

**ACCOMMODATING MENTAL ILLNESS IN THE
WORKPLACE: PRINCIPLES AND PRACTICE**

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1 Introduction

Whether an employee's disability is physical or mental in nature, the employer's duty to accommodate is theoretically the same. However, the practical impacts of disabilities on the workplace vary considerably with the disability. With physical limitations, the appropriate accommodations are often intuitive – the removal of physical barriers, the use of larger fonts or the prohibition of perfumes and colognes. On the other hand, appropriate accommodation measures for mental disabilities are often less obvious and the search for them can pose unique challenges for employers and unions alike. This paper explores the process of accommodating mentally disabled employees.

Section two provides some definitions and background on the historical development of Canadian human rights law. This is important to the theme, appearing throughout the paper, of what constitutes “reasonable” accommodation of disabilities. Section three discusses discrimination on the basis of mental illness and how it can be recognized for what it is. Section four gives an overview of the duty to accommodate in general and the application of these principles to cases of mental illness.

While this paper deals with accommodating mental illness in the workplace, the general principles of accommodation are still the primary focus. We recognize that we do this at the risk of duplicating some of the efforts of our fellow authors. However, in our research we discovered that where employers and unions most often find themselves in trouble, they have deviated from these first principles. It is only by knowing those

principles and by applying them in a disciplined way that employers and unions will be able to consistently discharge their duties.

2 The evolution of discrimination law in the 20th century

2.1 Early human rights legislation

At one time, discrimination on the basis of race, religion and other grounds was a normal part of Canadian life. In employment and other contracts, one was free to discriminate as one desired and no court would interfere.

This began to change in the mid-20th century. In 1944, Ontario passed the first anti-discrimination law in Canada, the *Racial Discrimination Act*.¹ Since then, human rights legislation has been enacted in all Canadian jurisdictions and it continues to evolve as discrimination on the basis of race, religion and other grounds has steadily become more socially unacceptable.

Under the earliest human rights statutes, only overt displays of racial and religious discrimination were prohibited. Signs announcing discriminatory policies (i.e. “whites only” or “no Catholics”) were forbidden, but other forms of discrimination fell outside the reach of the law. Gradually, the scope of legislation expanded to include more protected grounds (including disability) and more prohibited conduct (such as discrimination in employment).

¹ S.O. 1944 c. 51.

2.2 “Direct” and “Adverse Effect” discrimination

As the law evolved, so did behaviours. Some people made sincere efforts to re-evaluate long-held stereotypes and to eliminate discriminatory practices. Others learned to discriminate more subtly to circumvent human rights laws.

By the 1980’s, more sophisticated approaches to human rights analysis had evolved. In *O’Malley*,² the Supreme Court of Canada recognized two distinct forms of discrimination: “direct” and “adverse effect”. The analytical approach used would depend on which type of discrimination was found. The *O’Malley* decision would shape the development of human rights law through to the end of the 1990’s, bringing subtler discrimination techniques into focus in the process.

Direct discrimination refers to the adoption of a standard, rule or practice that, on its face, treats one group of people differently than others based on a protected characteristic. As an example, a company policy against hiring women would be direct discrimination on the grounds of sex. However, “direct” does not necessarily mean “blatant”. Most people are aware of human rights legislation, and they are less likely to discriminate openly than they might have been in previous times. Since openly discriminatory rules make easy targets for human rights complaints, direct discrimination is now most often in the form of unwritten rules and practices. At any rate, whether blatant or not, direct discrimination usually follows a familiar pattern:

1. the perpetrator observes a characteristic (actual or perceived) in the victim;

² *Ontario (Human Rights Commission) v. Simpsons Sears Ltd.*, [1985] 2 S.C.R. 536.

2. this characteristic distinguishes the victim from others on one of the prohibited grounds;
3. the defendant treats the victim differently from others on the basis of that characteristic.

Adverse effect discrimination was defined by Justice McIntyre in *O'Malley* as follows:

It arises where an employer **for genuine business reasons** adopts a rule or standard which is on its face neutral, and which will apply equally to all employees, but which has a discriminatory effect upon a prohibited ground on one employee or group of employees in that it imposes, because of some special characteristic of the employee or group, obligations, penalties, or restrictive conditions not imposed on other members of the work force.³

A classic example of this is the minimum height requirement. At first glance, it might look like direct discrimination on the basis of height. It is, but that is not a problem in itself because height is not a protected ground under human rights statutes. Therefore, the direct discrimination is not illegal because the standard applies equally to everyone, regardless of sex, age, race, etc. The problem with the height standard is in its adverse effect on women, who are, on average, shorter than men. The standard thus discriminates on the basis of sex by excluding women at a higher rate than men.⁴

2.3 A distinction without enough of a difference?

The “traditional” approach of analyzing direct and adverse effect discrimination separately developed for some valid reasons. First, separating discrimination into categories is a helpful technique for recognizing a variety of practices that might

³ *Ibid.* at para. 18.

⁴ See for example *Chapdelaine v. Air Canada*, [1987] C.H.R.D. No. 12 (QL), in which two women successfully challenged the airline’s minimum height requirement of 5’6” for pilots. The evidence showed that at the time of the complaints, 82% of Canadian women between the ages of 20 and 29 were shorter than 5’6”, while only 11% of men of that age group were shorter than this standard. Not surprisingly, “of 525 pilots hired by the Respondent between 1978 and 1980, only 5 were women.”

otherwise evade scrutiny. Second, direct discrimination was thought to be the “worse” kind in the sense that its victims are usually the targets of deliberate attacks, whereas adverse effect discrimination is typically the result of oversight (that is, a failure to recognize diverse needs) rather than a conscious effort to discriminate.

