the ability of employees to practice their religion, often through the establishment of work schedules which, although adopted for valid business reasons, unintentionally impinge on religious practices. There is a significant body of court and tribunal decisions which have dealt with resolving the conflict between the demands of employment and the freedom to practice religion. Many years ago the Supreme Court of Canada, in *Ontario Human Rights Commission v. Simpsons-Sears*, 1985 CanLII 18 (SCC), [1985] 2 S.C.R. 536 (*Simpsons-Sears*), established that an employer has a duty to take reasonable steps to accommodate an employee who is unable, because of religious beliefs, to work in accordance with the established work schedule. The duty to accommodate requires an employer to look for ways to accommodate the applicant's need to absent himself from work for religious purposes. The duty to accommodate may thus require the employer to rearrange the applicant's work so as to enable him to work the hours that would otherwise be available to him, absent his need for religious leave. Whether accommodation up to the point of undue hardship takes the form of make-up assignments or other adjustments to the applicant's schedule, the goal must be to facilitate an opportunity for the applicant to work his full complement of hours, without encroaching on his religious beliefs.

In this case, because the Respondent had essentially made no attempt to accommodate the Applicant, the Tribunal readily concluded that the Respondent had discriminated against the Applicant.

***Andres v. Canada Revenue Agency* (19 September 2014, PSLRB)**

The Canada Public Service Labour Relations Board recently dismissed a grievance where the Grievor alleged discrimination because he was forced to use part of his annual vacation as per the collective agreement in order to observe Orthodox Good Friday and Easter Monday. Essentially, the Grievor had various options available to him pursuant to a specific provision in the collective agreement for religious observances that allowed employees to take certain days off with pay. The Grievor wanted to be able to take the days off with pay without having to use any of his other entitlements under the collective agreement. Importantly, the Employer did not argue that providing the two days off with pay

was undue hardship, but rather, simply that the Grievor had other alternatives available to him under the collective agreement.

The Arbitration Board concluded that the Employer had not discriminated against the Grievor because the collective agreement provided a menu of options as to how religious obligations could be accommodated, including annual leave, compensatory leave, leave without pay for other reasons, and at the Employer's discretion, time off with pay to be made up by the employee. The Board recognized that these various options did not include the possibility of additional paid leave for religious observances, which is what the Grievor was seeking. Nonetheless, the Board found that that there had been no violation of the *Canadian Human Rights Act*. In coming to this conclusion, the Board reaffirmed the proposition that in cases of religious observance, the duty to accommodate is not absolute and an employer can satisfy its duty to accommodate by alternate means without first having to show that a leave of absence with pay would result in undue economic or other hardship.

Recent Case Law on the Accommodation Process

***Lee v. Kawartha Pine Ridge District School Board,* 2014 HRTO 1212 (CanLII)**

The Applicant was a school caretaker who was dismissed when he refused to return to work. He claimed his dismissal was discriminatory because he was unable to return to the school where his permanent position was located for reasons related to his disability, after he had been accommodated for some time at a different school.

The Tribunal decided that no weight should be given to the medical evidence asserting the Applicant had a disability that required accommodation because there was inconsistency between what the Applicant testified to (his physical aversion to the school as the reason why he could not return to his permanent position) and what his doctors said (that he could not work with the supervisor, who was now his supervisor in either location). As a result, the Tribunal found that there was no disability that required accommodation and therefore the dismissal was not discriminatory. However, the decision contains a lengthy discussion of the procedural component of the duty to accommodate, and the Tribunal ultimately found that, even though there was no violation of the substantive component of the duty, the Respondent had failed to meet its procedural obligations towards the Applicant.

The Tribunal began its analysis of the procedural component of the duty to accommodate by citing the Divisional Court's decision in ***ADGA Group Consultants v. Lane***, 2008 91 O.R. (3d) 649, the case often relied on by the Tribunal for the proposition that the duty to accommodate includes both a

substantive and a procedural component. The Tribunal noted the following passage from the *ADGA* case, describing the nature and extent of the procedural component of the duty:

> [90] […] The procedural duty to accommodate involves obtaining all relevant information about the employee's disability, at least where it is readily available. It could include information about the employee's current medical condition, prognosis for recovery, ability to perform job duties and capabilities for alternate work. The term undue hardship requires respondents in human rights cases to seriously consider how complainants could be accommodated. A failure to give any thought or consideration to the issue of accommodation, including what, if any, steps could be taken constitutes a failure to satisfy the 'procedural' duty to accommodate.

