

DUTY TO ACCOMMODATE

(1-day course)

Participants' Handouts



*Prepared by the Education Program
of the Public Service Alliance of Canada
2010*

*Revised by BC Region Education Program
May 2012, April 2015, October 2019, July 2023 and November 2023*

List of Supplies

- ☐ All standard tools needed for course introduction
 - Smile cards
 - Online expense claim instructions
 - Paper expense claims including childcare claim forms
 - Certificates
- ☐ Prohibited grounds of discrimination (kept in course handout binder)

List of Participant Handouts

- ☐ PSAC booklet *“Duty to Accommodate – A PSAC Guide for Local Representatives (2019)”*
- ☐ Handout #1 – *“Course Agenda”*
- ☐ Handout #2 – *“2023 PSAC Statements on Harassment and Scent-free Environments”*
- ☐ Handout #3 – *“Participant Course Assessment”*
- ☐ Handout #4 – *“Discrimination Scenarios – Questions”*
- ☐ Handout #5 – *“Discrimination Scenarios”*
- ☐ Handout #6 – *“Discrimination Scenarios - Discussion Sheet”*
- ☐ Handout #7 – *“Meiorin - Decision Summaries”*
- ☐ Handout #8 – *“Grismer - Decision Summaries”*
- ☐ Handout #9 – *“Meiorin and Grismer Workshop Questions”*
- ☐ Handout #10 – *“Meiorin and Grismer - Discussion Sheet”*
- ☐ Handout # 11– *“Employment Related Human Rights Complaints - Additional Information”*
- ☐ Handout # 12– *“Case Studies - Accommodation”*
- ☐ Handout # 13– *“Case Studies - Accommodation - Discussion Sheet”*

- ☐ Handout # 14– *“Jurisprudence Summary – Religious Accommodation – Union Liability (Renaud)”*
- ☐ Handout # 15– *“Jurisprudence Discussion Sheet – Religious Accommodation – Union Liability (Renaud)”*
- ☐ Handout # 16– *“Jurisprudence Article – Family Status Accommodation – Childcare (Johnstone)”*
- ☐ Handout # 17 – *“Jurisprudence Article – Family Status Accommodation – Eldercare (Misetich)”*
- ☐ Handout # 18– *“How to Win a Duty to Accommodate Grievance”*
- ☐ Handout # 19– *“The Duty to Accommodate - Scenario”*
- ☐ Handout # 20 – *“Sample Release of Information Form”*
- ☐ Handout # 21– *“Sample Medical Ability to Work Form”*
- ☐ Handout # 22 – *“Reintegration and Accommodation Plan”*

Course Agenda

- A. Introduction
- B. Concepts Behind Discrimination

Break

- C. Defining Accommodation and Exploring Its Evolution

Lunch

- D. What Gives Us a Legislative Right to Accommodation?
- E. Jurisprudence

Break

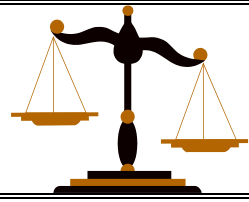
- F. Roles of the Parties Involved in the Accommodation Process
- G. An Overview of the Accommodation Process
- H. Building Communication Networks
- I. Determining What Information is Required
- J. Return to Work Programs
- K. Closing

Insert
2023 PSAC Statements on
Harassment and Scent-free Environments

Participant Course Assessment

Please indicate the degree to which you agree or disagree with each of the following statements by circling your response.					
Strongly Disagree	Disagree	Neutral	Agree	Strongly Agree	
1	2	3	4	5	
1. The facilities were favourable to learning.	1	2	3	4	5
2. I gained new knowledge about the Duty to Accommodate.	1	2	3	4	5
3. The level of information was appropriate.	1	2	3	4	5
4. Examining scenarios enhanced my learning.	1	2	3	4	5
5. The exercises were useful learning experiences.	1	2	3	4	5
6. The reference materials/handouts will be useful to me.	1	2	3	4	5
7. The course met all of its stated objectives.	1	2	3	4	5
8. The pace was right.	1	2	3	4	5
9. The content was logically organized.	1	2	3	4	5
10. The facilitator was well-organized and well-prepared.	1	2	3	4	5
11. The facilitator was an effective communicator.	1	2	3	4	5
12. Participants were encouraged to ask questions and offer opinions.	1	2	3	4	5
13. Participants were encouraged to interact and learn from each other by engaging in dialogue.	1	2	3	4	5
14. The facilitator was enthusiastic and increased my interest in the subject.	1	2	3	4	5
15. I feel motivated to improve my knowledge and skills about the duty to accommodate by applying and practicing what I have learned and pursuing other learning opportunities.	1	2	3	4	5
16. The aspect of the course I enjoyed most was...					

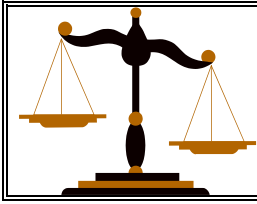
17. The course could be improved by...	
Additional comments:	
Location of Course:	Date:
Facilitator(s):	
Name:	
Thank you.	