Still, there is danger in placing too much stock in the traditional approach.

Discrimination, regardless of type, always takes a toll on the dignity of the victim.

Separating the claims into categories, while helpful as an identification technique, falsely suggested that the different forms of discrimination called for entirely different legal approaches. This is what happened with *O’Malley*.⁵

The difference in treating discrimination claims was problematic. The distinction between the forms of discrimination is rarely clear – many claims can easily be characterized as fitting in both categories. However, the traditional analysis would force a tribunal to settle on one characterization or the other. Since the outcome of the complaint depended all too often on which of these artificial constructs was adopted, the traditional approach generated inconsistent results. This was unfair to both claimants and respondents.

2.4 *Meiorin*: a “unified approach” to analyzing discrimination

The *Meiorin*⁶ decision ushered in a new era in Canadian human rights law. In that case, a unanimous Supreme Court acknowledged that a more coherent “unified approach” was

⁵ Kevin D. MacNeill, *The Duty to Accommodate in Employment*, looseleaf (Aurora, ON: Canada Law Book, June 2005) at 6-21 – 6-24.

⁶ *British Columbia (Public Service Employee Relations Commission) v. B.C.G.S.E.U.*, [1999] 3 S.C.R. 3.

required. Under *Meiorin*, all forms of discrimination are now subject to the same defences and the same remedies. Once a claimant establishes that he or she was a victim of discrimination, the discriminator must justify the offending standard. However, because traditional categories are helpful in identifying discriminatory practices, the terms “direct” and “adverse effect” are still used.

3 Discrimination on the basis of mental illness

The Ontario *Human Rights Code*⁷ prohibits discrimination on the basis of “disability”. This includes physical, mental and intellectual disabilities. Therefore, employees who are disabled by mental health problems are entitled to the same protection from discrimination as their physically disabled co-workers.

According to the Canadian Psychiatric Association (CPA), “mental illness” generally means:

...significant clinical patterns of behaviour or emotions associated with some level of distress, suffering (pain, death), or impairment in one or more areas of functioning (school, work, social and family interactions). At the root of this impairment are symptoms of biological, psychological or behavioural dysfunction, or a combination of these.⁸

In other words, mental illness is not always crippling. The term covers a wide range of conditions. Some illnesses will produce no noticeable effect on the employee’s work, while others can be disruptive, causing among other things reduced productivity, increased absenteeism and difficulty with interpersonal relationships.

⁷ R.S.O. 1990, c. H.19.

⁸ Canadian Psychiatric Association, “Mental Illness and Work”, online: <<http://www.cpa-apc.org/MIAW/pamphlets/Work.asp>>.

3.1 *Mental illness is often overlooked*

Direct discrimination on the basis of mental illness is similar to direct discrimination on other grounds. Consider the following examples:

- The use of derogatory epithets (wacko, basket case, etc.) directed at an employee because of actual or perceived mental illness.
- Refusals by one or more employees to work with or to associate with a co-worker because of that co-worker's actual or perceived mental illness.
- An employee with a real or perceived mental illness is routinely passed over for promotions. The denial is founded on the assumption that mental illness makes the candidate unreliable or will cause the candidate to "lose it" in stressful situations.

Direct discrimination can only occur where the perpetrator thinks the victim has a mental illness. However, the untrained observer (that is, most of us) often fails to recognize mental health problems for what they are. Consider these warning signs:

1. Consistent late arrivals or frequent absences
2. Lack of cooperation or a general inability to work with colleagues
3. Decreased productivity
4. Increased accidents or safety problems
5. Frequent complaints of fatigue or unexplained pains
6. Difficulty concentrating, making decisions, or remembering things
7. Making excuses for missed deadlines or poor work
8. Decreased interest or involvement in one's work
9. Working excessive overtime over a prolonged period of time
10. Expressions of strange or grandiose ideas
11. Displays of anger or blaming of others⁹

⁹ Mental Health Works, "Employers – How can I tell if someone is mentally ill?", online: <<http://www.mentalhealthworks.ca/employers/faq/question2.asp>>.

With one or two exceptions, the above symptoms are not routinely associated with mental illness. Instead, people tend to associate a narrower range of symptoms with mental disability. The CPA notes that “[m]any employers and employees have unwarranted fears and see persons with psychiatric disabilities as unskilled, unproductive, unreliable, violent or unable to handle workplace pressures.”¹⁰

Given this atmosphere of misunderstanding and fear, it is easy to see why many mentally ill employees would hide or deny their disabilities. As mental illnesses remain virtually invisible because of these stigmas, co-workers and employers overlook them as causes of performance-related problems. This, in turn, means the mentally ill employee can find himself or herself being disciplined for poor performance that arises from his or her mental disability. Ironically, in hiding their conditions to avoid being the target of direct discrimination, mentally ill employees become more vulnerable to adverse effect discrimination.

3.2 Performance standards and mental illness

Most of the symptoms listed in section 3.1 above can lead to disciplinary action in some form. Would discipline on those bases amount to discrimination?

The usual performance standards that organizations use, like minimum production rates, task completion deadlines or punctuality requirements, are facially neutral. However, certain disabilities can make it harder for some employees to meet these standards. The

¹⁰ *Supra* note 8.

result can be that those employees are subjected to adverse-effect discrimination on the basis of their disabilities.

However, employers need not despair – none of this means that performance standards are a thing of the past. Human rights law is not premised on the dominance of one party's rights over the rights of others. Instead, it is about *balancing* the rights of the parties and finding a compromise. Employees do have the right to be free of workplace discrimination on the basis of disability, but this is balanced against the right of the employer to conduct its affairs. It is also balanced against the rights of other employees.

