

**A CROSS-CANADA UPDATE ON HOW TO MEET
YOUR DUTY TO ACCOMMODATE**

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**CONFERENCE ON IMPLEMENTING AND MAINTAINING RETURN-TO-
WORK STRATEGIES**

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I. Functioning effectively and managing return-to-work cases appropriately without a common definition of disability and undue hardship

The duty to accommodate was firmly expounded by the Supreme Court in the *Meiorin* decision.¹ In *Meiorin*, the Supreme Court ruled that an employer's workplace standard that systematically excluded certain groups of employees on the basis of sex had to be scrutinized to determine if the workplace rule was really required to ensure the performance of the job.

An employer's duty to accommodate in the workplace is the legal requirement for an employer to eliminate employment standards, rules or practices that discriminate against individual employees or individuals applying for employment on the basis of the prohibited ground of disability, as well as other grounds such as race, sex, age etc. The focus of this paper will be upon the accommodation by employers of individuals with disabilities.

The *Human Rights Code* of Ontario² provides that every person has a right to equal treatment with respect to employment without discrimination because of... disability.³ In unionized settings, the employer is bound by the provisions of the *Human Rights Code*, R.S.O. 1990, c. H. 19 by virtue of section 54 of the *Labour Relations Act, 1995*, S.O. 1995, c. 1, Sched. A., and the general common law including the decision of the Supreme Court of Canada in *Tranchemontagne v. Ontario (Director, Disability Support Program)* [2006] 1 S.C.R. 513.

Section 48(12)(j) of the *Labour Relations Act, 1995* empowers labour arbitrators to interpret and apply the *Human Rights Code*. Disability is given a very broad definition in the *Human Rights Code* at subsection 10(1). The *Human Rights Code* prohibits discrimination on account of disability with respect to employment. The *Code* defines "disability" as follows:

"disability" means,

¹ *British Columbia (Public Service Employee's Relations Commission) v. BCGSEU* (hereinafter referred to as *Meiorin*), [1999] 3 S.C.R. 3.

² R.S.O. 1990, CHAPTER H.19

³ Subsection 5(1) states that: Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences, marital status, family status or disability.

Subsection 5(2) states: Every person who is an employee has a right to freedom from harassment in the workplace by the employer or agent of the employer or by another employee because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, age, record of offences, marital status, family status or disability.

any degree of physical disability, infirmity, malformation or disfigurement that is caused by bodily injury, birth defect or illness and, without limiting the generality of the foregoing, includes diabetes mellitus, epilepsy, a brain injury, any degree of paralysis, amputation, lack of physical co-ordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment, or physical reliance on a guide dog or other animal or on a wheelchair or other remedial appliance or device, a condition of mental impairment or a developmental disability, a learning disability, or a dysfunction in one or more of the processes involved in understanding or using symbols or spoken language, a mental disorder, or an injury or disability for which benefits were claimed or received under the insurance plan established under the *Workplace Safety and Insurance Act, 1997*.

It is not considered discrimination to refuse to continue to employ an employee or exclude a person from a particular job if that person is incapable of performing the essential functions of the work because of the person's disability. But, before concluding that the disabled person cannot perform the essential functions of the work, the disabled employee's individual needs must be accommodated up to the point of undue hardship by the employer having the duty to make such an accommodation.⁴

Ontario and Federal human rights legislation make express reference to a statutory duty to accommodate. The Supreme Court of Canada decisions also suggest that employers have a common law duty to accommodate to the point of undue hardship, and that this duty is implied in human rights legislation across Canada.

If, as the result of these disabilities, an employee experiences a reduced capacity to carry out certain aspects of his or her job, then the employer is required by human rights law to make changes to the workplace to accommodate the disabled employee's needs up to the point of undue hardship. By so doing, the employer assists the employee in maintaining his or her ability to participate in productive work. This accommodation process also encourages a continuing employment relationship free of discrimination.

What is undue hardship?

Employers are under a duty to accommodate employees up to the *point of undue hardship*. The principle has been largely been defined through the decisions of various Courts and tribunals in human rights matters. Undue hardship implies that there must be excessive disruption or interference with the employer's operation. Undue hardship does not mean merely inconvenience. An accommodation solution by the employer includes any solution that *may reach* up to the point of impossibility for the employer to accommodate any further. But, only if that point is

⁴ *Masonite International Corp. v. United Brotherhood of Carpenters and Joiners of America, Local 1072 (Ganeshamoorthy Grievance)*, [2007] O.L.A.A. No. 522, 161 L.A.C. (4th) 426.

reached, will an employer be able to terminate an employee with a disability that would otherwise be held to be unlawful discrimination.

There are several considerations that are important in defining undue hardship. The major factors⁵ relate to *financial costs* and *health and safety considerations*. *Financial cost to the employer* is a factor that an employer will raise to quantify that an accommodation would be so costly that it would substantially affect the economic viability of the business. Costs are therefore advanced as an indicator of the point of undue hardship. Another factor in defining undue hardship is whether *health and safety considerations* cannot be met, assuming the employer could accommodate the employee. The latter will turn on assessing whether the degree of risk to co-workers or safety of the public would be so significant as to outweigh the benefits of the accommodation.

The point of undue hardship will also vary depending on the size of the employer's operation, but the burden must be substantial in order to be deemed undue hardship. Trivial burdens and subjective beliefs by the employer about excessive future costs are not allowed in the accommodation process.⁶ Since undue hardship is not defined expressly, an employer should consult the case law of its particular jurisdiction for guidance as to what are the permissible *limits* to its duty to accommodate an employee. In unionized settings, arbitral jurisprudence will also be of some assistance and guidance. However, those limits are extremely high, given the importance the Supreme Court of Canada has given to human rights legislation, elevating human rights legislation and the rights that are protected to a quasi-constitutional status. Also, the Court has indicated that given the case by case analysis that accommodation entails, the results will vary because factors are being balanced.