Discrimination Scenarios – Questions

Review the scenario(s) that you have been assigned. Discuss and answer the following questions:

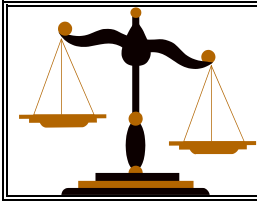
1. What is(are) the issue(s) in this scenario?
2. Is(are) there a negative impact(s) on an individual in this scenario?
3. If yes, is(are) the negative impact(s) related to a prohibited ground in human rights legislation?
4. Can you identify a circumstance in this scenario where accommodation may have to be addressed so that there will be equality for all persons in the workplace? **(At this point, you should not be identifying what type of accommodation should be provided, but only the circumstance that may require accommodation.)**



Discrimination Scenarios

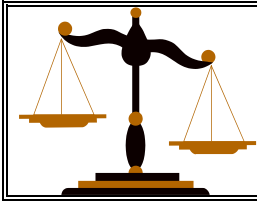
Scenarios:

1. Mahta has been employed with her current employer for over ten years. Mahta is of Muslim faith and observes her religion's Holy Days. For the last ten years, Mahta has been taking annual leave, compensatory leave, or making up the time she has required to mark the Holy Days. She has never been denied access to leave required to attend to her religious needs. In her specific case, Mahta requires one day of leave to celebrate the conclusion of Ramadan (a one month fast). The collective agreement provisions include Christmas and Good Friday as designated paid holidays.
2. Tobias has applied for a competition and is required to take a cognitive abilities test. Tobias has a learning disability which affects how he processes written information. He normally compensates for this by reading the instructions several times. He is advised that he is allowed a maximum of three hours to complete the test. His manager says there is a 3-hour time limit to complete the test because the reliability and validity of the results will be impacted if a longer test completion time is allowed.
3. The employer has decided to create a "pre-qualified pool" for inspector positions. Individuals are given notice and have an opportunity to apply and be considered. Candidates are provided a statement of qualifications that outline the requirements against which they will be assessed. Qualifications that reflect the range of knowledge, abilities, aptitudes, personal suitability, or other attributes required for the position(s) are identified. Candidates are assessed using various assessment instruments. All candidates who qualify (attain the requisite cut-off scores) are placed in the pool, without ranking. Recourse rights are only provided during the initial pool selection process. Managers then access the pool using required criteria.



Discrimination Scenarios

4. Sarah is a receptionist and is required to be at her desk from 8:30 a.m. until 4:30 p.m. Hours of work and absenteeism were not a problem until she recently became a single parent. She is now frequently late and cannot stay beyond 4:30 to make up for lost time. Her childcare arrangements have recently fallen through, and it will be at least one week before she can make new arrangements. She has recently applied for leave with pay for family-related responsibilities but has already used her five-day allocation under the CA provision. Her employer is offering her leave without pay or paid annual leave.
5. Inderjit was recently hired under an organization's employment equity strategy. Although she has been a citizen of Canada for six years, Inderjit has maintained close contact with her culture and family in India. The work environment appears to be welcoming and a team approach is ingrained in the organization's values. Staff meet for one hour each week to identify problems and brainstorm solutions. Inderjit is not a vocal participant in this process. Her supervisor has noticed this and secretly thinks that Inderjit lacks the knowledge of the issue(s) at hand. Her co-workers are becoming increasingly dismissive of her. Inderjit is the only racialized member of the team.
6. Harold is required to frequently travel for his work, often on short notice. His employer has a travel policy that lists the hotels that employees are allowed to use during travel. Harold has a mobility disability and has encountered access issues with several hotels on the list. Exceptions can be made to the list with approval from the district manager. Requests for exceptions must identify alternative accommodations and be forwarded at least two weeks prior to the travel date.
7. Management is concerned with the high rates of employee absenteeism. The workforce, mostly white males, is spread out over thirty worksites across the country. In an effort to address absenteeism, a policy is implemented that provides for progressive disciplinary measures in cases where an employee has a absenteeism rate higher than the average for each work location.



Discrimination Scenarios Discussion Sheet

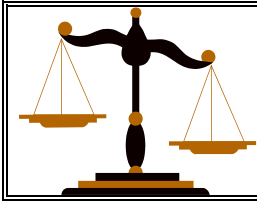
Scenario 1:

The Issues: Collective agreement provisions that don't respond to a human right (religious observance).

Negative Impact: While the majority (who happen to be Christians) are entitled to leave to celebrate their religion's "Holy Day" (Christmas and Good Friday) those of other faiths do not have this same entitlement. Although we can argue that these two days have become secularized and are no longer thought of as religious days, the reality is that those who have maintained a religious connection to these days are guaranteed leave with pay.

Prohibited Grounds: Most human rights provisions provide for the protection against discrimination based on religion or creed. As well, under the Employment Equity Act provisions, one could argue that visible minorities would be adversely affected given that the majority of Christians are perceived as Caucasian and the majority of Muslims (as an example) are perceived as non-Caucasian.

Accommodation Issue: The need for inclusive religious leave entitlements.



Discrimination Scenarios Discussion Sheet

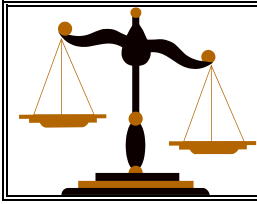
Scenario 2:

The Issues: Testing procedures (as opposed to test design) that disadvantage individuals who have a disability.

Negative Impact: Given the rigidity of the testing procedure and test reliability policies, the time limits have a negative impact on those who have learning disabilities.

Prohibited Grounds: Disability (under all provisions). This issue is also meant to be dealt with under the Employment Equity Act.

Accommodation Issue: The need for testing (design and procedures) that does not unfairly exclude persons with disabilities.



Discrimination Scenarios Discussion Sheet

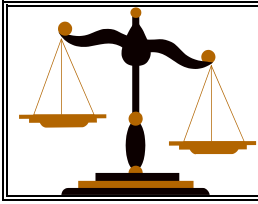
Scenario 3:

The Issues: Staffing

Negative Impact: The pre-qualified pool model, although it has positive elements (job related/objective job requirements as opposed to non-job-related or to inflated job requirements), provides for a potential (and likely) subjective bias. Many studies point to the cultural or other biases that may creep in to the staffing system unless managers are either trained in how to conduct “barrier-free” selection or selection criteria is kept to neutral and job related requirements to ensure it is barrier-free.

Prohibited Grounds: Race, colour, national or ethnic origin, sex / gender, disabilities, age, religion or creed. This issue is also meant to be dealt with under the Employment Equity Act.

Accommodation Issue: The need for both an inclusive design of staffing “tools” and “processes” and barrier-free systems.