3.3 *Disciplinary measures as discrimination*

Subjecting a disabled employee to discipline is not necessarily unjust. Only where the behaviour leading to discipline is actually caused by the disability can there be discrimination. As discussed in section 4.3.3 below, the duty to accommodate will then arise, but only after the employer is notified that accommodation is required. Practically, this means the employee's failure to request accommodation will relieve the employer of the duty. However, this rule is applied cautiously in cases of mental disability, since the disability itself can affect the employee's ability to recognize his or her own needs and hinder his or her ability to make an accommodation request.

Sometimes, the duty to accommodate arises after disciplinary measures have been imposed, when new medical evidence comes to light . The period of time between discipline and the duty arising can be substantial. In one case, an arbitrator found that

new medical evidence gave rise to a duty to accommodate nearly two years after an employee was discharged.¹¹

Despite the employer's duty to accommodate disabled employees, there are situations where employee misconduct, even if caused by a disability, justifies discipline or dismissal. In *Canada Safeway and MacNeill*,¹² an arbitration panel considered the circumstances that would require reinstatement of an employee who was dismissed for theft. In that case, a cashier grieved her dismissal for having stolen \$5,000 from her employer's cash registers. The grievor argued that her behaviour was caused by her emotional and psychological condition. In dismissing the grievance, the board held that an award reinstatement requires that an arbitrator find:

1. the employee was experiencing an illness or condition;
2. there is a factual connection between the illness or condition and the misconduct;
3. the illness or condition must sufficiently "[displace] responsibility from the grievor to render the grievor's conduct less culpable"; and
4. the grievor is rehabilitated. This means there must be sufficient confidence that the employee can return and be a fruitful contributor and that the underlying problems that led to the misconduct are resolved so that the risk of recurrence is minimized.¹³

¹¹ *Re Canada Safeway Ltd. And U.F.C.W., Loc. 401* (1992), 26 L.A.C. (4th) 409. See also *Re Babcock and Wilcox Industries Ltd. and U.S.W.A., Loc. 2859* (1994), 42 L.A.C. (4th) 209 (Ont. – D.R. Williamson) (evidence of reactive depression brought to employer only after discharge – employee reinstated); *Re Calgary Co-operative Assn. and Calco Club* (1992), 24 L.A.C. (4th) 308 (Alta. – W.D. McFetridge) (rude behaviour towards customers a result of frontal lobe behaviour caused by 15-year-old brain injury, evidence arose after discharge – employee reinstated); *Green v. Canada (Public Service Commission)*, [1998] C.H.R.D. No. 5.

¹² *Re Canada Safeway Ltd. and R.W.D.S.U. (MacNeill)* (1999), 82 L.A.C. (4th) 1.

¹³ *Ibid.* at 20-21.

On the evidence, the arbitration board found that the grievor had failed to establish a causal link between a psychological condition and the thefts.¹⁴ Therefore, the dismissal was not an act of discrimination and the duty to accommodate does not obviously arise. However, the 4-step framework used by the board to analyze the appropriateness of the discharge should be helpful in determining the point of undue hardship in cases of misconduct due to disability. The first three steps are crucial to determining if disciplinary measures would, in fact, constitute discrimination on the basis of disability. The final step provides a technique for evaluating the level of hardship the employer would incur by foregoing the imposition of the chosen disciplinary measure.

4 The Accommodation Process

Because mental illnesses include a wide array of health problems, they call for a wide variety of accommodation measures. Fortunately, most measures require creativity and flexibility rather than large expenditures.¹⁵

The key to the accommodation process is communication between employer and employee. Medical diagnoses are helpful, but the employee is likely to know more about his or her accommodation needs than anyone else.

Accommodating mental health problems does not have to turn the workplace upside-down. Some typical accommodation measures include the following:

¹⁴ *Ibid.* at 23.

¹⁵ Mental Health Works, “Employers – What kinds of accommodations are people with a mental health problem likely to need?”, online: <<http://www.mentalhealthworks.ca/employers/faq/question17.asp>>.

- Flexible scheduling. Examples: accommodate medical appointments during work hours; part-time instead of full-time; more frequent breaks.
- Changing supervision and instruction methods
- Modifying duties / job bundling
- Use of simple technological aids like tape recorders or modified lighting.¹⁶

4.1 Discussing mental health with an employee

The topic of an employee's mental health is a sensitive one and employers are right to approach it with caution. Mental health information is, like physical health information, intensely personal. Employers are generally not entitled to detailed health information about their employees. How, then, can employers broach the topic of mental health with an employee while maintaining respect for the employee's rights?¹⁷

Preparation is the key to successfully approaching an employee about suspected mental health issues. Before the meeting, the employer should prepare thoroughly. One might prepare by asking the following questions, writing out and critically analyzing the answers:

1. What behaviour or performance issue am I concerned about?
2. Why am I concerned?
 - a. Is there an objective work standard the employee is failing to meet?
 - b. Is the behaviour having a negative effect on other employees?
 - c. Is my concern performance-related, or is it a concern for the employee's personal health?

¹⁶ Mental Health Works, *supra* note 15.

¹⁷ In this section, I have drawn heavily on the Mental Health Works website, especially the page "How can I approach an employee about their mental illness?", found online at <http://www.mentalhealthworks.ca/employers/faq/question4.asp>.

3. What resources does the employer have to offer the employee (i.e. EAP)? Collect the information for the employee before the meeting.
4. What policies does the employer have dealing with accommodation?
5. How can I make this meeting less stressful for the employee?
 - a. What positive contributions does the employee make?
 - b. Will my own fears make it difficult for me to respond appropriately?