In all cases, it is the employer who has the burden of proving and establishing undue hardship. That threshold belongs to the employer to prove that it has exhausted its duty to accommodate an employee in order to prevent a finding that the employer discriminated on prohibited grounds.

The duty to accommodate, within the employment setting, typically involves the employer doing whatever is necessary to assist an employee short of reaching a limit of impossibility. This high burden is placed upon the employer in order to avoid a finding of discrimination based on an employee's disability under human rights law. In the context of an employee with a disability, the duty to accommodate refers to the

⁵ National Union, *Primer on the duty to accommodate*, November 2002.

⁶ *Central Alberta Dairy Pool v. Alberta (Human Rights Commission)*, [1990], 2 S.C.R. 489. The Court held that it was not necessary to provide a comprehensive definition of what constitutes undue hardship. It listed instead some factors that may be relevant to an appraisal, such as: financial cost, disruption of a collective agreement, problems of morale of other employees, interchangeability of workforce and facilities, size of employer's operations, safety considerations, magnitude of risk and who bears the risk. The Court stated that the list was not intended to be exhaustive and the results obtained from a balancing of these factors against the right of the employee to be free from discrimination will necessarily vary from case to case.

obligation imposed upon the employer to take necessary steps (short of undue hardship) to accommodate the needs of a disabled employee in the workplace so that the employee can proceed to perform the essential tasks of the job. For example, say an employee has a disability due to the amputation of a thumb on one his or her hands, and a job requires the employee to stack heavy bags on a pallet. The employer should provide the employee with bag lifting equipment to enable the employee to perform the palletizing of bags. The essential task of the job is to accomplish the task of palletizing bags, and not manually lifting bags. The Human Rights Commission's research on this subject states that most accommodation requests are not excessively costly, and many cost nothing at all.⁷

One purpose of human rights legislation is to prevent disabled workers from being excluded from the workplace.⁸ The term disability is also known as a handicap in human rights legislation. Handicapped or disabled employees must however have the skills to perform the core or essential functions of the job.

II. Explaining employer obligations under the duty to accommodate - under what circumstance can disabled employees be laid off or terminated?

Under Canadian law, an employer must take proactive steps to eliminate discrimination related to human rights grounds to the point of undue hardship.

Prior to *Meiorin*, the duty to accommodate an employee would arise only when an employee, for example, was not able to perform his or her job tasks in the regular manner. The employee was under an obligation to inform the employer of the needs that required accommodation. The employer only had a duty to accommodate job difficulties so that the employer avoided discriminating on a prohibited ground. An employer was required under law to take reasonable steps to eliminate the effects of employment practices or standards that tended to discriminate against employees or individuals applying for employment on prohibited grounds such as sex, race and so on. The *Meiorin* decision expanded the duty by placing a positive obligation on employers to review and design workplace standards so that they do not discriminate. That is, the employer must act proactively to eliminate discriminatory requirements, practices, policies and rules from its workplace.

The employer has the duty to accommodate its employee. In unionized settings, the duty to accommodate also extends in certain circumstances to the union. For instance, where the union negotiated a provision in a collective agreement with the employer that subsequently turns out to have a discriminatory impact, the union will share the obligation with the employer to eliminate the effects of that discriminatory provision.⁹ The union must cooperate with the efforts of an employer to

⁷ Ontario Human Rights Commission, *Policy and Guidelines on Disability and the Duty to Accommodate* at p. 27.

⁸ *O'Malley v. Simpson's-Sears*, [1985], 2 S.C.R. 536. The Court expressed that there is a societal obligation to respect and protect the right to equality by taking *reasonable* measures.

⁹ *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970 [hereinafter *Renaud*].

accommodate an employee, and the union must not interfere with that accommodation process. As exclusive bargaining agent for the employees, the union must also defend an employee if an employer does not take action to discharge its duty to accommodate. In the *Renaud* case, the Court held that the union can discharge its duty by establishing that a proposed accommodation would create undue hardship upon *other* unionized employees. The effect on other employees is therefore what the union needs to establish, which is quite different from what the employer needs establish to prove undue hardship such as the expense or disruption to the business of the employer.

Exclusion based on occupational requirements

An employer can exclude certain employees from the workplace where it can establish that the job requires an employee to perform certain essential tasks for the job. Bona Fide Occupational Requirements (BFOR) are the essential tasks required to perform a job. In *Meiorin*, the Court set out three tests that help determine whether a discriminatory standard is really a BFOR¹⁰:

1. *Did the employer adopt the standard for a purpose rationally connected to the performance of the job?*
2. *Did the employer adopt the particular standard in an honest and good faith belief that it was necessary to the fulfillment of that legitimate work-related purpose?*
3. *Is the standard reasonably necessary to the accomplishment of that legitimate work-related purpose?*

For a standard to be *reasonably necessary*, it must be shown that it is impossible to accommodate an employee sharing the characteristics of the claimant without imposing undue hardship upon the employer.

In *Meiorin*, the Court suggested questions that should be asked to determine if an employer has discharged its duty of accommodation to the point of undue hardship. A decision-maker should consider¹¹:

1. *Has the employer investigated alternative approaches that do not have a discriminatory effect, such as individual testing against a more individually sensitive standard?*
2. *If alternate standards were investigated and found to be capable of fulfilling the employer's purpose, why were they not implemented?*

10 *Meiorin* at para. 54.

11 *Meiorin* at para. 65.

