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Human Rights Update 2014: Accommodation and the Diverse Workforce

November 26, 2014

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Opening Comments and Welcome

Catherine Peters

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Overview of Key Accommodation Principles

Jodi Gallagher Healy

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The Fundamentals of Accommodation

- Procedural and substantive components
- Employer's duty to accommodate to the point of undue hardship
- Employee's duty to cooperate
 - Communicating needs and providing documentation
 - Accepting *reasonable* not *perfect* accommodation of *needs* not *preferences*

Undue Hardship

- Onus on employer to establish undue hardship
- The *Code* refers to three factors:
 - Cost
 - Outside sources of funding, if any
 - Health and safety requirements
- June 2014 OHRC *Policy on Preventing Discrimination Based on Mental Health Disabilities and Addiction* recognizes other limitations on the duty to accommodate

What is *Not* Required by the Duty to Accommodate?

- Measures that fundamentally alter the nature of the employment or service
- Indefinite leave over many years
- Pay for work not provided
- Creating an unproductive job/bundle of tasks
- Hire helper/shadow to perform duties
- Continued efforts after employee fails to cooperate

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

- Daycare kitchen worker with standing, lifting restrictions, eventually terminated
- Accommodation is a collaborative process – termination was for *intransigence* not her disability
- Employee's subjective fear of exacerbation and disagreement with modified work did not relieve her of duty to return to work to try modified duties

Sells v. Kawartha Pine Ridge DSB, 2014 **HRTO 760 (CanLII)**

- Teacher on sick leave for eye condition/migraines
- Teacher asked to go on a class trip and be on stage at graduation – doctor approved
- *"An employer is not required to simply accept a doctor's opinion about how the accommodation can be best accomplished"* – if in doubt, clarify
- Refusing last minute requests was not discriminatory

Accommodating Needs vs. Preferences

- Duty to accommodate *Code*-related needs, not an applicant's preferences
 - no disability-related need to drive Ford F150 even though doctor says so (*Taite*)
 - no obligation to provide equivalent lunch room to disabled employee (*Nitta Gelatin*)
- However, "*where the optimal form of accommodation can be achieved through minimal effort, then it should be achieved*" (*Remtulla*)

Disability Accommodation

Maureen Quinlan

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

- Employee required shoulder surgery in 2003
- Joint Worker Re-Entry Process followed
- Meetings held, information solicited
- Employee "left alone" during LMR per practice
- Grievance filed in November 2004
- Employer insulated from liability by process

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

- Health Care Aide had recurrent back disability
- Incapable of lifting requirements in several jobs
- No duty to create new position or fundamentally alter existing positions
- No obligation to employ two employees to do the job of one

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

- New police constable subject to statutory 12-month probationary period
- Developed OCD – phobia regarding exposure to bodily fluids
- Taken off road, ultimately off work altogether
- IME determined that relapses could never be ruled out and would be more likely to occur under stress

Buttar v. Halton Regional Police Services Board (cont'd.)

- Employee would not take Cognitive Behaviour Therapy
- Legal issue – extension of statutory probationary period due to s. 47(2) of the *Code*
- Rejected by employer because there was no medical prospect that such accommodation would succeed
- Employee given choice of conversion to civilian status or face Chief's recommendation for termination

Buttar v. Halton Regional Police Services Board (cont'd.)

- Employee chose to accept civilian position
- Found position demeaning, refused to attend
- Threatened with dismissal, went on sick leave
- Filed complaint regarding failure to accommodate as police constable, "premature decision"
- By the time of hearing, had "fully recovered" and demanded return to probationary constable status

Buttar v. Halton Regional Police Services Board (cont'd.)

- Based on IME, Tribunal rejects claim regarding "coerced choice" and extension of probationary period
- Rejects claim for IME re-assessment based on futility and grievor's failure to take CBT
- Rejects claim that employer had to pay for CBT
- Questioned obligation to employ as a civilian
- Rejected claims to the position he had chosen to leave

Family Status Accommodation

Andrew Zabrovsky

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Family Status Accommodation

- What is "family status"? The status of being in a parent and child relationship
 - *Human Rights Code*, s. 10
- "Family" not limited to traditional family units
 - Includes family members' identity, childcare, eldercare, etc.
- Includes duties and obligations associated with family member

Included in "Family Status"

"Immutable or constructively immutable characteristics, such as those that form an integral component of the legal relationship between a parent and child...the childcare obligations at issue are those which a parent cannot neglect without engaging his or her legal liability."

Not Included in "Family Status"

"Voluntary family activities, such as family trips, participation in extracurricular sports events, etc. do not have this immutable characteristic since they result from parental choices rather than parental obligations."

New Formula for "Family Status" Test

Employee must show:

1. That a child is under his or her care and supervision
2. The childcare obligation at issue engages a legal responsibility for that child
3. The employee has made reasonable efforts to meet the childcare obligation through alternative solutions, and that no alternative solution is reasonably accessible
4. The workplace rule interferes with the childcare obligation in a manner that is more than trivial or insubstantial

Family Status: Practical Advice

- A well-documented accommodation process in which meaningful inquiries must be made
- Employer should consider the following questions:
 - What are the employee's childcare needs?
 - Have all possible alternatives been explored?
 - Will other employees cooperate to facilitate?
 - Would transitional accommodations help?