If the employer's concern is performance-related, it remains a performance issue even if the cause of the problem is a disability. It is not discrimination to approach the disabled employee to discuss the issue. Discrimination only arises when, as a consequence of the disability-related performance issue, the employee is either disciplined or has his or her working conditions changed. But a frank and honest discussion about the performance issue will be necessary in any event. There is no other practical way for the employer to proceed, whether the aim is to initiate a search for accommodation or to discipline the employee.

4.2 How to determine if a work standard is a BFOR

If a standard is discriminatory (either directly or by adverse effect), it is justified if the employer shows that it is a BFOR. This requires the employer to show all of the following, on a balance of probabilities:

- (1) That the employer adopted the standard for a purpose **rationaly connected** to the performance of the job;
- (2) That the employer adopted the particular standard in an **honest and good faith belief** that it was necessary to the fulfilment of that legitimate work-related purpose; and
- (3) That the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the

characteristics of the claimant **without imposing undue hardship** upon the employer.¹⁸

The first two steps of the BFOR test are intuitive. They prevent employers from using arbitrary and irrelevant (albeit facially neutral) criteria as a smokescreen for illegal discriminatory practices. The third step, the duty to accommodate, is where the real challenge lies for employers and unions alike.

4.3 Discharging the duty to accommodate

Finding appropriate accommodation is a task shared jointly by the employer, the union (if applicable) and the employee. All parties are required to work reasonably and cooperatively for the success of the accommodation process. A tribunal can assign blame to any party for causing a breakdown in the search process. The results of such a finding can be serious, leading to liability for the employer or union, or to dismissal of the employee's complaint.¹⁹

4.3.1 Employer's duties

An employer's duties do not arise until it:

- a) receives a reasonable request for accommodation from the employee; or
- b) (in rarer circumstances) receives "constructive notice" of the need for accommodation.

Generally, the employee must make a timely request for accommodation. Failure to do so can strip the employee of his or her right to accommodation. However, there are

¹⁸ *Meiorin*, *supra* note 6 at para. 54 (emphasis added).

¹⁹ *MacNeill*, *supra* note 5 at 13-1.

situations in which, despite the absence of express notice, the employer was “constructively” notified because the employee’s need for accommodation is obvious.²⁰

In one case, a counter worker at dry cleaning store had suffered from a long history of depression. She did not tell her employer about this history. Within four months of hiring, several incidents occurred in which customers found the employee crying in the back of the store. One morning, the employer discovered the employee sleeping overnight at the store. Eventually, the employee was hospitalized for depression and when she did not volunteer the reason for her hospitalization, she was dismissed for poor performance. In its decision, the B.C. Human Rights Tribunal rejected the employer’s argument that the employee’s refusal to request accommodation relieved the employer of its duty. Instead, the circumstances (particularly the hospitalization) required that the employer inquire into the employee’s needs.²¹

Once the employer is deemed to have been notified, it is under a duty to investigate and to consider accommodations. The employer, not the employee, has primary responsibility for finding accommodation because, having control of the workplace, it is “in a better position to formulate accommodations.”²²

²⁰ MacNeill, *supra* note 5 at 13-6.1.

²¹ *Willems-Wilson v. Allbright Drycleaners Ltd.*, [1997] B.C.H.R.T.D. No. 26.

²² *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970 at para. 39 [“*Renaud*”].

4.3.2 Union's duties

Unions are subject to human rights legislation, just as employers are. As such, unions are also entitled to the defence of BFOR.²³ For the union's duty to accommodate to arise, it must first be a party to discrimination. This can occur in two ways:

- a) the union agrees to a discriminatory work rule; or
- b) the union, not having agreed to a discriminatory work rule, nonetheless impedes the employer's reasonable efforts at accommodation.²⁴

Unions can find themselves engaged in a delicate balancing exercise because they represent both the human rights claimant(s) and the workers whose rights could be affected by the accommodation measure. The Supreme Court has offered some guidance on striking that balance:

The [union's] duty to accommodate should not substitute discrimination against other employees for the discrimination suffered by the complainant. Any significant interference with the rights of others will ordinarily justify the union in refusing to consent to a measure which would have this effect. Although the test of undue hardship applies to a union, it will often be met by a showing of prejudice to other employees if proposed accommodating measures are adopted. As I stated previously, this test is grounded on the reasonableness of the measures to remove discrimination which are taken or proposed.²⁵

4.3.3 Employee's duties

It is up to the employee to request accommodation. Once the search for an accommodation begins, the employee must co-operate with the employer to find the appropriate accommodation. This requires the employee to share information with the employer about the nature of the illness and the limitations that it causes, so that the employer can look for accommodation. This does not entitle the employer to a precise

²³ *Renaud, supra* note 22 at para. 32.

²⁴ *Renaud, supra* note 22 at paras. 36-37.

²⁵ *Renaud, supra* note 22 at para. 38.

diagnosis of the employee's condition, since the employer only needs to know the employee's capabilities and limitations.

Once an accommodation measure is proposed, the employee must accept it if the proposal is, in all the circumstances, reasonable. In other words, the employee cannot expect a perfect solution to his or her needs.²⁶ If the employee rejects a reasonable proposal, the employer has discharged its duty to accommodate and is not required to make further offers of accommodation.

4.4 What is “undue hardship”?

Though the employer is under a duty to accommodate, this does not impose a limitless burden. It must, in Justice McIntyre's words, “take reasonable steps to accommodate the complainant, short of undue hardship.”²⁷ Section 17 of Ontario's *Human Rights Code* uses different language, but it effectively provides a BFOR defence for claims of discrimination on the basis of disability, subject to a duty to accommodate:

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.
- (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.