Discrimination Scenarios Discussion Sheet

Scenario 4:

The Issues: Rigid/inflexible hours of work.

Negative Impact: Policies or practices related to hours of work that “limit” employment, or employment related opportunities for individuals (usually women) with dependents.

Prohibited Grounds: Family status, in this case. One may argue sex / gender as well, and link to what is known and accepted as the primary family related responsibilities for women. The issue can be dealt with under the Employment Equity Act.

Accommodation Issue: The need for work-life balance in the workplace.

	Discrimination Scenarios Discussion Sheet
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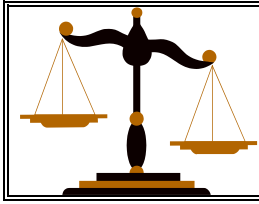
Scenario 5:

The Issues: Workplace culture and environment that only meet the needs of the dominant Caucasian culture. Also at issue are race based assumptions about communication.

Negative Impact: Harmful assumptions made about individuals who don't fit the organizational communication "style". Workplace cultures that further marginalize people from other cultures. In many studies, the lack of an inclusive workplace/organizational culture appears as a critical barrier against the full participation of equity groups.

Prohibited Grounds: Race, national or ethnic origin but could also impact on disability (those with speech, hearing or "communication" related disabilities).

Accommodation Issue: Ensuring that day to day workplace rules and practices are barrier-free. Building conceptions of equality into the workplace culture or the workplace set of value systems.



Discrimination Scenarios Discussion Sheet

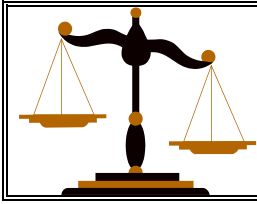
Scenario 6:

The Issues: Travel policy that disadvantages persons with certain types of disabilities.

Negative Impact: Employees with mobility concerns are disadvantaged because their accommodation needs are not addressed in the employer policy. The procedure to request an exception places an extra burden on them in that they must identify alternatives to the employer's list and comply with rigid timeframes/procedures to request what others can take for granted.

Prohibited Grounds: Disabilities. This issue is also meant to be dealt with under the Employment Equity Act.

Accommodation Issue: Employment related policies require an "equity lens" to ensure barriers are removed but to also ensure that the hotel listings, as an example, are pro-active in responding to special needs.



Discrimination Scenarios Discussion Sheet

Scenario 7:

The Issues: Absenteeism policy and practice which will likely have a disproportionate impact on equity groups.

Negative Impact: Policy may disadvantage individuals who are based on a more frequent basis. Given that the workplace is mostly male and white, the “average” and does not reflect individuals who require leave for special needs, e.g., religious or cultural observances, childcare, medical needs, etc. Discipline is not appropriate in such cases.

Prohibited Grounds: Disability, sex / gender, age, race, religion, family status

Disability - not all persons with disability require medical attention, or sick leave, but many may

Sex / gender - women still are the primary care providers

Age - older workers may have health issues not related to a disability

Race, religion - traditional, cultural or religious needs ... leave for this will be identified for progressive discipline measures. Dominant culture gets to take designated holidays instead of being deemed to be absent.

Family Status –persons with family responsibilities for care could be negatively impacted by a policy change like this.

Accommodation Issue: Ensuring employer policies do not have a disproportionate impact on protected individuals; ensuring workers with special needs are accommodated to the point of undue hardship; ensuring our collective agreements are barrier-free.

Meiorin Decision Summary



British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees' Union (BCGSEU) (Supreme Court of Canada) (1999) (a.k.a. Meiorin)

Facts:

- Tawney Meiorin worked as a fire fighter for three years during which her supervisors found her work satisfactory. At some point, the government adopted a new series of fitness tests for fire fighters. Ms. Meiorin passed three of the four tests but failed the fourth, a 2.5 km run. She completed her run in 11 minutes, 49.4 seconds rather than the 11 minutes designated as the standard. As a result, she was dismissed.
- Meiorin filed a grievance alleging discrimination on the basis of gender. The grievance arbitrator found that the aerobic capacity the 2.5 km run was supposed to measure was adverse effect discrimination against women. Furthermore, there was no evidence that the aerobic capacity aspect was necessary for either men or women to perform the work of a forest firefighter safely and efficiently. He ruled that the government had not met its duty to accommodate Ms. Meiorin and ordered that she be reinstated and compensated for lost wages and benefits.
- The case found its way before the British Columbia Court of Appeal. This Court held that as long as the standard was necessary to the safe and efficient performance of the job and was applied through individual testing, there was no discrimination. It also held that to allow Ms. Meiorin to succeed would be “reverse discrimination” by setting a lower standard for women. The Court of Appeal allowed the government’s appeal and reversed the arbitrator’s decision.
- The Union appealed to the Supreme Court of Canada. The Women’s Legal Education and Action Fund, in coalition with the Canadian Labour Congress and the Disabled Women’s Network, intervened.

Supreme Court of Canada Decision

Findings:

- The Supreme Court of Canada eliminated the distinction between direct and adverse affect discrimination and replaced it with a “unified” approach.
- A three-step test was adopted for determining whether the employer established, on a balance of probabilities, that a *prima facie* discriminatory standard is a *bona fide* occupational requirement (BFOR):
 - 1) The employer must show that it adopted the standards for a purpose rationally connected to the performance of the job. The focus should be on the validity of the general purpose and not the validity of the particular standard;
 - 2) The employer must establish that it adopted the standard in an honest and good faith belief that it was necessary to fulfil that legitimate work-related purpose; and,
 - 3) The employer must establish 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 demonstrate that it is impossible to accommodate individual employees sharing the characteristics of the individual without imposing undue hardship upon the employer.
- This approach is premised on the need to develop standards that accommodate the potential contribution of all employees in so far as this can be done without undue hardship to the employer. Standards may adversely affect members of a particular group and thus, it follows that a rule or standard must accommodate individual differences to the point of undue hardship if it is to be found reasonably necessary. Unless no further accommodation is possible without imposing undue hardship, the standard is not a BFOR in its existing form and the *prima facie* case of discrimination stands.
- The B.C. government was able to meet the first two steps of the test but failed the last step. In examining the third step, the Court held that the employer could not show that the particular standard was reasonably

necessary in order to identify those persons who are able to perform the tasks of a forest fire fighter safely and efficiently.