Religious Accommodation

Dolores Barbini

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Religious Accommodation

1. Refresher on Freedom of Religion
2. Accommodating conflicts between religion and schedule
 - A. Recurring Conflicts
 - B. Holy Day Conflicts
3. Conclusion

Refresher on Freedom of Religion

- Freedom of religion consists of the freedom to undertake practices and harbour beliefs, having a nexus with religion, in which an individual demonstrates that s/he sincerely believes or is sincerely undertaking in order to connect with the divine, irrespective of whether a particular practice or belief is required by official religious dogma or is in conformity with the position of religious officials.

Refresher on Freedom of Religion (cont'd.)

- What does this mean?
 - To establish that freedom of religion has been infringed, a claimant must show
 - (1) that s/he sincerely believes in a practice or belief that has a nexus with religion; and
 - (2) that the conduct at issue interferes in a non-trivial manner with his/her ability to act in accordance with that practice or belief.

Refresher on Freedom of Religion (cont'd.)

- The fact that different people may practise the same religion in different ways does not affect the validity of the case of a person alleging that his/her freedom of religion has been infringed.

Accommodating Conflicts Between Religion and Schedule

- Two main areas in which the need for religious accommodation arises in relation to schedules:
 - Weekly days of observance
 - Annual days of observance
- Each type can present accommodation challenges for employers

Weekly Conflicts

- ***Smith v. Network Technical Services Inc*, 2013 HRTO 1880 (CanLII)**
 - Employee noted during interview that he could only work one or two Sundays per month due to religious obligations
 - After hiring, employer experienced staffing shortage and required the employee to work Sundays
 - Employer: "If you don't work Sundays, you don't work here"

Weekly Conflicts (cont'd.)

- Employer did not consider its *Code* obligations, terminated the employee for being confrontational and refusing to work Sundays
- Tribunal found that the employer was aware of the employee's request for accommodation but made no effort to accommodate
- Awarded damages to employee of \$5000 for injury to dignity

Weekly Conflicts (cont'd.)

- Takeaways:
 - Procedural: Consider scheduling requests and options to accommodate, and be prepared to show what steps were considered and/or taken
 - Substantive: Discriminatory reason for termination was enough to violate *Code*, even where other reasons existed to terminate and there was no intent to discriminate

Schedule Conflicts with Holy Days

- ***Chambly v. Bergevin*** (1994)
 - Supreme Court of Canada found that insofar as teachers belonging to a religious minority had to take days off without pay to celebrate their holy days, their work schedule was discriminatory.
- Does this mean employers are required to provide paid days off for the celebration of holy days?

Schedule Conflicts with Holy Days (cont'd.)

- Ask: Are there other ways to accommodate religious holidays?
- In *Ontario v. GSB ("Tratnyek")* (2000), the Court of Appeal noted:

"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 economic or other hardship."

Schedule Conflicts with Holy Days (cont'd.)

- *Andres v. Canada Revenue Agency* (2014) - PSLRB
 - Accommodation should not override the fundamental basis of the relationship, which is that an employee provides work for pay
- Affirmed the "menu of options" approach:
 - Employees may make up time when they would not usually work;
 - Employees may arrange to switch shifts with other employees;
 - Where possible, employees' shift schedules may be adjusted;
 - Subject to the *Employment Standards Act* and operational needs, employees may make up time by working on a secular holiday; or
 - Employees can work a compressed work week.

Schedule Conflicts with Holy Days (cont'd.)

- Takeaways:
 - Work with employees to understand their needs and identify appropriate options
 - Be creative in your attempt to generate multiple solutions
 - Assist the employee in achieving any of the solutions you've suggested (e.g.: facilitating shift swapping)

Conclusion

- General principles of accommodation apply
 - Accommodation process is a shared responsibility
 - Procedure and substance both matter
 - Document steps, proposals and efforts
 - Accommodations don't need to be perfect, only reasonable

Conclusion (cont'd.)

- Slight variation on duty to accommodate:
 - Not necessarily to point of undue hardship
 - Rather; if there are other reasonable means of providing paid time off, then duty can be met

Managing the Accommodation Process

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

- Obtain all relevant information about the employee's current medical condition, prognosis for recovery, ability to perform job duties and capabilities for alternate work
- Seriously consider how complainants could be accommodated
- Ignoring, disregarding or failing to adequately consider and assess a request for accommodation under the *Code* causes a person with a disability to experience discrimination by being ignored, disregarded and rendered invisible

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

- The employer fulfilled its procedural duty to obtain relevant information about the employee's disability and assess accommodation options for the employee through tripartite process contemplated by the collective agreement
- The employer's procedural duty was satisfied even though it relied on information that was subsequently determined to be incorrect

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

- Accommodation is a collaborative process in which the employee must participate and cooperate
- Endorses employer's right to seek medical information as part of the procedural duty to accommodate
- Employee's failure to cooperate frustrated the accommodation process

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

- Employee notified employer of disability but did not make formal request for accommodation through "official channels"
- Procedural duty to accommodate nevertheless engaged once employer had reason to believe employee was experiencing difficulties related to disability
- Employer criticized for not having accommodation policy that clearly delineated management responsibilities

Procedural Considerations

- Clear policy or collective agreement process advisable
- Specific request for accommodation not required
- Triggered where information reasonably available to employer that employee may have accommodation needs
- Focus on identifying needs and generating options for accommodating those needs
- Preparation and record keeping are essential

Discussion and Questions

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