Section 15(2) of the *Canadian Human Rights Act*²⁸ is a similar provision that applies to federally regulated employers.

²⁶ *Renaud*, *supra* note 22 at para. 44.

²⁷ *O'Malley*, *supra* note 2 at para. 23.

²⁸ R.S.C. 1985, c. H-6.

The meaning of “undue hardship” is controversial, but it is clear that the employer must make a substantial effort:

More than mere negligible effort is required to satisfy the duty to accommodate. The use of the term "undue" infers that **some hardship is acceptable; it is only "undue" hardship that satisfies this test.** The extent to which the discriminator must go to accommodate is limited by the words "reasonable" and "short of undue hardship". These are not independent criteria but are alternate ways of expressing the same concept. What constitutes reasonable measures is a question of fact and will vary with the circumstances of the case.²⁹

Note that, in the passage above, Justice Sopinka explicitly equates the terms “reasonable” and “short of undue hardship”. While most of the case law frames the duty to accommodate analysis in terms of undue hardship, it is sometimes helpful to remember that this expression provides a reference point for determining what a reasonable requirement is.

4.5 Factors in assessing undue hardship

There is no bright line to guide employers in finding the point of undue hardship. Instead, in each case the relevant factors are weighed and balanced “against the right of the employee to be free of discrimination”.³⁰ Which factors are relevant may change from one case to the next. From the case law, the following list of factors emerges:

- financial cost considering the circumstances (including considering the size of the employer);
- disruption of a collective agreement;
- problems of morale of other employees;
- interchangeability of work force;
- adaptability of facilities;
- magnitude of any safety risks;
- identity of those who bear the risks.³¹

²⁹ *Renaud*, *supra* note 22 at para. 19 (emphasis added).

³⁰ *Central Alberta Dairy Pool v. Alberta (Human Rights Commission)*, [1990] 2 S.C.R. 489 at para 62.

³¹ *Ibid.*

In apparent contrast, section 17(2) of the Ontario *Human Rights Code* lists only two factors to consider: cost (including any outside sources of funding), and health and safety requirements. Similarly, section 15(2) of the *Canadian Human Rights Act* lists “health, safety and cost”.

In this section, each factor is considered in detail. It should be noted in advance that the level of hardship is measured by considering the combined weight of all factors. However, in most cases of undue hardship there is a single predominant factor.

4.5.1 The OHRC Policy and “excluded” factors

The OHRC takes the hard line position that the undue hardship analysis must altogether ignore the effects of accommodation on employee morale, third-party preferences and collective agreements.³² The Supreme Court, on the other hand, is more deferent to the value of rights negotiated in collective agreements, though the court does approach objections to accommodation measures that are based on collective agreements with some amount of scepticism – see section 4.5.3 above.

In *Renaud*, blind adherence to collective agreements in the face of a need to accommodate was found to be unacceptable.³³ However, this does not mean that collective agreements are unimportant. It is merely the rejection of an extreme position that would make collective agreements immune to human rights laws. The OHRC position, in contrast, occupies the other extreme by maintaining that the contractual rights

³² OHRC Policy, *supra* note 36 at 27-29.

³³ *Renaud*, *supra* note 22 at para. 30.

of other employees are irrelevant as against the disabled employee's right to non-discrimination. As Swinton points out, this finds little support in the jurisprudence.³⁴

4.5.2 Cost

Most accommodation measures come with little or no direct cost to the employer or union. For example, rearranging the disabled employee's work schedule to allow attendance at regular medical appointments may involve no direct costs at all. Where there are direct financial costs, they are proper considerations in the hardship analysis as long as they are quantifiable and supported by objective evidence.

It is arguable that a number of the factors from the case law, such as morale issues and collective agreement disruptions, are just indirect "costs" because of the impact that these can have on productivity.³⁵ However, the Ontario Human Rights Commission (OHRC) takes the opposing view. It argues that by failing to include them explicitly in the language of the *Code*, the legislature deliberately excluded these factors.³⁶ Which of these competing interpretations is correct remains an unsettled question that is considered further in sections 4.5.3 and 4.5.1 of this paper.

Whether morale and other indirect costs can properly be included, the question remains: at what level do the costs of accommodating generate undue hardship? In *Grismer*, the Supreme Court cautioned:

³⁴ Swinton, *supra* note 39 at 101-102.

³⁵ See the discussion in Chris Rootham, Sean McGee & Bill Cole, "More Reconcilable Differences: Developing a Consistent Approach to Seniority and Human Rights Interests in Accommodation Cases" (2004) 11 C.L.E.L.J. 69 at 75-80.

³⁶ Ontario Human Rights Commission, *Policy and Guidelines on Disability and the Duty to Accommodate* (Toronto: Ontario Human Rights Commission, 2000) at 27-29, online: <<http://www.ohrc.on.ca/english/publications/disability-policy.pdf>> ["OHRC Policy"].

While in some circumstances excessive cost may justify a refusal to accommodate those with disabilities, one must be wary of putting too low a value on accommodating the disabled. It is all too easy to cite increased cost as a reason for refusing to accord the disabled equal treatment.³⁷

According to the OHRC, this sets a high standard that can only be met if the costs of accommodation are high enough to “alter the essential nature of the enterprise” or to “substantially affect its viability.”³⁸ Taken literally, this position calls for employers to bear any accommodation costs up to a point that approaches bankruptcy. However, the OHRC Policy, while often persuasive, does not bind arbitrators or courts. Neither the Supreme Court nor labour arbitrators have shown much appetite for imposing such an onerous burden.³⁹ As such, on this issue the OHRC Policy appears to lack an authoritative legal foundation.

