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Understanding the Need to “Accommodate” Employees When the Law Requires an Employer To Do So

There are many workplace challenges facing Canadians. From observations while working in the field of workplace and community human rights over many years, Stephen Hammond has chosen what he considers the top 10. This video transcript is intended to start a dialogue. If you feel it may help your workplace or your association, please use it. Print out the text, have a discussion, and try to come to resolutions that can be helpful to your group. The best way to deal with workplace challenges is to talk about them in a respectful way. If you would like to access the video that goes with the transcript, it can be purchased at HumanRightsTrainingStore.com

The “duty to accommodate” is one of the most difficult areas of human rights and employment law, not just because it can be complex, but because it grates against many people’s ideals of “one rule for all.” Yet most circumstances won’t be complex at all and a bit of understanding and education goes a long way.

When people think about discrimination, they usually think about direct discrimination – as in, “I won’t hire any women.” However, discrimination can also be indirect; it’s then called “adverse effect,” “adverse impact” or “indirect discrimination.” It’s characterized by an employer with a policy that applies to everyone equally, but has an undue negative impact on those with certain human rights characteristics.

Let’s say your policy is, “I’ll hire only people at least six feet tall.” Not only does this discriminate against people under six feet; it negatively impacts women more than men. As well, it negatively impacts men and women from countries or regions of the world where individuals are typically not as tall as in Canada. Height is not a protected human rights ground, but sex, ancestry and place of origin are.

But what if you need tall people for your workplace? If you can justify it as a legitimate job requirement, you are in a better position. This “legitimate” job requirement is often referred to as

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a bona fide occupational requirement (BFOR). But keep in mind it has to be legit. If your rule lacks merit and someone challenges it, the jig is up.

If your policy is found to discriminate against someone on human rights grounds, whether directly or indirectly, you'll have to accommodate that person. How far do you have to go? The courts say up to the point of, or short of, "undue hardship."

Defining "undue hardship" is perplexing at best and uncertain at worst. The Supreme Court of Canada has laid out criteria, while making it clear that their list is not exhaustive; the definition will depend on the facts of each case. In determining undue hardship, the Court has said employers should consider the following:

- ❖ Financial cost
- ❖ Disruption of a collective agreement
- ❖ Problems of morale of other employees
- ❖ Interchangeability of workforce and facilities
- ❖ Size of the employer's operation
- ❖ Safety and who bears the risk

But if you think that a few upset employees, or a frustrated supervisor who has to spend more time figuring out schedules, will constitute undue hardship, you need to think again. The late Supreme Court of Canada Justice John Sopinka dispelled the notion that undue hardship equaled inconvenience when he was writing for the Court in a case regarding a British Columbia school custodian. He said it had to amount to "more than minor inconvenience..." to "actual interference with the rights of other employees, which is not trivial but substantial..." "Minor interference or inconvenience is a price we pay for religious freedom in a multicultural society."

Therefore, from a practical perspective, if you find you have hiring standards, policies, procedures or work rules that may discriminate against someone, look long and hard for a solution. Don't be ready with a "no" just because you haven't done it before, or because it might cause a few workplace wrinkles.

You may be thinking, "How far do I have to go to accommodate? Shouldn't employees have to give a little as well?" You're not alone in your thinking and you're right. The Supreme Court notes that employees also have to be reasonable. Affected employees might not have to come up with a solution to the problem, but if they don't accept a reasonable solution, then the employer has every right to deny the requested accommodation. The Court makes it clear that the solution does not have to be "perfect" to be reasonable.

Canada's population is changing and that will mean the need for more accommodations than in the past. First, we're aging and with aging comes more disabilities. Most workplaces understand the need to accommodate people who have been injured on the job. All that may be needed is to apply that to new applicants or those who have become disabled while on the job, but not related to a workplace incident.

As well, the immigrants coming to Canada are from different countries than when my grandparents came to Canada. And with them, different religions and perhaps accommodations. The fastest growing religions groups in Canada are Muslims, Hindus, Sikhs and Buddhists. Christianity is still the largest group, but people in this religion are shrinking as a percentage of the population, while the other four are growing as a percentage of the population.

One of the biggest problems will be to get other employees to understand why accommodations are needed. Here are three suggestions:

First, don't expect everyone is going to accept it. For many, this is a stellar example of "politically correct bull ____." No matter how you explain it, some people won't take kindly to a separate set of rules. That's fine, but don't let someone thwart your workplace requirements under the law. Agreeing to disagree is one thing. Sabotaging a policy set by the Supreme Court of Canada will only increase your chances of litigation or bad publicity.

Second, try to get people to understand that accommodating someone is not the same as allowing her to slack off. It's not a way of milking the system; it's a way of working within the system, within a person's legal rights. Accommodations are not designed to allow an employee to head to the local bar, ski hill or golf course.

For most employees, it allows them to honour a higher set of principles or deal with a physical or mental obstacle. In many circumstances, an employer will go to great lengths to check the reality of the request. How involved is this employee with her religion, or does his disability truly put limitations on his ability to do his job?

Keep in mind we accommodate employees all the time for items not nearly as serious as faith or injury. If an employee says "I need a Saturday off next month to attend my cousin's wedding in Red Deer," we usually take him at his word and make accommodations when we can.

Third, let other employees know that if they need an accommodation, it will also be available for them. Portray it as an insurance policy. We all pay insurance every year, hoping we never have to collect. Likewise, should we join a religion, get injured or acquire some

other set of circumstances requiring special policies, we will be happy that the option is there; it offers peace of mind.

Not long ago a case of accommodation came before the Supreme Court of Canada. A school board in Quebec didn't want to allow a student to wear his kirpan (ceremonial dagger) even though there were no known examples of anyone getting hurt by a kirpan in Canada's history. The family had agreed to a compromise of giving their son a very small dagger and sewing it into his clothing, but the school board said no. The school board asked the court how they would explain the situation to students, parents and teachers that any other "weapon" was not allowed, yet the kirpan was allowed.

Justice Charon said, "It is incumbent on the schools to discharge their obligation to instill in their students this value that is at the very foundation of our democracy." The "value" Justice Charon refers to is the value of accommodating religious differences. The same holds true for employers in any workplace.

The more we learn about accommodations and the more we are open to the importance of accommodating people when the need arises, the better off we'll be to accept new people into our workplaces and institutions.

What do you think?

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