3. *Is it necessary to have all employees meet the single standard for the employer to accomplish its legitimate purpose or could a standard reflective of group or individual differences and capabilities be established?*
4. *Is there a way to do the job that is less discriminatory while still accomplishing the employer's legitimate purpose?*
5. *Is the standard properly designed to ensure that the desired qualification is met without placing an undue burden on those to whom the standard applies?*
6. *Have other parties (such as the union) who are obliged to assist in the search for possible accommodation, fulfilled their roles?*

Finding alternate work before termination is allowed

In case of *Canada Safeway and UFCW, Local 401*,¹² the Board held that the employer's duty to accommodate extended *beyond* the employee's own position. It stated that before the employer could terminate a disabled employee, it would have to establish:

1. *That the employee was unable to discharge his duties at the time that he was terminated;*
2. *That the employee would be unable to discharge his duties within a reasonable time following the date of his termination;*
3. *That reasonable assistance from the employer would not have enabled the employee to discharge his duties as of the termination date or within a reasonable time thereafter; and*
4. *That there is no other job in the bargaining unit which the employee could perform as of the termination date or within a reasonable time thereafter.*

Termination due to frustration of the contract of employment

An employer may also take the position that an employee's contract of employment has come to an end based on the doctrine of frustration. If frustration occurs, the employer does not actually terminate the employee's employment, and thereby the situation does not trigger statutory, common law, or contractual termination obligations.

Typical situations where an employer may argue that a contract of employment has been frustrated are when:

¹² (2000), 89 L.A.C. (4th) 312.

1. The employee demonstrates an excessive rate of absenteeism, without any clear prognosis for achieving satisfactory attendance in the future; or
2. The employee is offered suitable work, and an accommodation solution by the employer, but the employee refuses the offer.

Therefore, when an employee is absent from work due to a disability or illness for a long period of time, the employer may argue that the employee's contract of employment is ended under the doctrine of frustration. The doctrine of frustration states that the employer is entitled to its core bargain with the employee, and if the bargain is not provided, then the employer's obligation should also end.

However, Courts have expressed doubt as to the validity of the doctrine of frustration to employment contracts that include provisions for short-term sick leave and long-term disability benefits. The Ontario Court of Justice (General Division) has stated in *Antonacci*:¹³

This is not a case in which it is appropriate to find that the contract of employment was frustrated, if only because the defendant offered its employees sick leave and long term disability plans. This is consistent with the conclusion that the contract of employment contemplated a lengthy period of absence by an employee, especially one with long service and was injured on the job.

Given the tri-partite nature of the collective agreement, there exists some arbitral doubt as to whether the doctrine of frustration can form the basis by which unionized employees can be terminated by the doctrine. Under arbitral jurisprudence, the possibility of dismissal can exist on a narrow ground that is not defined as frustration, but rather where a unionized employee is completely unable to perform the work contemplated by the collective agreement because of a permanent ongoing disability or illness. However, the employer must establish that the employee's condition prevents, and in the future will likely to continue to prevent, the employee from returning to productive employment without endangering the employee's health and safety or that of others.¹⁴

To establish this, the employer would look at the nature and history of the disability, patterns and effects on the employee's employment record. The employer's attempts to accommodate the employee must be considered, as well as any medical evidence or prognosis that assists in determining the likelihood of the employee overcoming the disability that prevents the employee from doing the essential tasks of the job.

The employer's ability to terminate an employee on the basis of such complete incapacity would still be dependent on whether the termination would deprive the

¹³ *Antonacci v. Great Atlantic & Pacific Co. of Canada, Ltd.*, [1998] O.J. No. 876 at para. 39 per Swinton J. See also Court of Appeal in *Antonacci v. Great Atlantic & Pacific Co. of Canada, Ltd.*, [2000] O.J. No. 40 at paras. 10-13 affirming the trial judge's conclusion on that issue.

¹⁴ *Brown and Beatty*, at para. 7:6110.

employee of his or her rights to exhaust sick leave or long-term disability benefits. The employee must be warned of the possibility of termination, and the employer must have exhausted its duty to accommodate the employee under the law.

The case of frustration of a contract of employment and of a collective agreement towards a particular employee is therefore not an easy one for an employer to make. Frustration is a common law doctrine. The case of frustration is more complicated because the common law is subject to human rights legislation and to the legal obligations imposed upon an employer to demonstrate that it has exhausted its duty to accommodate to the point of undue hardship. The doctrine of frustration must also yield to other common law termination obligations and to those statutory duties imposed on an employer under Employment Standards legislation that require an employer to give minimum notice before termination, or pay in lieu of notice.

In Ontario, where there exists a disability within the meaning of the *Human Rights Code*, an employer is required to accommodate the disability to the point of undue hardship. It should also be noted that the Ontario legislation does not refer to any notion of reasonableness at subsection 17(2) of the Code. Human Rights Legislation in Canada has been interpreted very expansively in the Courts, commissions, and tribunals. The term in the Ontario *Human Rights Code* is "handicap". As a suppletive interpretation, the Supreme Court has stated that while a common cold or flu could not be considered disabilities, a *disability or handicap* "may be the result of a physical limitation, *ailment*, a social construct, a *perceived* limitation or a combination of all of these factors.¹⁵

Attendance Management Programs (AMP)

If an employer wants to avoid unlawful termination situations, employers need to document their steps and have in place monitoring policies. An example of such a management tool is an absenteeism program that can also be used for determining where a duty to accommodate may arise. In a legitimate exercise of their management rights, employers may introduce certain policies to counsel employees that exhibit high rates of absenteeism. An employer's Attendance Management Program (AMP) attempts to deal with employees who have high rates of absenteeism and in order to ascertain the cause of the absenteeism. This in turn permits the employer to provide assistance to employees to further the legitimate business interests of the firm and improve productivity of its employees. Dealing with causes of absenteeism is a valid concern for an employer.