4.5.3 Health and safety: general principles

Employers have a duty to ensure the safety of all of their employees. Sometimes, this duty conflicts with the duty to accommodate disabilities. However, the existence of a safety concern does not inevitably generate undue hardship. Instead, the impact of a proposed accommodation on the health and safety of employees and the public are factors to be weighed in the undue hardship analysis, alongside the other factors.

The amount of hardship caused by a safety risk is assessed by considering:

1. the severity of the consequences if the risk were to materialize;
2. the probability of the risk materializing; and

³⁷ *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 S.C.R. 868 at para. 41.

³⁸ OHRC Policy, *supra* note 36 at 30.

³⁹ Katherine Swinton, “Disability and the Duty to Accommodate: An Academic Perspective”, in William Kaplan *et al.*, *Labour Arbitration Yearbook 1998* (Toronto: Lancaster House, 1998) 93 at 101.

3. the identity of the people who are exposed to the risk.⁴⁰

The severity and probability of harm must usually be established by objective evidence instead of by anecdotes and impressions.⁴¹ In some circumstances, however, “common sense and intuitive reasoning” may be sufficient to establish undue hardship without a need for rigorous proof.⁴²

The weight given to a safety risk depends on who bears the added risk. A disabled employee can voluntarily assume some amount of additional risk of harm in order to take advantage of an accommodation measure. However, the right to assume more risk for oneself clearly does not include the right to impose the same level of additional risk on others. Therefore, increased risk is less tolerable where the proposed measure puts other employees or the general public at risk.⁴³

How much additional risk can the employee bear? Although a Manitoba Queen’s Bench judge once held that “no employer should be required to employ someone whose physical condition subjects him to the risk of more than trivial injury,”⁴⁴ today a more moderate position prevails. In *Meiorin*, it was suggested that the use of an “uncompromisingly stringent” safety standard might be ideal from the employer’s perspective, but that to

⁴⁰ MacNeill, *supra* note 5 at 12-36 – 12-43.

⁴¹ *Meiorin*, *supra* note 6 at para. 79.

⁴² MacNeill, *supra* note 5 at 12-33.

⁴³ MacNeill, *supra* note 5 at 12-38 – 12-41.

⁴⁴ *Loveday v. Baker Manufacturing Ltd.*, [1984] M.J. No. 446 at para. 14 (Q.B.).

justify its use, the employer must still demonstrate that the use of such a standard was necessary to avoid undue hardship.⁴⁵

4.5.4 Health and safety: mental illnesses

Some mental illnesses can impair an employee's ability to perform certain tasks safely. Usually, these risks relate to symptoms such as difficulty concentrating. As such, the increased risks are usually predictable, quantifiable and can be controlled by adopting appropriate accommodation measures.

Unfortunately, many people associate mental illness with violence. These fears are founded on widely held myths and stereotypes surrounding mental health issues. While it is true that certain mental illnesses can trigger violent behaviour, mentally ill people are generally no more violent than the rest of the population. Actually, according to the Canadian Mental Health Association, "they are far more likely to be the victims of violence than to be violent themselves."⁴⁶

Since employers are obliged to provide a safe workplace for all of their employees, a growing number of them are implementing strict anti-violence and anti-bullying policies. This focus on health and safety is commendable, but employers are reminded that the duty to accommodate is not displaced by the duty to provide a safe workplace. Rather, the two duties co-exist. By rigidly applying zero-tolerance anti-violence policies without

⁴⁵ *Meiorin*, *supra* note 6 at para. 62.

⁴⁶ Canadian Mental Health Association, "CMHA – ACSM – Info Centre", online: <http://www.cmha.ca/english/info_centre/mh_pamphlets/mh_pamphlet_04.htm>.

heeding the duty to accommodate, employers could inadvertently be guilty of adverse-effect discrimination against mentally disabled employees.

To clarify, **human rights laws do not make zero-tolerance policies illegal**. First, a disciplinary act is not discriminatory unless the employee establishes a causal link between the violent behaviour and a mental disability. Second, most violent incidents do not involve mental illness anyway. Remember, the majority of people who commit violence are not mentally ill,⁴⁷ and even among those violent people who are mentally ill, their violent behaviour is not necessarily caused by their mental illness.

In summary, disciplining employees for violent or bullying behaviour is generally acceptable and is a necessary part of ensuring workplace safety. However, in the minority of cases where the offensive behaviour is caused by a mental illness, the employer's duty to accommodate arises. This does not mean that employers should accommodate disabled employees by tolerating violent behaviour. It means only that the blind application of disciplinary measures, without regard to mental disability, may breach the duty to accommodate in some circumstances.

In weighing any safety concern, the employer must consider the means available for controlling the risk. In some circumstances, it may be reasonable to require, as a condition of employment, that the employee follow a course of medical treatment to

⁴⁷ American Psychiatric Association, "Violence and Mental Illness", online: <http://www.psych.org/public_info/VIOLEN~1.cfm>.

control the symptoms of the disability. For example, in *Code Electric*,⁴⁸ a bipolar employee grieved the employer-imposed conditions for returning to work after an illness. The grievor had 5 years of service when he first became ill. During a span of 19 months, the grievor was hospitalized 4 times and was absent for a total of 8 months. The arbitrator found that three of those relapses were precipitated, at least in part, by the grievor's use of alcohol and marijuana, though the grievor was aware that these drugs could render his treatment less effective. In the circumstances, the arbitrator ordered a return to work on several conditions, including that the grievor would adhere to the prescribed treatment regiment and authorize his psychiatrist to contact the employer if the grievor showed signs of relapsing.