- The procedures adopted by the researchers who developed the standard were flawed because they simply described the average aerobic capacity of the people already doing the job without determining whether this was the minimum level required in order to perform the job safely. The standard was also flawed because the researchers did not determine whether the aerobic capacity of male and female test subjects varied or related to their ability to perform the job. The Court further held that the government did not show that changing the standard would constitute undue hardship.
- The Court listed some important questions that may be asked in the course of the analysis. In sum, if individual differences can be accommodated without imposing undue hardship on the employer then the standard is not a BFOR. Furthermore, employers designing workplace standards have an obligation to be aware of differences between individuals, and differences that characterize groups of individuals. They must build conceptions of equality into workplace standards. The standard itself is required to provide for individual accommodation, if reasonably possible.

Grismer Decision Summary



Terry Grismer v. British Columbia (Superintendent of Motor Vehicles, British Columbia (Council of Human Rights) (Supreme Court of Canada) (1999)

Facts:

- Terry Grismer suffered from a condition called homonymous hemianopia which eliminated most of his left-side peripheral vision in both eyes. Grismer's driver's licence was cancelled on the ground that his vision no longer met the standard of minimum field of vision of 120 degrees. People with Grismer's condition were not allowed to hold a driver's licence in B.C., although there were exceptions in other cases. Grismer filed a human rights complaint with the B.C. Council of Human Rights. The Council found that there was *prima facie* discrimination and that the Superintendent had failed to show that applying the visual field standards inflexibly, without individual assessment, was reasonably necessary.
- The Superintendent petitioned for judicial review but the Supreme Court of B.C. dismissed the petition. The Superintendent appealed to the B.C. Court of Appeal which set aside the Council's decision. Grismer appealed the B.C. Court of Appeal decision to the Supreme Court of Canada.

Supreme Court of Canada Decision

Findings:

- The Supreme Court of Canada applied the test set out in *Meiorin*. Once a claimant establishes that the standard is *prima facie* discriminatory, the onus shifts on the defendant to prove on a balance of probabilities that the discriminatory standard is a *bona fide* occupational requirement (BFOR) or has a *bona fide* and reasonable justification, using the three part test of *Meiroin*.
- The Court held that accommodation ensures that each person is assessed according to his or her own personal abilities rather than presumed group characteristics. Accommodation refers to what is

required in the circumstances to avoid discrimination. Standards must be as inclusive as possible. There are more than one ways to establish the necessary level of accommodation. Failure to accommodate may be shown by evidence that the standard was set arbitrarily, or that individual assessment was unreasonably refused or in some other way. If the policy or practice is reasonably necessary to an appropriate purpose or goal, and accommodation short of undue hardship is incorporated into a standard, the fact that the standard excludes some people does not amount to discrimination. The ultimate issue is whether the employer or service provider has shown that it provides accommodation to the point of undue hardship.

- The Court held that in the assessment of the cost as a justification to refuse to accommodate those with disabilities, one must be wary of putting too low a value on accommodating the disabled. Impressionistic evidence of increased expense will not generally suffice.
- In Grismer's case, the Court found that the discrimination did not lie in the refusal to issue a licence but in the refusal to give the claimant a chance to prove through an individual assessment that he could be licensed without jeopardizing the goal of reasonable road safety. Terry Grismer passed all of the requisite tests except for the field of vision test. He was able to compensate for his limited field of vision with a mirror system he had developed, yet was not permitted to pass the test with his equipment. The absolute standard of 120 degree vision was not supported by evidence and was struck down.
- The Court concluded that those providing services subject to human rights legislation must adopt standards that accommodate people with disabilities where this can be done without sacrificing their legitimate objectives and without incurring undue hardship.

Meiorin and Grismer Workshop Questions

After reviewing the Meiorin Decision and the Grismer Decision, answer the following questions:

Meiorin Decision

- What are the key considerations of this case?
- How has this case changed the way employers and unions approach accommodation issues in the workplace?

Grismer Decision

- What are the key considerations of this case?
- How has this case changed the way employers and unions approach accommodation issues in the workplace?

Meiorin and Grismer Discussion Sheet

MEIORIN (workplace gender discrimination case) and
GRISMER (services disability discrimination case)

The following summarizes the PSAC analysis of the impact of these Supreme Court of Canada (SCC) decisions on the duty to accommodate.

Prior to *Meiorin* and *Grismer*, the duty to accommodate a worker only arose when a problem had been identified. For example, in the situation of a worker who is no longer able to perform the job in the traditional manner, the worker had an obligation to advise the employer of the need to be accommodated and the employer had an obligation to ensure that difficulties arising out of discrimination based on a prohibited ground were accommodated.

The most radical change to the duty to accommodate (DTA) concept, flowing from these two decisions is that:

Meiorin and *Grismer* have placed a positive obligation on the employer to design the workplace so that equality and accommodation are built in to all policies rules and practices. “Accommodation” now means, first of all, that all workplace standards, rules, policies and practices must be proactively designed to be “inclusive”, i.e., designed to reflect and meet the needs of all segments of society, so far as is reasonably possible, short of undue hardship. The key requirement is for employers to ensure they do not institute barriers against those segments of society that are not present in the workplace, due to historic systemic discrimination. The new concept creates considerable overlap with the purpose of the *Employment Equity Act (EEA)*.

NOTE: In addition, individuals whose needs have not been addressed by the initial pro-active process are entitled to seek further individual accommodation measures, up to the point of undue hardship. As an example, if a selection test is deemed to be barrier-free and inclusive, but an applicant requires an individual assessment in order to have her/his accommodation needs met, this individualized assessment must be afforded, up to the point of undue hardship.