The Tribunal then considered the Federal Court of Appeal decision in ***Canada (Human Rights Commission) v. Canada (Attorney General)***, 2014 FCA 131 ("*Cruden*"), a case decided subsequent to *ADGA* in which the Federal Court of Appeal rejected the notion that there is an independent procedural duty to accommodate which may give rise to a violation of the legislation even if the substantive duty to accommodate has been fulfilled. The Tribunal declined to follow the *Cruden* decision, noting that it was decided under different legislation and was based on a misreading of the *ADGA* case. The Tribunal then went on to provide the following detailed analysis of the employer's procedural duty to accommodate:

> [95] In my view, some confusion has arisen as a result of the language used in describing these independent bases for a finding of a violation of the *Code* as the "substantive duty to accommodate" and the "procedural duty to accommodate". While this may serve as a useful shorthand, it clouds the basis upon which a violation of the *Code* is found. In order to establish a violation of the *Code*, one of the rights protected under Part I of the *Code* must be found to have been infringed. In the context of an allegation of discrimination in employment, this engages section 5 of the *Code*, which guarantees the "right to equal treatment with respect to employment without discrimination because of … disability." In this context, the duty to accommodate appears in Part II of the *Code* as an interpretive provision. Section 17(1) states that "a right of a person under this Act is not infringed for the reason only that the person is incapable of performing or fulfilling the essential duties or requirements attending the exercise of the right because of disability." This is further qualified by s. 17(2) of the *Code*, which states:

> No tribunal or court shall find a person incapable unless it is satisfied that the needs of the person cannot be accommodated without undue hardship on the person responsible for accommodating those needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any.

It is correct to observe that a violation of the "duty to accommodate" is not a violation of the *Code*. Rather, from a substantive perspective, the correct way to frame the issue is that it is a violation of s. 5 of the *Code* to discriminate against an employee because of disability if that person's disability-related needs can be accommodated without causing undue hardship to the employer. Similarly, from a procedural perspective and as expressed by the adjudicator in *ADGA* and upheld by the Divisional Court, it is a violation of s. 5 of the *Code* to discriminate against an employee because of disability by failing to take appropriate steps to assess the employee's disability-related needs.

[96] In my view, the failure to take appropriate steps to assess an employee's disability-related needs inherently has a negative effect on that employee because of disability by failing to acknowledge that employee's right to be free from discrimination because of disability. This right to be free from discrimination inherently engages the employee's dignitary interest in having her or his disability-related needs appropriately considered and assessed, whether or not at the end of the day these needs could be accommodated in a substantive sense. One of the ways that disadvantaged or marginalized groups experience discrimination is by being ignored or disregarded, which results in members of these groups not being seen or being rendered invisible. In my view, in the context of a request for *Code*-related accommodation, ignoring or failing to consider an employee's stated needs is an emanation of this form of discrimination. To ignore, disregard or fail to adequately consider and assess a request for accommodation under the *Code* or, more particularly in the context of such a request made by a person with a disability, to ignore, disregard or fail to adequately consider or follow up on medical documentation provided in support of an accommodation request, inherently has a negative impact on the dignity interests of a person identified by a protected *Code* characteristic by causing that person to experience discrimination by being ignored, disregarded and rendered invisible.

> [97] Procedural discrimination in the context of a request for accommodation will generally result in an award of compensation for injury to dignity, feelings and self-respect. However, procedural discrimination may also result in other remedies being awarded, depending on the particular circumstances of the individual case. The fundamental principle underlying this Tribunal's remedial authority under the *Code* is, where a violation of the *Code* has been found, for the applicant to be put in the position he or she would have been in but for the discrimination. Where procedural discrimination has occurred, this Tribunal needs to consider, on a balance of probabilities, what position the applicant would more likely than not have been in had the procedural discrimination not occurred. In some cases, where the evidence does not support a finding of substantive discrimination, the evidence may support a finding that even if the accommodation request or medical documentation had been appropriately considered and assessed, the applicant's position more likely than not would not have changed and as a result there would be no basis to award further remedies. In other situations, however, even if substantive discrimination is not found, the evidence may support that appropriately considering and assessing the accommodation request may have resulted in further dialogue between the parties that more likely than not would have put the applicant in a different position. In such cases, additional remedies may be appropriate, including potentially compensation for lost income or even reinstatement.