There is never a guarantee that an employee will diligently follow the course of treatment prescribed by his or her doctors. However, this does not usually entitle the employer to demand conditions like those imposed in *Code Electric*. That case was exceptional because at the time the conditions were imposed, the employer had already made reasonable attempts at accommodation and the grievor's repeated failures to follow the prescribed treatment led directly to the relapses. In general, an employer is generally not entitled to demand a guarantee of continual fitness for work from any of its employees anyway. To demand such a guarantee from a disabled employee while requiring nothing of the sort from non-disabled employees is clearly discriminatory and breaches the duty to accommodate. While the employer can require that its employees present no

⁴⁸ *Code Electric Products Ltd. v. International Brotherhood of Electrical Workers, Local 258 (Kinder Grievance)*, [2005] B.C.C.A.A.A. No. 14 (E. Burke).

unreasonable safety risks, a no-risk standard is unacceptable. As one Ontario arbitrator explained:⁴⁹

...while an employer must, of course, accept responsibility for providing a safe and healthful work environment for its employees, it may not justify discrimination in employment opportunities by adopting a risk aversion standard that is not reasonably proportional to the actual risk.

In *Gordy*,⁵⁰ the employer refused to rehire a seasonal fishing guide suffering from bipolar affective disorder unless he could guarantee that he would not relapse into a manic state. This requirement was discriminatory since, as the tribunal explained, “[n]o other guide was required to provide a guarantee that he would not experience a medical condition, such as a heart attack, which might affect his ability to guide safely.”⁵¹

In *Shuswap*,⁵² a registered nurse was suspended because of her bipolar mood disorder. The disorder was under control, but relapses, which usually develop over a period of several days, were always possible. Concerned that a relapse could compromise patient safety because they would lead to errors in dispensing medication, the employer demanded, as a condition of reinstatement, a “guarantee” from the grievor that she would not relapse. The arbitrator found that the employer’s demands were not reasonably necessary to avoid undue hardship, since the standard was “one of absolute safety or perfection, not one of reasonable safety.”⁵³ Although the grievor posed a “slightly higher” risk to patient safety than other RN’s, the employer did not provide objective

⁴⁹ *Re Dominion Colour Corporation and Teamsters Chemical, Energy and Allied Workers, Local 1880* (1999), 83 L.A.C. (4th) 330 at 382 (Ont. Arb. Bd. – R. Ellis).

⁵⁰ *Gordy v. Oak Bay Marine Management Ltd.*, [2000] B.C.H.R.T.D. No. 15.

⁵¹ *Ibid.* at para. 162

⁵² *Shuswap Lake General Hospital v. British Columbia Nurses' Union (Lockie Grievance)*, [2002] B.C.C.A.A.A. No. 21 (J.M. Gordon).

⁵³ *Ibid.* at para. 141.

evidence of actual injuries or of a quantifiable risk of future injuries. Furthermore, the employer failed to provide objective evidence that having co-workers assist the grievor had compromised patient safety due to resulting nursing shortages.⁵⁴

Where the employer has objective evidence supporting its concern that a safety risk is not under control, further accommodation may not be necessary. Consider an Ontario arbitrator's decision in the discharge grievance of a paranoid schizophrenic who threatened and assaulted co-workers during a delusional episode.⁵⁵ The grievor's illness was controllable with medication. In this case, the risk that the grievor would fail to take the medication turned out to be more than speculative – the incident leading to her discharge resulted from her eleventh relapse into delusional behaviour at work. The relapses were all caused by the employee ceasing to take her medication. The discharge was upheld.

4.5.5 Effects on employee morale

Among the factors considered by the Supreme Court in the undue hardship appraisal are disruption of a collective agreement and problems of morale with other employees. As these factors overlap in the labour context, they should be analyzed together.⁵⁶

The effects of safety concerns on employee morale can be devastating, even if the fears are unfounded. The appropriate employer response thus depends on the circumstances. First, the employer must determine if the fears are justified. The disabled employee, as

⁵⁴ *Ibid.* at paras. 144-46.

⁵⁵ *C.A.W., Local 80 v. Honeywell Limited*, Lancaster's Equity, Disability and Accommodation Reporter, July/August 2002 (Tacon), aff'd [2003] O.J. No. 3699 (Div. Ct.)

⁵⁶ MacNeill, *supra* note 5 at 12-50.

part of his or her duty to provide relevant information, must provide the employer with a medical opinion detailing the symptoms that can be expected and what accommodation measures are required. If the medical evidence shows the safety concerns to be unjustified, then they are irrelevant to the undue hardship analysis. Though the employer cannot control what other employees think or how they feel, neither can it stand by and “allow discriminatory attitudes to fester into workplace hostilities that poison the environment for disabled workers.”⁵⁷ Instead, it must take an active role to educate its employees, to dispel unjustified fears and to discipline those who insist on discriminating against disabled workers.

For their other effects on morale, accommodation measures can be sorted into three broad categories, as follows:

1. discreet measures that have no appreciable effects on the rights and entitlements of other workers;
2. conspicuous measures that have no appreciable effects on the rights and entitlements of other workers; and
3. measures that require changes to the rights and entitlements of other workers.

Strictly speaking, only measures falling into the third of these categories can be weighed in the hardship assessment. Consider an example where a mentally ill employee needs more frequent breaks than he or she would otherwise be entitled to. Colleagues may wonder about the “special treatment” being offered to the mentally ill employee. The legally correct position may well be that it is none of their business, provided that the

⁵⁷ OHRC Policy, *supra* note 36 at 28.

accommodation afforded to the disabled employee does not increase the workload or otherwise change the working conditions of the other employees.