Other important principles established by *Meiorin* and *Grismer* include:

- a) The Duty to Accommodate applies to both direct and indirect (adverse effect) discrimination.
- b) *Bona Fide* Occupational Requirements (BFOR) and duty to accommodate concepts are united. A BFOR cannot be valid without exhaustion of the duty to accommodate built into the standard, policy, rule etc. **(See Guide, p. 5-6)**
- c) If a standard, policy, practice, etc., is found to be discriminatory, it must be struck down and replaced. **(See Guide, p. 1)**
- d) The undue hardship standard is set high. Under section 15(2) of the *Canadian Human Rights Act*, the factors that may be considered as contributing to undue hardship are limited to **health, safety and cost**. Undue hardship does not mean merely inconvenience. Two major issues have been identified as important in defining undue hardship, namely:
 - ⇒ If the **financial costs** associated with the accommodation would be prohibitive to the point that it would alter the essential nature or substantially affect the viability of the enterprise. Note, however, that outside sources of funding will be considered in this determination.
 - ⇒ If **health and safety** considerations are not met, in particular, where the degree of risk which remains after accommodation has been made is so significant, that it outweighs the benefits of the accommodation. Public safety and the health and safety of co-workers are considerations in this regard.

(See Guide, p. 7 - 8)



A note of caution:

- ◆ Where legislation limits the number of undue hardship factors, we should be careful to limit the employer to those. The PSAC is of the view that accommodation principles are not well served by a broad list of justifications that allow employers to disregard this principle. In the absence of such limiting legislation, *Meiorin* accepts the open-ended shopping list of undue hardship factors commonly accepted in the case law following the 1990 Supreme Court of Canada case of *Central Alberta Dairy* which included factors such as: the impact on the collective agreement; interference with the rights of other employees; problems of employee morale; size of the employer's operation; flexibility in the workforce and in facilities. **(See Guide, p. 7 - 8)**
- ◆ The PSAC endorses the limitation of undue hardship to health, safety and cost, given our human rights objectives. However, we are opposed to employer accommodation measures which seek to immediately call into question collective workplace rights.

In assessing whether or not employers are complying with the new accommodation/BFOR obligations, in the situation of a human rights complaint or grievance, the following must be proven by the contending parties:

1. The complainant/grievor must establish that the workplace standard, etc. being challenged is, *prima facie*, discriminatory.
2. Once a *prima facie* case of discrimination is established, the employer/respondent then is required to prove that, despite the discrimination, the challenged standard, etc. is a *Bona Fide Occupational Requirement* (BFOR) and is, therefore, valid.
(See Guide, p. 5 - 6)
3. To establish a BFOR, the employer **must meet a three-step legal test:**
 - I. There is a rational connection of the standard, rule, policy etc. to the performance of job;
 - II. The employer has adopted the standard, rule, policy etc. in good faith;
 - III. The standard must be “reasonably necessary” for the accomplishment of that legitimate work-related purpose. To demonstrate that it is “reasonably necessary”, the employer must show that it is “impossible to accommodate [members of human rights-protected groups] without imposing undue hardship on the employer”.

This step is the core of accommodation. It is here that the concept of inclusion comes into play. Employers have to prove that their standards, rules, policies are reasonably necessary for the safe and efficient performance of the job at issue. This includes proving that it is impossible, without undue hardship, to accommodate the human rights characteristics of a group or of an individual. In the specific case of *Meiorin*, the employer failed to establish that their 11-minute testing standard was reasonably necessary for the safe and

efficient performance of the job, given that *Meiorin* had successfully performed the job for a three-year period, yet had failed the standard which had been set based on all mostly male testing sample. **(See Guide, p. 6 - 7)**

In examining Step iii), the Court, in *Meiorin*, set out the following six questions:

- 1) Have alternative approaches been investigated?
- 2) If they have and they accomplish the employer's purpose, why have the alternative approaches not been adopted?
- 3) Is it necessary for all employees to meet a single standard?
- 4) Is there a less discriminatory way to do the job while still meeting the employer's legitimate purpose?
- 5) Is the standard designed to meet its purpose without placing an undue burden on persons to whom it applies?
- 6) Have the other required accommodation parties fulfilled their roles?

(See Guide, p. 6 - 7)

Legal Factors

- ◆ Provincial and territorial human rights acts vary in their accommodation provisions. However, the Meiorin decision creates a "unified approach" to accommodation issues which, along with the employer's duty to be proactive and systemic in eliminating discrimination, applies to all human rights legislation in Canada.
- ◆ The Supreme Court of Canada has held that all human rights legislation is quasi-constitutional (i.e., nearly constitutional) in that it expresses fundamental Canadian values and important public policies. Thus, if there is a conflict between other legislation and human rights legislation, the *Human Rights Act* is paramount (i.e. "trumps" the ordinary legislation). In light of this, acts, such as workers' compensation acts or the re-employment provisions of the Public Service Employment Act, which purport to accommodate employees with disabilities, may not go far enough to fulfill the accommodation requirements of human rights legislation. The last word is always the human rights act.

In order to comply with their accommodation obligations under the *Employment Equity Act*, employers subject to this Act are to:

- ◆ Ensure their employment equity plan includes provisions for the accommodation of the needs of applicants and employees from the four designated groups.

The specific Canadian Human Rights Commission (CHRC) assessment factors require the employer to have a written policy on accommodation.

Provisions related to accommodation should ensure that:

- I. the needs of applicants and employees from the four designated groups are accommodated up to the point of undue hardship;
- II. accommodation can address both physical accessibility issues and the need for adjustments to policies or procedures;
- III. accommodation is achieved through individual assessment;

- IV. accommodation respects individual dignity, minimizes the individual's discomfort, and maximizes the employee's autonomy;
- V. there are effective implementation mechanisms in place to ensure that accommodation will be provided. These may include such elements as a written policy, arrangements to ensure the availability of adequate funding for accommodation, and a strategy for communicating information on accommodation to managers and staff.