In the end result, the Tribunal found that the failure by the employer to seek clarification of a psychiatrist's note stating that he "strongly recommended" that the Applicant be "medically accommodated" at his preferred location, constituted procedural discrimination. Significantly, the Tribunal also found that the psychiatrist's response to any request for clarification from the employer would not have been sufficient to justify the Applicant's refusal to return to the school where his permanent position was located. Nevertheless, the Applicant was awarded $3,000.00 as compensation for injury to dignity, feelings and self-respect.

***Sacco v. TRW Canada Ltd.*, 2013 HRTO 1068 (CanLII)**

In this case, the Applicant worked as a production employee in the Respondent's automotive parts operation. He suffered an upper body injury in October 2005 and subsequently suffered further injuries affecting his ability to bend and lift objects. As a result, he was placed on modified work for extended periods between 2005 and 2008. The Applicant was referred for an Independent Medical Evaluation ("IME") in March 2008, which resulted in a recommendation that he

should not lift more than five kg and that he should not be required to do any overhead lifting.

The collective agreement between the Respondent and the Thompson Products Employees' Association ("TPEA") contained a detailed accommodation process known as the "11.06 process". Pursuant to this process, the employer, the employee and the TPEA were required to work together to identify potential jobs in which an injured employee could be accommodated. This process was used following the Applicant's IME in April 2008 to identify a list of jobs that might be consistent with his medical restrictions. These jobs were reviewed by an occupational therapist, who concluded that none of the jobs identified were consistent with the Applicant's restrictions, but that there was one job that would be suitable with modifications.

In late July 2008, the Applicant attempted the one job that was identified as suitable with modifications, and performed the job for two hours before deciding that he could not do the job. A week later, in August 2008, he attempted the job again, worked in it for approximately one day, and then discontinued the job. Following the Applicant's unsuccessful attempts at the job, the occupational therapist re-assessed the job and confirmed that it was suitable in light of the Applicant's restrictions.

The Applicant, the Respondent and the TPEA continued to meet in August and September to discuss the availability of suitable work. In these meetings, the Respondent advised the Applicant that it believed the job he had attempted was suitable in light of his restrictions, and that it did not have another position in which to accommodate him.

The Applicant and Respondent had essentially no contact between September 2008 and October 2010, when the Respondent terminated the Applicant's employment for innocent absenteeism. Just under one year after his termination, the Applicant filed a human rights application alleging that the Respondent had discriminated against him by refusing to accommodate him and then terminating his employment.

Several months after the human rights application was filed, the Workplace Safety and Insurance Appeals Tribunal ("WSIAT") issued a decision overturning earlier decisions issued by a Workplace Safety and Insurance Board ("WSIB") adjudicator and a WSIB Appeals Resolution Officer which had confirmed that the work offered to the Applicant was suitable in light of his restrictions. The WSIAT found that the job that had originally been considered suitable was, in fact, not suitable in light of the Applicant's restrictions.

Because of the Applicant's delay in filing the application, the Tribunal determined that it would only consider whether the Respondent failed to accommodate the Applicant when it terminated his employment in October 2010.

The Tribunal held that the 11.06 process undertaken between April and July 2008 satisfied the Respondent's procedural duty to explore and assess accommodation options for the Applicant, and that there was no obligation to repeat the process in October 2010 before terminating the Applicant's employment. It stated:

> [40] I am also satisfied that the respondent did meet its procedural duty to accommodate the applicant. The procedural duty to accommodate requires a respondent to obtain relevant information about an employee's disability and to consider and explore options that may be available to accommodate disability.
>
> [41] In my view the respondent did obtain relevant information about the applicant's disability and assessed accommodation options for the applicant through the 11.06 process: a process that formally involved the applicant and that systemically considered jobs that could be available to the applicant. It is true that as a result of this process the respondent wrongly relied on a determination that the UPN 150 position provided suitable accommodation for the applicant. However, this does not mean that the respondent did not meet its procedural duty to obtain information about the applicant's disability and to consider and explore options that may be available to accommodate his disability. I am of the further view that it was reasonable for the respondent to rely on the 11.06 process and its outcomes when it decided to terminate the applicant in October 2010 given the evidence I heard that there had been no change in the applicant's medical status or in the nature of the jobs available in the St. Catharine's plant form 2008 to 2010.