Employees are expected to assist in the accommodation process by articulating the nature of their disability and request that the employer provide an accommodation. Once a disability request is put forth, the employer has the duty to find a solution to accommodate the employee up to the point of undue hardship. An employee's

¹⁵ Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Boisbriand (City), [2000] 1 S.C.R. 665 [hereinafter *City of Boisbriand*].

personal privacy interests will need to be balanced against the employer's right to access minimal personal medical information in order to discharge the duty of the employer to accommodate up to the point of undue hardship.

Attendance management programs typically try to address innocent absenteeism and use employer counseling and notices to avoid an employee moving towards a situation where a contract of employment may be deemed to have reached "frustration".¹⁶ An AMP when properly structured will avoid having any hallmarks of a disciplinary process and could also be used to identify and deal flexibly with employees in need of accommodation, in cases where an employee did not initially wish to reveal his or her needs. Culpable absenteeism should be dealt through a completely separate process. Any disciplinary process must exclude situations that involve innocent absenteeism or absenteeism related to a disability situation beyond the employee's control.¹⁷

Counseling or coaching programs must not be structured to harass an employee or find reasons to terminate a disabled employee who can be accommodated. The process should not thwart the individualized accommodation process when a disability is found to be at issue. In the wrongful termination case of *Keays v. Honda* case, the Ontario Courts affirmed the fundamental principle of human rights law and that accommodation is an employee's right, not a favour granted by one's employer.¹⁸

An AMP may focus on medical documents such as simple medical notes from employee's treating physician to justify innocent absenteeism related to temporary illness. Sick leave provisions in contracts of employment and long-term disability benefits granted to protect an employee's job should be kept in mind when an employer uses the AMP in a good faith exercise of its management rights. An employer has legitimate business interests to plan and schedule its human resources to accomplish its business goals. An AMP is appropriate to the extent that it is not used as a means for terminating disabled employees unlawfully.

¹⁶ *Re United Automobile Workers and Massey Ferguson (1969)*, 20 L.A.C. 370 (Weiler); and *Champion Road Machinery Ltd. and Gearco Ltd. and International Association of Machinists & Aerospace Workers, Lodge 1863 (1992)*, 25 L.A.C. (4th) 1 (Verity). Since then, the *Human Rights Code*, body of jurisprudence of SCC on human rights legislation, and arbitral jurisprudence on Attendance Management Policies have imposed a duty on the employer to ensure that its policies are consistent with the employer's duty to accommodate until the point of undue hardship, even where the issue involves illness. Workplace safety legislation also requires the employer to put into place a plan to allow an injured or disabled employee to return to work through individualized lighter duties for example and accommodations. See *Occupational Health and Safety Act*, R.S.O. 1990, c. O.1 and the *Workplace Safety and Insurance Act*, 1997, S.O. c. 16, Sch. A.

¹⁷ *Ontario Human Rights Commission v. Gaines Pet Foods Corp. (1993)*, 16 O.R. (3d) 290. The Divisional Court stated that the employer has the right to terminate an employee for absenteeism as long as the absenteeism is unrelated to any disability or handicap. In the case before the Court, absenteeism was related in part to the employee suffering from cancer. Since the employer considered these absences in its decision to terminate the employee's employment, the Court held that the termination was discriminatory.

¹⁸ *Keays v. Honda Canada Inc.* [2005] O.J. No. 1145.

In the Federal workplace, the *Desormeaux case*¹⁹ involved an employer's failures to consider the causes of absenteeism before terminating two of its employees following the introduction of an AMP to deal with absenteeism. This resulted in the dismissal of an employee (Mr. Alain Parisien) in the face of evidence that his absenteeism may have been related to a post-traumatic stress disorder. The employer also dismissed another employee (Ms. Francine Desormeaux) because of repeated absenteeism due to chronic migraine headaches amongst others illnesses and injuries. In both of these termination cases, the employer did not meet the legal test of accommodation until undue hardship. An arbitrator appointed under the collective agreement had nonetheless dismissed the employees' grievances against the employer. The employees then filed complaints with the Canadian Human Rights commission. The Human Rights Tribunal found that both employees suffered from disabilities, and that their dismissals had been based in part on this factor, and that the employer did not exhaust its legal duty to accommodate to the point of undue hardship. The Tribunal ordered the employer to reinstate both employees.

On appeal by the employer to the Federal Court, only the decision involving Mr. Parisien was upheld. The Federal Court held that in the case of Ms. Desormeaux, there was no evidence that the employee had any disability-related absences, and reversed the Tribunal's decision thereby upholding the arbitrator's prior decision. Ms. Desormeaux then appealed to the Federal Court of Appeal. The Federal Court of Appeal held that there had been evidence put forth before the lower Tribunal that the headaches constituted an actual disability²⁰ and that the employer had therefore failed to accommodate her to the point of undue hardship. The Federal Court of Appeal also stated that there was nothing in the Tribunal's decision to require employers to indefinitely maintain on their workplace employees who are permanently incapable of performing their jobs, but that on the particular facts of the case, the employer had failed the legal test of undue hardship established under *Meiorin*.²¹ The Court reinstated the decision of the Tribunal that had ordered the reinstatement of the dismissed employee. In these cases, while the employer had an AMP, it did not implement it properly. A properly structured and administered AMP would have been able to avoid the wrongful terminations based on disability discrimination.

The Supreme Court in the *Renaud case*²² has stated that unions also have duties to accommodate. As bargaining agents of collective agreements with employers, unions form an integral part of the accommodation process. In unionized settings, an AMP

19 *Desormeaux v. Ottawa-Carleton Regional Transit Commission* [2003] C.H.R.D. No. 1; Judicial Review decision [2004] FC 1778; and Appeal decision [2005] FCA 311.

20 The Tribunal had concluded that Ms. Desormeaux suffered from migraine headaches which constituted a disability according to the test set out by the Supreme Court in *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. City of Montreal*, [2000] 1 S.C.R. 665, since the condition was chronic, significantly incapacitating and periodically interfered with her ability to do her job. Because this disability was a factor in her dismissal, then the dismissal was *prima facie* discriminatory. See *Desormeaux v. Ottawa-Carleton Regional Transit Commission*, [2005] FCA 311 at para. 2.