Employment Related Human Rights Complaints Additional Information

If you believe you have experienced discrimination, you may be able to file a complaint with either the **Canadian Human Rights Commission (CHRC)** or the **BC Human Rights Tribunal (BCHRT)**.

If your employer is a federal department, Crown corporation or agency, or First Nations government or you work in a federally regulated industry, the **CHRC** will deal with your complaint.

If your employer is First Nations Health Authority, the BC Commissionaires or is provincially regulated, the **BCHRT** will deal with your complaint.

Complaints must be filed within 12 months of the act or treatment that you are making the complaint about. Exceptions are sometimes made, but not often.

You will need to provide:

- The specific ground(s) of discrimination
- A detailed description of what happened
- The negative effect this act or treatment had on you.

If you work for any employer covered by the *Federal Public Service Labour Relations and Employment Act*, you must pursue any other recourse available (grievances or harassment complaint process) to you before the complaint is actioned by the CHRC. However, the 12-month timeline is still critical. Even while your grievance or harassment complaint is in process you should file the human rights complaint. You can call the CHRC to ask for help with the process. See contact information below.

Additional information, including ways to file, can be found:

CHRC: <https://www.chrc-ccdp.gc.ca>

BCHRT: <https://www.bchrt.bc.ca>

Contact Info:

CHRC: CHRC National Call Centre
Toll Free: 1-888-214-1090
TTY: 1-888-643-3304
Fax: 1-613-996-9661
Email: complaint.plainte@chrc-ccdp.gc.ca

BCHRT: In person or by mail:
1270 - 605 Robson Street
Vancouver, B.C. V6B 5J3
Phone: 604 775-2000
Toll Free (in B.C.): 1 888 440-8844
TTY: 604 775-2021
Fax: 604 775-2020
Email: BCHumanRightsTribunal@gov.bc.ca



Case Studies – Accommodation

Scenario #1

Task:

Read the following scenario and identify the following:

1. What is/are the accommodation issue(s) in this case?
2. Are there other issues that may need to be addressed? What are they?
3. How would you best approach obtaining accommodation in this case? Why? Be as detailed as possible in your answer.
4. Choose a workshop reporter who will briefly summarize your case study and your responses to questions #1- #3 above.

Scenario:

Tulimaq works in a large city in western Canada. He has adopted a child from the Northwest Territories through an Aboriginal “custom adoption”, where the matriarch has selected Tulimaq to be the child’s father.

The child now resides with the Tulimaq in the city. Tulimaq has requested care and nurturing leave without pay, for a six-month period, to settle the child in and make appropriate long-term childcare arrangements. His request has been denied, because the child does not meet the collective agreement’s definition of “family”. The employer is fully aware of the adoption situation but is of the view that there are no legal ties between the child and the father. Therefore, they cannot set a precedence by accepting this child as a family member, for the purposes of allocating leave entitlements.

Tulimaq has come to you for assistance.



Case Studies – Accommodation

Scenario #2

Task:

Read the following scenario and identify the following:

1. What is/are the accommodation issue(s) in this case?
2. Are there other issues that may need to be addressed? What are they?
3. How would you best approach obtaining accommodation in this case? Why? Be as detailed as possible in your answer.
4. Choose a workshop reporter who will briefly summarize your case study and your responses to questions #1- #3 above.

Scenario:

Ai works in an administrative position at a large fish-marketing company in B.C. Ai will be turning 65 years old next month and has only been working at the company for 10 years.

The union and management have negotiated a mandatory retirement rule, wherein everyone must retire at the age of 65. The union is fully supportive of this mandatory retirement rule, given the desire to protect older workers from being forced to work beyond 65 and to support job creation of good paying jobs for youth.

Ai lives alone and supports herself as well as assisting to financially support her two grandchildren. If she retires now, she will be short 5 years' service to obtain a full pension. Ai feels that her quality of life, and the quality of life of her grandchildren, will be severely affected if she is forced to retire.

She wants to stay on in her current position and has come to you for assistance.



Case Studies – Accommodation

Scenario #3

Task:

Read the following scenario and identify the following:

1. What is/are the accommodation issue(s) in this case?
2. Are there other issues that may need to be addressed? What are they?
3. How would you best approach obtaining accommodation in this case? Why? Be as detailed as possible in your answer.
4. Choose a workshop reporter who will briefly summarize your case study and your responses to questions #1-#3 above.

Scenario:

Cherise is a single mother and a veteran of the Canadian Forces who did one tour of duty as a peacekeeper in a very troubled part of the world. She began working with the federal public service two years ago as a PM-2.

Cherise's co-workers and her supervisor have been impressed with how well she has learned her job duties. She is responsible for key files in a federal grants and contributions program. She meets with stakeholders; negotiates projects; reviews and makes recommendations on project proposals; monitors projects; provides input for policy and program development; represents the government at various community and inter-departmental meetings; and prepares briefing notes and Ministerial correspondence.

Recently Cherise began to have flashbacks from her tours of duty and is feeling depressed. Her concentration and motivation are diminished. She easily gets confused, feels angry when facing deadlines, and finds inter-personal interactions stressful. She has been impatient with colleagues and clients, and she is struggling with her attendance. There are days when Cherise requires no accommodation and days when she does.

Cherise is taking anti-depressant medications. Her health professional has stated her condition is transient but offered no details on what "transient"



Case Studies – Accommodation

means. Unfortunately, she exhausted her sick leave when she had surgery earlier this year.

Cherise's manager feels that her state of mind is causing a problem for the rest of the work unit. Other employees are frustrated at being asked to fill in at the last minute. The manager is encouraging her to minimize stress levels by taking long term disability and devoting her time to getting well and looking after her family.

Cherise wants to remain in the workplace and has come to you for advice and guidance.