The Applicant argued that there were other jobs he could have performed between 2008 and 2010, which the Respondent had not formally considered as part of the 11.06 process. However, the Tribunal agreed with the Respondent that several of these jobs were essentially unproductive "make work" projects, and at paragraph 35 held that "the Respondent was not obliged to assign the Applicant to ongoing 'make work' duties or duties usually assigned in order to provide employees recovering from an injury or disability with an opportunity to return to work as soon as possible and to carry out some short term work before returning to their regular duties or modified regular duties." The Tribunal held that doing this would impose undue hardship on the Respondent. The Tribunal also held that, given that the Applicant had no bumping rights with respect to persons

working in the plant office or in security, the Respondent was not required to displace a staff member in either of those areas in order to accommodate the Applicant, finding that that too would impose undue hardship on the Applicant. Since the Respondent was not required to accommodate the Applicant in either make work projects or office or security jobs, the Respondent was not required to consider these options as part of the accommodation process. Accordingly, the Tribunal found that the Respondent had not violated either the procedural or the substantive aspect of the duty to accommodate when it terminated the Applicant's employment.

***Pazhaidam v. North York General Hospital*, 2014 HRTO 984 (CanLII)**

The Applicant was employed by the Respondent as a porter; he was a member of a bargaining unit represented by the Service Employees' International Union, Local 1 ("SEIU"). He suffered a workplace injury to his right shoulder in 2005 and to his left shoulder in 2008, and received WSIB benefits for both of these injuries.

As a result of his workplace injuries, the Applicant had significant physical restrictions, particularly in pushing, pulling and lifting above the shoulders, with the result that he required accommodation. It was common ground that he was no longer capable of performing the essential duties of his home position as a porter. As a result, the parties embarked on a process to identify other vacant positions consistent with the Applicant's restrictions in which he could be accommodated on a permanent basis.

The key issue in dispute was whether or not the Applicant should have been the successful applicant for a vacant cleaning position at a senior's centre. The Respondent did not dispute that, but for his physical restrictions, the Applicant would have been the successful applicant for the position. However, the Respondent took the position that, at the time the cleaner position became available, it had made a number of requests for updated medical information to which the Applicant had not responded. Moreover, it had warned the Applicant that he would not be considered for further jobs until he provided the requested updated medical information.

After noting that the duty to accommodate has both procedural and substantive components, the Tribunal emphasized that the duty to accommodate is a collaborative process. Citing numerous prior Tribunal decisions, the Tribunal held that the Applicant has a duty to participate in the accommodation process by providing medical documentation about his restrictions and the accommodation he required. It noted that, in accordance with its procedural duty of accommodation, the Respondent had been seeking all relevant information about the Applicant's disability, and had asked the Applicant on numerous occasions to provide updated medical information regarding his restrictions. The Tribunal accepted that the reason that the Applicant was not considered for the disputed

cleaner's position was because he had not provided updated medical information that the Respondent considered necessary to determine his accommodation needs. It stated:

> [120] In my view, an employer is justified in obtaining medical clearance for an employee who has a disability and has had work-related aggravations of his disabilities in the past. This is because there is an obligation on an employer to safely accommodate when the nature of the disability is not clear or if the restrictions associated with the disability are not self-evident […]. In this case, the hospital had conflicting and incomplete medical documentation. In addition, a less physically demanding clerical job had resulted in a report from the applicant that there was an aggravation of his disabilities. The applicant was informed on a number of occasions by email and over the telephone that updated medical information was required and that he would not be considered for further positions until that information was provided. The applicant acknowledged that he was aware of this condition.

In these circumstances, the Tribunal found that the Respondent had fulfilled its procedural duty of accommodation and that, in the absence of current medical information regarding the Applicant's restrictions, it was not possible for the Respondent to consider whether the duties of the cleaner position could have been modified to accommodate the Applicant.