21 *Desormeaux v. Ottawa-Carleton Regional Transit Commission*, [2005] FCA 311 at para. 21 per Linden J.A.

22 *Central Okanagan School District No. 23 v. Renaud*, [1992] S.C.R. 970.

program needs to respect typical collective agreement provisions that prevent against discrimination, provide sick leave periods, and long-term disability benefits to employees. Unions have an obligation to enforce employee's rights and to assist in the accommodation process once a disability-related accommodation request is put forth.

An employer must not use an AMP to avoid discharging its duty to accommodate by introducing a rigid and mechanistic system that ignores the particular circumstances of an employee. A mechanistic process with rigid structural features is antithetical to individual accommodation/flexibility called for under the law. There is no need to establish or prove intent under Human Rights legislation, just the discrimination. An employer's policy, such as an AMP, must be structured and implemented in a manner so that it does not fall contrary to the requirements under *Meiorin*.²³

Arbitral authority on the ability to terminate unionized employees where an employer has attained the limit of undue hardship

However, arbitrators have long upheld the right of management to counsel and even terminate the employment of an employee for "innocent absenteeism". *Brown and Beatty's Canadian Labour Arbitration (4th Edition)* summarizes the jurisprudence, as follows at paragraph 7:6100 (references excluded):

When employers are faced with employees who, as a result of some infirmity or incapacity, are unable either to report for work on a consistent and regular basis or to perform the tasks expected of them, arbitrators have not left them without any remedy. To the contrary, in the absence of any limitations in the collective agreement, they have recognized the employer's right to insist on the benefit of its bargain and to require the employee to render those services that the agreement anticipates she will perform in return for her remuneration. Most fundamentally, where it can be established that (i) an employee's record of past absences is excessive and (ii) that there is no reasonable expectation that it will improve in the future then, unless the employer has waived its rights, and so long as it will not deprive those who are handicapped of their rights to sickness, disability and related benefits more than others, nor of their right not to be discriminated against that is guaranteed in both the Constitution and human rights legislation, employers can terminate their services on the grounds of innocent, non-culpable absenteeism. As well, in addition to dismissal, arbitrators have recognized that in appropriate circumstances, and depending on the language of the agreement, it will be permissible, and in some cases required, for employers to warn, counsel, transfer, lay off, place on long-term disability or employee assistance or attendance/performance program or on a medical leave, reject on probation, demote, make part-time, put on a modified work program, or retire employees who are incapable of reasonably regular attendance or executing the tasks which they are expected to perform. In such circumstances, it has been recognized that without such options, employers would be required to bear the costs

23 *British Columbia (Public Service Employee Relations Commission) v. BCGSEU* [1999] 3 S.C.R. 3.

associated with employees who were unable adequately to discharge their employment obligations.

Apart from human rights considerations, the employer is further bound to make sure that any rules it unilaterally promulgates in any policy meet the criteria set out in the seminal case of *Lumber & Sawmill Workers' Union, Loc. 2537 and KVP Co.* (1965), 16 L.A.C. 73 (Robinson Co. Ct. J.) as follows at 85:

1. The rule must not be inconsistent with the collective agreement.
2. It must not be unreasonable.
3. It must be clear and unequivocal.
4. It must be brought to the attention of the employee affected before the company can act on it.
5. The employee concerned must have been notified that a breach of such rule could result in his discharge if the rule is used as a foundation for discharge.
6. The company should have consistently enforced such a rule from the time it was introduced.

These are commonly known as the *KVP* principles. The management rule or policy must adhere to the Collective Agreement; and must represent a reasonable application of managerial prerogative. The manner in which management applies the rule or policy must adequately distinguish between culpable and non-culpable absences; and any disability/accommodation assessment must be made on an individual basis. This is required in the case law: see for example, the Supreme Court of Canada decision in *McGill University Health Centre (Montreal General Hospital) v. Syndicat des employés de l'Hôpital général de Montréal*, [2007] 1 S.C.R. 161 [hereinafter, *McGill*].

The employer has an independent duty to consider disability and to accommodate if it perceives that an employee suffers from a disability, and should enquire of the employee, rather than await “revelation” of such. As mentioned in the citation from *Brown and Beatty*, arbitrators have in the main held that, depending on the language in the agreement, the employer has an obligation to warn and counsel employees who are incapable of regular attendance, in addition to accommodating the employee to the point of undue hardship for the employer.²⁴

An AMP is a proper policy, if it provides a graduated non-disciplinary warning system coupled with counseling for employees with absenteeism problems. Thus, much depends on how an AMP is put into practice: how management interprets and

²⁴ See for instance: *Oshawa (City)* (1996) 56 L.A.C. (4th) 335 (Brandt); and, *Northern Telecom Canada Ltd.* (1991) 19 L.A.C. (4th) 362 (Kennedy).

applies it. It may be that so long as the process and “coaching” allows the parties including a union representative to enter into a dialogue about the problem and kinds of accommodation that can be achieved in any given case, and makes it clear that an employee’s job is in jeopardy if he/she does not improve his/her attendance, then an AMP is a legitimate management tool and can also assist an employer in exhausting its duty within the accommodation process.

A cautionary note however is that such attendance management program remains open to legal challenge if it contravenes in the manner of its implementation the collective agreement, human rights law, and the *KVP* principles.