Case Studies – Accommodation

Scenario #4

Task:

Read the following scenario and identify the following:

1. What is/are the accommodation issue(s) in this case?
2. Are there other issues that may need to be addressed? What are they?
3. How would you best approach obtaining accommodation in this case? Why? Be as detailed as possible in your answer.
4. Choose a workshop reporter who will briefly summarize your case study and your responses to questions #1- #3 above.

Scenario:

Birrah is a registered nurse's aide with a hospital in the North West Territories. Birrah has only worked there for one year, but she loves her work and is enjoying the northern experience. The other nurses at the unit have been working at this hospital for several years. The nursing unit employs seven full time nurses: four work the permanent day shift (the supervisor and three nurses) and the other three nurses rotate shifts and/or cover for each other to ensure 24-hour coverage.

Recently, Birrah was diagnosed with fibromyalgia and is experiencing a lot of pain, fatigue, and stiffness, making it very difficult to sleep. Her doctor recommended a more predictable routine as opposed to continually changing shifts. Sleep disruption exacerbates fibromyalgia and increases her level of fatigue and stress.

Birrah has discovered that one of the day shift nurses has resigned. She approached the supervisor, armed with the directions of the physician, and asked if she could change to the permanent day shift. Her supervisor said it wouldn't be possible because another nurse with more seniority has expressed an interest in the position. The collective agreement allows for shift bidding by seniority. Birrah asks for the union's assistance.



Case Studies – Accommodation

Scenario #5

Task:

Read the following scenario and identify the following:

1. What is/are the accommodation issue(s) in this case?
2. Are there other issues that may need to be addressed? What are they?
3. How would you best approach obtaining accommodation in this case? Why? Be as detailed as possible in your answer.
4. Choose a workshop reporter who will briefly summarize your case study and your responses to questions #1 - #3 above.

Scenario:

Fred has worked in a unilingual English AS-2 term position for the past two years. His long-time manager recently retired, and a new manager was hired.

Fred has learning disabilities that were diagnosed decades ago in high school. He can't afford another assessment to refresh the diagnosis.

He requires a multi-modal approach to process information. To fully understand a task, he needs to read information, be given verbal instructions, paraphrase and then write instructions down. If given too much information at once, he gets overloaded and struggles to process the details. When dealing with familiar information he has much less difficulty. Stress makes things more difficult for Fred.

He has accommodated his disability by being very organized and by working closely with his management team. His past manager tried not to give him last-minute deadlines. They worked together to ensure that he fully processed the information required to complete assignments. His manager was aware of Fred's strengths and weaknesses and enjoyed working with him. She found Fred to be a conscientious, good-humored, and diligent worker. He was valued and relied upon by his colleagues. She had been discussing using the departmental employment equity program to move Fred



Case Studies – Accommodation

into an indeterminate position, however, had not done so prior to her retirement.

The new manager cannot understand why Fred is not performing well. Before he would consider making Fred indeterminate, he sent Fred for language aptitude testing because the unwritten departmental policy is to hire only bilingual people indeterminately. Fred failed the test.

Fred tried to explain the nature of his disability to the new manager to no avail. Given his dismal test results and apparent inability to meet deadlines, the manager advised he will not move Fred into an indeterminate position. He told Fred to look for other work before the end of his term.

There are numerous equivalent unilingual English positions within the branch. Fred would like to transfer to another position to work under a different manager. His manager doesn't want to transfer Fred because he feels his work is poor. Fred has come to you for assistance.



Case Studies – Accommodation

Scenario #6

Task:

Read the following scenario and identify the following:

1. What is/are the accommodation issue(s) in this case?
2. Are there other issues that may need to be addressed? What are they?
3. How would you best approach obtaining accommodation in this case? Why? Be as detailed as possible in your answer.
4. Choose a workshop reporter who will briefly summarize your case study and your responses to questions #1- #3 above.

Scenario:

Kefir works at the front counter as a service provider in a large company. The office where Kefir works is open from Monday to Friday, inclusive.

Kefir was given a day off without pay to observe a religious day, Yom Kippur. His initial request for special leave with pay was denied. His manager did not want to set a precedent.

As the office is only open Monday to Friday, and Kefir's responsibilities are primarily in dealing with drop-in clientele, Management could not accommodate Kefir by permitting him to work on the weekend. Kefir could not make up the time at night due to family obligations. Therefore, scheduling alternatives were not available.

Kefir believes that he should be given this leave, with pay, in light of the fact it was impossible to make up for the lost day of work and his family's financial stability is dependent upon the total of his annual salary. Kefir has come to you for representation in this matter.



Case Studies – Accommodation

Scenario #7

Task:

Read the following scenario and identify the following:

1. What is/are the accommodation issue(s) in this case?
2. Are there other issues that may need to be addressed? What are they?
3. How would you best approach obtaining accommodation in this case? Why? Be as detailed as possible in your answer.
4. Choose a workshop reporter who will briefly summarize your case study and your responses to questions #1-#3 above.

Scenario:

Pearson works at an airport. The Airport Authority has implemented an alcohol and drug testing policy which requires some employees, including those in safety sensitive positions, to declare whether they have, or have had, a substance abuse problem as defined in the policy.

Pearson works in a safety sensitive position and disclosed, per the policy requirements, that he had a history of alcohol abuse, but has been sober for the past 7 years. As a result of his disclosure, the Airport Authority removed him from his job and reassigned him to a less desirable position at the same rate of pay. Pearson is now subject to mandatory medical examinations and random drug and alcohol testing.

Pearson feels humiliated. His job satisfaction has been greatly affected and he doesn't believe he should be subject to these changes. He has been taking an increased amount of sick leave lately, which he feels has made him more suspect in the employer's mind. Pearson comes to you for assistance. He is afraid that if things don't get better, he will have to quit his job.



Case Studies – Accommodation Discussion Sheet

Scenario #1

Accommodation issue(s):

- ◆ The issue here is related to family needs. It stems from particular cultural practices that are outside of the “normal” practices of the dominant culture.