***Sears v. Honda of Canada Mfg.*, 2014 HRTO 45 (CanLII)**

The Applicant had a number of vision-related issues, including being severely myopic and colour blind. He had been employed by the Respondent for over ten years, performing specific processes on the Respondent's production/assembly line. In 2010, in response to some issues being experienced by the work group as a whole, the Respondent changed the colours on the software with which the Applicant worked, which made it difficult for him to see the information on his computer screen.

While the Respondent was notified in writing of the Applicant's disability as early as 2001, the Applicant did not formally request accommodation at that time, and there was a dispute between the parties concerning whether the Respondent's management knew at the time the change in software was introduced that it would cause difficulties for the Applicant. The Tribunal found that the Applicant had a sincerely held belief that he had brought his disability-related issues to the attention of management. However, because he had not done so through any of the official channels, the information did not come to the attention of those

individuals in the organization who were responsible for initiating a formal accommodation process.

After the changes were made to the software, the Applicant went off work for a period of time in early 2010 in some distress, claiming that he required a stress leave. An accommodation process was initiated in or around June 2011, and the Applicant was able to return to work on modified duties in June 2011 pending the implementation of accommodation measures. Various accommodation measures – including changes to the computers, training for the Applicant on adjusting the screen presentation, special lighting and a magnifying glass – were put in place by the end of November 2011. However, the Applicant's employment was ultimately terminated in February 2012, and he alleged that his dismissal was contrary to the *Code.*

The Tribunal found that the procedural duty to accommodate can arise without a specific request for accommodation by an individual, provided there are circumstances giving reason to believe the individual is experiencing difficulties because of disability. In this case, the Tribunal found that the procedural duty arose as early as 2001, when the Respondent was notified of the Applicant's disability. Moreover, in the Tribunal's view, the Respondent had sufficient information both before and after the software changes that it should have realized that the Applicant's visual issues would cause and were in fact causing difficulties for the Applicant, and should have initiated inquiries about the need for accommodation at that time. The Tribunal held:

> [148] […] [T]he corporate respondent has no policy dealing with its responsibility to accommodate and setting out expected roles for supervisory and other staff. There is also no evidence that the corporate respondent has briefed supervisors (or, indeed, other staff […]) about their duty to inquire when a need for accommodation comes to their attention.
>
> [149] To initiate accommodation relating to disability, an employee must of course be prepared to disclose information about the relevant disability to someone in authority. An employee who has already disclosed his or her disabilities to the employer may not be aware that s/he must do so again. In this case, the applicant had reason to believe that his employer knew that he had disabilities that made his job more difficult, and he did believe this. While he has given no evidence of disability-related inability to initiate effective communication, and I have therefore found that he should have been more active in his own behalf, his belief that his employer simply declined to do anything about his disability-related difficulties was not unreasonable in the circumstances.

> [150] I conclude that the corporate respondent initially failed in its procedural duty to accommodate in that, despite knowledge of the nature of the applicant's disabilities, his attempts to work around problems caused by his myopia and his requests for assistance with his work, the applicant's supervisors did not initiate any inquiry as to whether the applicant needed accommodation. I accept that the applicant left work as a direct result of the corporate respondents' failure to meet its procedural duty.

The Tribunal found that the Respondent had failed to initiate inquiries about accommodation until several months after the Applicant left work in distress, and actual accommodations were not implemented until some six months later. When the Applicant did ultimately return to work with accommodation, the modified duties plan was not adhered to by his team leader. When the applicant complained about this, there was no follow-up by the Respondent, which the Tribunal found "further reinforced the applicant's impression that complaining would not result in any effective action by the corporate respondent" (para. 158). The Tribunal also found that at least part of the reason for the Applicant's termination in February 2012 was the fact that he filed an Application asserting his rights under the *Code*. Ultimately, the Applicant was awarded an extensive remedy which included lost wages, $35,000.00 in damages for injury to dignity, feelings and self-respect. The Tribunal also directed the Respondent to retain a human rights professional to produce a human rights policy or policies reflecting the Respondent's procedural and substantive duty to accommodate employment difficulties related to personal characteristics protected under the *Code*, with the roles of all management employees clearly delineated.