Automatic termination clauses

In *McGill*, the Supreme Court of Canada provided its approach to determining the limits on the duty to accommodate in the context of an employee experiencing disability-related absenteeism. In collective agreements, a union (who is the exclusive bargaining agent for the employees) and the employer, often negotiate automatic termination clauses into collective agreements that provide a right to terminate an employee absent from work for defined periods of continuous absence. Employers and unions however were left with uncertainty as to whether or not these collective agreement provisions could legally provide a basis for termination in light of the expanding duty to accommodate imposed upon both the employer and the union.

The Supreme Court’s decision in *McGill* provides employers with useful guidance on the scope of the duty to accommodate in the case where there is an automatic termination clause in the collective agreement. This case provides insights as to the limits on accommodation; and identifies at what point an employer who has exhausted its duty of accommodation can then rely on the automatic termination clause to end the employment relationship with a disabled employee. In *McGill*, the employee had experienced unsuccessful attempts to return to work. The employee continued to be fully disabled at the date of the automatic termination.

The union challenged the termination as discriminatory and as a breach of the employer’s duty to accommodate. The question for the Supreme Court was how to explain the employer’s duty to accommodate in light of this automatic termination clause within the context of disability-related absenteeism.

The Court stated that the parties to a collective agreement have a right to negotiate clauses in a collective agreement providing for termination if an employee is absent longer than a specified period. The existence of a negotiated period is a *relevant factor* to consider when assessing whether or not an employer has exhausted its duty to accommodate a disabled employee to the point of undue hardship.

The parties cannot agree to provide a lesser protection within a clause of the collective agreement than what the employee would be entitled to under human rights

and other applicable legislation. The protection must be consistent with the scope of the employer's duty to accommodate.

In assessing undue hardship, one must consider the complete employee history from the very beginning of the disability-related absence. If accommodation is *impossible*, short of undue hardship, then the limit of the duty has been reached from a human rights law perspective, and any further discriminatory conduct of the employer is permissible.

The court identified that a specific termination clause is simply one relevant factor to consider in assessing the scope of the duty to accommodate. Therefore, the parties cannot at the outset define the scope nor contractually impose any limits on the duty to accommodate within a collective agreement. Each accommodation issue must be evaluated on the particular circumstances of each case.

The Supreme Court also reaffirmed that *individualization* is integral step to the accommodation process. The accommodation process therefore does not prohibit reasonable compromises such as a negotiated automatic termination clause, but such a provision is just one single factor in the assessment. The termination clause can be applied at the termination time, only after it is determined that the employer has exhausted its duty to accommodate in the circumstances of the particular individual employee.²⁵

The inquiry still involves case-by-case analysis, and remains inherently highly fact-dependent. The Court does not permit rigid and mechanistic approaches in accommodation matters related to disability.

III. At what point can an employer stop accommodating an individual without risk of a *Human Rights Code* complaint?

In Ontario, the duty to accommodate disabled persons is set out in section 17 of the *Human Rights Code*. The case law makes it clear that even illness may be a disability within the meaning of the *Human Rights Code*. In the *City of Boisbriand* case cited previously, the Supreme Court of Canada held that for the purposes of human rights legislation a disability "*may be the result of a physical limitation, ailment, a social construct, a perceived limitation or a combination of all of these factors*". This highly fact sensitive definition imposes an obligation on employers to investigate and consider many factors before it can be said to be relieved of its duty of accommodation.

The *Human Rights Code* further expressly provides that an employer is required to accommodate an employee with a disability to the point of undue hardship:

Disability

²⁵ *Supra* note 4 at para. 89.

17(1) 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.

Accommodation

(2) The Commission, the Tribunal or a court shall not 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.

Subsection 17(2) creates an obligation upon an employer or union to accommodate the restrictions of a disabled employee to the point that it would create undue hardship on the employer, before the employer can be relieved under subsection 17(1) from a finding of discrimination. The employer's statutory obligation to accommodate an employee is a duty that is independent of any obligations or rights the employer has with respect to the employee under workers' compensation legislation,²⁶ or under a collective agreement (or contract of employment).

While the term undue hardship is not defined in the Code, in deciding whether an employer has met the undue hardship standard, a decision-maker will typically ask whether the employer has done everything that could reasonably be expected of it in trying to accommodate the employee's needs to the point of impossibility.²⁷ While employees are not entitled to perfect accommodation, more than minor inconvenience must be shown before the complainant's right to accommodation can be defeated.²⁸ If the employer has exhausted its accommodation duty to the point of undue hardship, and an employee remains incapable of performing or fulfilling the essential duties or requirements of the job because of disability, then subsection 17(1) of the Code makes it clear that the employer can stop accommodating even an employee with disabilities.

Again, the employee's right to accommodation is not absolute. If an employee refuses an accommodation, then the employee may lose his or her grievance or see his or her complaint dismissed for lack of cooperation within the accommodation process, as long as, the accommodation proposal by the employer meets the undue hardship test. However, the risk that an employee makes a complaint directly to the Human Rights Tribunal exists at all times. Under the amendments to the *Human Rights Code*, the screening of complaints by the Human Rights Commission will be eliminated, thereby making the hearing and adjudication of employee complaints by the Tribunal a more likely possibility.

²⁶ *Air Canada and I.A.M. (Petelka)*, [1998], 74 L.A.C. (4th) 233.

²⁷ *Brown and Beatty*, *Canadian Labour Arbitration* (Aurora: Canada Law Book, 2003) at 7:6120.

²⁸ *Central Okanagan School District No. 23 v. Renaud*, [1992] S.C.R. 970.

IV. How will the revisions to the Ontario *Human Rights Code* affect your organization's return-to-work procedures?

The *Human Rights Code Amendment Act 2006 (Bill 107)* became law on December 20, 2006. Most of its provisions will not come into effect until it is proclaimed in force, which is expected to occur this year, on June 30, 2008.