Practically speaking, the issue may not rest quite so easily. The employer could still be left to cope with a morale problem arising from perceived favouritism. Ideally, the other employees will understand the need to accommodate the disabled employee. If not, the employer must take an active role in educating its employees. However, in doing so, the employer must respect the disabled employee's right to privacy. Some will prefer complete privacy while others would rather be very open about their recovery. The employer needs to find out what the disabled employee prefers before discussing the issue with other employees.

4.5.6 Collective agreements

Any perceived lack of respect for seniority rights can provoke strong resentment from unionized employees. This can pose a problem in situations where the only effective and available accommodation measures involve moving the disabled employee to another position, which raises potential conflicts between the disabled employee's right to be accommodated, and the contractual rights of more senior employees to claim the job first.

For an accommodation to be unduly disruptive to a collective agreement, it must cause "more than minor inconvenience" and cause "substantial" interference with the rights of other employees.⁵⁸ Of course, the employer and the union only have so much control over the effects of any given event on employee morale. Although the duty may require

⁵⁸ *Renaud, supra* note 22 at para. 20.

that accommodation measures be adopted, nobody can order the other employees to like it. The courts are aware of this, but they are cautious about letting the subjective feelings of some trump the protection that others have against discrimination:

The objection of employees based on well-grounded concerns that their rights will be affected must be considered. On the other hand, objections based on attitudes inconsistent with human rights are an irrelevant consideration. I would include in this category objections based on the view that the integrity of a collective agreement is to be preserved irrespective of its discriminatory effect on an individual employee on religious grounds. The contrary view would effectively enable an employer to contract out of human rights legislation provided the employees were *ad idem* with their employer.⁵⁹

Justice Sopinka also found that “[m]inor interference or inconvenience is the price to be paid for religious freedom in a multicultural society.”⁶⁰ This attitude clearly underlies court and tribunal decisions concerning the accommodation of disabled workers as well.

The key is to analyze the impact of the accommodation measure on the substantive rights of other employees. As a starting point, it is not acceptable to accommodate one person’s disability by putting another person out of work altogether. If this was the only feasible option, then undue hardship would surely result and the accommodation measure would not be required.

A less disruptive measure might involve “bumping” a more senior worker from a suitable job in order to make it available to the disabled employee. Still, in some situations bumping constitutes a significant infringement of the bumped employee’s seniority rights. For example, in a workplace with a low rate of turnover, it may take years for the

⁵⁹ *Renaud, supra* note 22 at para. 30.

⁶⁰ *Renaud, supra* note 22 at para. 20.

bumped employee to regain position he or she loses. In other workplaces with higher turnover rates, the amount of disruption may be more tolerable.⁶¹

Job “bundling” is another controversial accommodation strategy in which the employer cleaves certain tasks from a number of positions and assembles them into a new position for the disabled employee. Typically, the less strenuous tasks are bundled into the new position, leaving the other workers with jobs that are, overall, more demanding. As such, the newly created position often ends up being more desirable, but it is created specifically for the disabled employee, who has a priority claim to the job, regardless of seniority. What’s more, the resulting higher demands placed on the other employees may expose them to a higher likelihood of injuries through increased fatigue. All of these reasons make bundling a problematic solution, though whether it amounts to undue hardship will depend once again on the circumstances of the case. For example, in *Winpak*,⁶² a physically disabled employee grieved the employer’s refusal to bundle lighter-duty tasks that had been shared by all of the employees. The arbitrator found that, on the facts of this case, the periodic rotation of all employees through the light duties was an important strategy to prevent repetitive strain injuries. Bundling these tasks for a single employee would expose the others to an unacceptable increase in the risk of injury and would thus constitute undue hardship.

⁶¹ McNeill, *supra* note 5 at 12-59.

⁶² *United Steelworkers of America v. Winpak Portion Packaging Ltd.*, [2003] O.L.A.A. No. 416 (Picher) [*“Winpak”*].

4.5.7 What information must employees provide?

In searching for an appropriate accommodation measure, employers and unions need reliable information about the employee's condition. This can conflict with the employee's privacy interests.

An integral part of the employee's duty to assist in finding appropriate accommodation is a requirement to provide adequate relevant information about his or her needs.⁶³

Generally, employers are not entitled to a specific diagnosis, except in unusual circumstances.⁶⁴ Employers must also be flexible in what information they demand, rather than applying blanket disclosure requirements for all employee requests.⁶⁵

4.5.8 Requiring examinations by employer-chosen or independent professionals

Because disagreement sometimes arises over the extent of a disability and the functional limitations it imposes, the reliability of the medical information furnished by the employee can be controversial. Generally, the patient's right to bodily integrity means that no health professional may examine a patient without first obtaining consent. By logical extension, "an employer cannot compel employees to submit to a medical examination against their will,"⁶⁶ unless the employer has either contractual or statutory authority to make such an order.⁶⁷ Without this authority, the employer can demand no

⁶³ MacNeill, *supra* note 5 at 13-9.

⁶⁴ *British Columbia Public School Employers Assn. v. British Columbia Teachers' Federation* (2002), 107 L.A.C. (4th) 224 at para. 58 (B.C.C.A.A.) (Korbin).

⁶⁵ *St. Joseph's Hospital v. Ontario Nurses' Assn. (Campbell Grievance)*, [2002] O.L.A.A. No. 869 at paras. 27-28 (Keller).

⁶⁶ Dalton Larson, "The Use of Medical Evidence at Arbitration: An Arbitrator's Perspective", 2 Labour Arbitration Yearbook (1999-2000) 137 at 138.

⁶⁷ *Thompson v. Oakville (Town)* (1963), 41 D.L.R. (2d) 294 (Ont. H.C.).

more than a written report from a qualified professional of the employee's choosing, with enough detail to allow the employer to formulate accommodation options.