Bill 107 has introduced significant impacts on the issue of human rights compliance for all employers in Ontario. Employers can no longer rely on the backlog of complaints by the Human Rights Commission under the previous Human Rights regime to gamble that the chance of a successful complaint by a disabled employee ever being heard by the Human Rights Tribunal as being low. The elimination of the screening phase that existed under the old regime means that employers must now, more than ever, be proactive to eliminate discriminatory standards that may remain within the workplace. The Commission's current functions of receiving, mediating, investigating and prosecuting complaints will be eliminated. The Commission will undertake a more public role, including the ability to initiate reviews and inquiries into more systemic discrimination issues, as opposed to screening individual complaints.

Return to work programs and policies will also need to meet the requirements of human rights legislation and evolving human rights case law. Employees will be able to launch a complaint directly to the Human Rights Tribunal without having to pass through the complaints investigation process of the Human Rights Commission. Under the direct access model, individuals who believe their human rights have been infringed may bring their complaints directly to the Tribunal through an application process. The implication of abolishing the screening process and an employee's direct access to a tribunal to resolve a grievance is that there is clearly a potential for an increase in employee complaints proceeding to adjudication and/or mediation. The elimination of the screening process has therefore greatly increased the exposure of employers to hearings and decisions of the Human Rights Tribunal. *Integrated mediation* will also become a part of the Tribunal's dispute resolution process. The Tribunal's mediator will attempt to find agreement on a fair resolution of the matter without a hearing, again increasing pressure on employers to fulfill their legal duties under human rights law.

Workplace safety legislation also requires an employer to consider the accommodation needs of an employee disabled by any workplace injury. An employer's duty to accommodate therefore exists even to assist an employee's return to work after being injured in the workplace. An employer may have to consider reassignment of an employee to lighter duties within the workplace or even temporary alternate work, and consider factors such as whether the employee is ready to return to the workplace and the safety of other workers. The particular enforcement mechanisms that exist under such workplace legislative schemes are not affected by the amendments to the *Human Rights Code*.

The Courts may still deal with harassment if it touches upon other common law protections afforded to employees who are victims of an employer's wrongful dismissal.

The *Human Rights Code* provides a provision against workplace harassment at its section 5:

5. (1) *Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences, marital status, family status or disability.*

(2) *Every person who is an employee has a right to freedom from harassment in the workplace by the employer or agent of the employer or by another employee because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, age, record of offences, marital status, family status or disability.*

An employee who is entitled to accommodation but who is wrongfully terminated may seek damages in the Courts. The *Keays v. Honda Canada*²⁹ case demonstrates the Court's attitude where termination was found to be without cause, where the employer engaged in a form of harassment to avoid the accommodation process, and where a disability-related termination was involved. In such circumstances the Courts have provided a plaintiff with remedies not otherwise provided under the *Human Rights Code*.

Under the amendments, there will be no right of appeal from an Ontario Human Rights Tribunal decision.³⁰ A party can ask for a reconsideration of the decision in some situations where new facts are subsequently discovered, a party has not received notice of hearing, or on a public interest basis such as the decisions appears to be a significant departure from established case law. The Tribunal has the power to order various remedies and monetary compensation.

The Courts' response to these amendments in the *Human Rights Code* remains to be seen. The amendments appear to signal the Legislature's desire to reduce barriers to complainants, increase resolution of human rights complaints, and also provide increased powers to the Tribunal and finality of its decisions. These substantial changes may cause the Courts to channel complainants that seek remedies to the Human Rights Tribunal when the matter touches upon discrimination based on disability. Given the revisions have provided no appeal to the Courts; this may reduce litigation of the nature encountered in the *Honda* matter. However, there is an express provision at section 46.1 within the new Code regarding civil remedies.

29 *Keays v. Honda Canada Inc* (hereinafter referred to as *Honda*). [2005] O.J. No. 1145.

30 Section 45.8 states: Subject to section 45.6 of this Act, section 21.1 of the *Statutory Powers Procedure Act* and the Tribunal rules, a decision of the Tribunal is final and not subject to appeal and shall not be altered or set aside in an application for judicial review or in any other proceeding unless the decision is patently unreasonable.

Therefore, the revisions to the Code do not appear to have ousted the common law courts' jurisdiction regarding wrongful dismissal as encountered in the *Honda* case, even if human rights principles are at the core of such a civil litigation dispute. Moreover, in unionized-settings, the jurisdiction of the arbitrator to deal with human rights issues in the context of arbitration of collective agreement disputes has not been ousted by these amendments to the Code.

V. Examining the extent to which you can medically verify the capability of an employee to return to work - assessing the implications of privacy and personal health information legislation.

The accommodation process imposes a duty on the employer to accommodate employees with disabilities. An employer must avoid discrimination on prohibited grounds under human rights legislation, such as a disability or handicap. Such a disability can take on several forms and could involve permanent, temporary, physical or mental disabilities.

The employer's duty to accommodate is obviously dependent upon the quality of medical information³¹ provided by the employee seeking accommodation. A certain amount of personal health information is required for a successful accommodation. Employers need to consider the extent of an employee's privacy interest before they obtain the information they require to discharge the employer's duty to accommodate. Employers must reconcile these two competing interests, when accommodating and assisting the return of disabled employees to employment. In Ontario, the *Personal Health Information Protection Act, 2004*³² (PHIPA) and its statutory provisions impose certain limits upon the accommodation process.

An employee has a key role to play in the accommodation process, and the existence of the disability must be communicated to the employer. The employer must be aware of the individual's personal limitations in order to make reasonable changes to an employee's duties, hours of work, and work methods to enable the disabled employee to perform the essential tasks of the job. The employee may voluntarily provide the employer with his or her limitations, to allow the employer to address the employee's accommodation needs. The employer is however not entitled to *all* of the employee's medical information.

31 In Ontario, section 4 of the *Personal Health Information Protection Act, 2004* defines "personal health information" to mean: identifying information about an individual in oral or recorded form, if the information, a) relates to the physical or mental health of the individual, including information that consists of the health history of the individual's family, b) relates to the providing of health care to the individual, including the identification of a person as a provider of health care to the individual, c) is a plan of service within the meaning of the *Long-Term Care Act, 1994* for the individual, d) relates to payments or eligibility for health care in respect of the individual, e) relates to the donation by the individual of any body part or bodily substance, f) is the individual's health number, or g) identifies an individual's substitute decision-maker.

32 S.O. 2004, Chapter 3, Schedule A.

In Ontario, legislation such as PHIPA is designed to protect personal health information, how it is collected, and how it is used. PHIPA applies to recipients of personal health information, such as that obtained from custodians such as physicians. If an employer receives personal health information directly from its employee, then PHIPA in practice does not apply. However, an employer should nonetheless consider maintaining the medical information received and collected in a manner consistent with ever expanding privacy legislation principles.

A unionized employee with disabilities may sometimes believe that the employer is discriminating against the employee; even during the accommodation process is taking place. In such a dispute, an employee may file a grievance with its union against the employer, or proceed to file a human rights complaint, or eventually make an application before the Human rights Tribunal in Ontario. Given the possibility of such disputes, an employer should consider obtaining written consents at the outset from the employee clearly stating and identifying the purpose of why the employer needs certain information in the accommodation process. If the employer collects this personal health information for the purpose of meeting the employer's accommodation needs, then the employer should also protect the information and how it is used and disclosed to other participants in the accommodation process.

In a dispute, PHIPA permits the disclosure of personal health information for the purpose of a proceeding and if the personal health information relates to or is a matter in issue in the proceeding.³³ PHIPA defines the term "proceeding" to include a proceeding held in before or under the rules of a court, tribunal, arbitrator, regulator or mediator, and other entities listed at the definition section.

In Ontario, a treating physician who is not a party to the proceeding would be unable to disclose confidential personal health information of an employee without the patient's consent. In Ontario, the regulatory body licensing physicians have in place medical disclosure policies governing expected conduct that prevent the physician from disclosing patient personal information without the patient's consent; or without an order of a Court or tribunal ordering disclosure without consent.³⁴ Obtaining consent from the employee provides the ability for the employer to address the employee's needs within the accommodation process, and greatly assists the employer in documenting the steps that the employer has taken in exhausting its duty to accommodate.

Any health information unrelated or irrelevant to the purpose of accommodation or the performance of the employee's duties would be an excessive information request. Without an employee's prior consent, an employer may not be able to obtain the minimal medical information required for the accommodation process. In the *Keays v. Honda* case, the employer disputed and doubted the employee's accommodation request and ordered the employee to meet with an independent occupational specialist

33 Section 41 of PHIPA.

34 College of Physicians and Surgeons of Ontario, Policy Statement # 8-05, *Confidentiality of Personal Health Information*, (April 2006).

retained by the employer or else face termination. The employee who had attempted to mediate his accommodation request with the employer, then refused to comply with the employer's order to attend a meeting with the occupational therapist. The employer terminated the employee for insubordination. The Courts in Ontario found the employer had acted in an illegal manner and awarded damages since the wrongful dismissal also touched upon the employee's right to be accommodated.

The Courts have stated that an employee remains an integral party in the accommodation process. The unjustified refusal of an employee to cooperate in the accommodation process or the failure to provide some necessary medical information to the employer may frustrate the accommodation effort. Also, such a refusal from the employee may also provide justification to an employer to refuse to allow the employee to return to work until adequate proof of fitness to return to work is provided so that the employer may accommodate any restrictions.³⁵ Such conduct on the part of the employee, without good grounds for the refusal, may also result in an unsuccessful grievance or human rights complaint/application.

However, based on the *Keays v. Honda* case where an employee was able to stop further cooperation with the employer, it is possible for the employee to withhold consent to release information to the employer, if the employee believes the information requested exceeds the *purposes* of achieving accommodation or safe return to work. Employers should therefore determine the minimum amount of information disclosure necessary to achieve a successful employee accommodation, and at the outset, clearly communicate the purpose of collecting that information to the employee. An employee's medical information should be protected and released only to those who have a need to be aware of the information to assist in the accommodation process.

Arbitrators have also stated that an employee-grievor could not prevent the employer from communicating with the employee's treating physician so as to prevent the employer from satisfying its concern about the employee's ability to perform work assigned to him. Again, the purpose of access to such medical information must be clearly communicated to the employee.

Employers should therefore have in place written policies that explain the specific purpose of collecting medical information, the need for obtaining written consent from the employee, and how the employer controls and protects the employee's personal health information in the accommodation process.

An employee's treating physician is an independent licensed medical practitioner, and the treating physician understands and has the information to support an opinion that the patient can perform his or her job, or can return to work with any specified restriction(s), without presenting a danger to himself or herself or to other

³⁵ *Hobart Brothers of Canada, an ITW Canada Co. v. Glass, Molders, Pottery, Plastics and Allied Workers International Union Local 446 (Return to Work Grievance)*, [2006] O.L.A.A. No. 149 at para. 3.

employees.³⁶ Therefore, an employer can seek a *prognosis* from such a practitioner that provides minimum information regarding an employee's job-related limitations and capabilities. The limited information provided in a prognosis would likely satisfy the purpose of facilitating an accommodation or ensuring a safe return to work, and would meet the requirements of privacy legislation and the case law. At the other extreme, is a situation where an employer demands an employee to produce a *diagnosis* which consists of an employee's complete medical history and which reveals the actual nature of the employee's disability. An employer that requires an employee or his or her attending physician to produce such a diagnosis would likely offend privacy principles. Such detailed personal medical information would be *irrelevant* or exceed the level of information required to make an accommodation or to establish a safe return to work plan.

³⁶ *Ibid.*