Additional issues that may require addressing:

- ◆ The requirement for legal documentation related to adoption of a child coupled with the fact that legal documentation does not recognize this Aboriginal custom adoption.
- ◆ The definition of family in the collective agreement.
- ◆ Increased flexibility in work scheduling to meet family responsibilities.
- ◆ Whether granting another type of unpaid leave in this instance meets the requirement of workplace accommodation. Sometimes, to avoid setting a precedent, an employer will provide some other type of leave to deal with a given situation. Does this meet the Meoirin and Grismer test for an inclusive workplace or does it meet a particular accommodation request?

Obtaining Accommodation:

- ◆ The request for leave has already been denied. Therefore, the informal problem-solving route may not be open.
- ◆ There is, however, an immediate need to obtain leave for Tulimaq. One consideration would be to negotiate, **without prejudice**, a leave for Tulimaq. This could be followed with a grievance OR Human Rights complaint on the grounds of race and/or family status.
- ◆ You probably want a third-party decision on this matter (once an opinion that it is a good case has been made), as it has far reaching effects on others in the workplace.



Case Studies – Accommodation Discussion Sheet

- ◆ This issue must also be brought to the attention of the union to be addressed at the joint Employment Equity Committee, Joint Union Management Consultation, Bargaining Committee and other relevant bodies of the union.



Case Studies – Accommodation Discussion Sheet

Scenario #2

Accommodation issue(s):

- ◆ This is an issue of discrimination based on age. The mandatory requirement rule may have an adverse impact on older workers.

Additional issues that may require addressing:

- ◆ We may find that the mandatory retirement rule has a greater adverse impact on women and persons from racialized or Aboriginal groups in addition to persons with disabilities. Given the effects of historic systemic discrimination, these groups' access to paid employment has not been barrier-free. Given this, their contribution to any pension plan is likely to be less, compared to the dominant population and the mandatory retirement rule has a much more negative impact on them.
- ◆ In this case, the mandatory retirement rule was agreed to as a proactive way to deal with youth unemployment. This issue should probably be addressed from a more global perspective. Looking beyond the retirement provisions and into other areas of employment practices and policies may lead to more creative solutions to addressing youth unemployment from this company's perspective.
- ◆ Some of the human rights acts protect mandatory retirement plans, as long as the mandatory retirement rule applies to all workers within an organization. Given the new duty to accommodate jurisprudence, it can be expected that allegations of discrimination related to mandatory retirement rules, will be seen differently by the Courts.

Obtaining Accommodation:

- ◆ Ai requires the support of her union in having this rule identified as being a discriminatory rule. If this is the case, the union can ask to reopen the collective agreement on these grounds and re-negotiate the article. It is best to deal with this issue in a broad manner, given that it affects a huge segment of the workforce. However, given the Meiorin/Grismer decisions,



Case Studies – Accommodation Discussion Sheet

the parties to the collective agreement will also be required to consider each accommodation request on a case-by-case basis.

- ◆ If this action is not forthcoming, Ai has a case for a Human Rights Complaint, although part of the challenge may involve seeking changes to human rights law. She should seek to have this rule turned over and ask for compensation for financial loss and for the pain and suffering of her and her grandchildren.



Case Studies – Accommodation Discussion Sheet

Scenario #3

Accommodation issue(s):

- ◆ The primary issue relates to disability. In this case, it is a psychiatric disability. In addition, the manager is making decisions which are influenced by Cherise's family status.

Additional issues that may require addressing:

- ◆ Further exploration of Cherise's accommodation needs is required. The health professional she is seeking advice from is not able to define "transient" in regard to her disability. In addition, very little advice has been given regarding specific workplace accommodation for Cherise beyond allowing her to remain in the workplace. It would probably be helpful, if possible, to have more specific ideas with regards to making the workplace barrier-free for Cherise.
- ◆ Another consideration is the possible backlash from other employees. This should be mitigated as much as possible. Sensitization education and work reorganization should be considered, along with any other measures identified that would help coworkers address Cherise's accommodation needs as well as any increased stress the situation brings to bear. It is important to note that wherever possible, an open dialogue can be key to addressing this kind of co-worker backlash. However, the right to confidentiality is clear and such dialogue can only take place with the express permission of the worker requiring accommodation. Clearly, inappropriate behavior in the workplace cannot be accepted under any circumstance. However, sometimes behavior is being named "inappropriate" out of context. Also, where progressive measures are in place, such "questionable" behaviors can be eliminated.
- ◆ Ongoing access to paid leave should also be a consideration. Where members have run out of leave provisions, the parties should try and alleviate the stress of the employee having to take leave without pay.
- ◆ Although the manager's proposal that Cherise go on DI seems like a good solution, it is most probably a quick way for the manager to get the



Case Studies – Accommodation Discussion Sheet

“problem” out of the workplace. Given the articulated need by both Cherise and her health professional for her to maintain her status in the workplace, this could in fact, make the matter worse. What is equally important to consider in this case is the patronizing role the manager has assumed in supposing what is right for Cherise. Often, in cases of psychiatric disabilities, whether they are articulated or not, this is the response of the manager.

- ◆ Finally, in cases of psychiatric disabilities, the onus for recognition of the need for accommodation, on both the union and the employer, is greater. It is not good enough to wait for the employee to name their behavior as symptoms of a disability. In such cases, it is incumbent on the union and the employer to seek clarification as to whether there is a disability and what type of accommodation is required.

Obtaining Accommodation:

- ◆ The first thing you should do is find a way for Cherise to stay in the workplace without loss of income. This can be approached by convening a meeting. In the event such a meeting is agreed to, all applicable issues should be put on the table. It is very likely that the parties will have to draw on the assistance of an “expert”, to identify and remove barriers to full participation for Cherise. This is also likely to address barriers for the employment of, and retention of, others with a similar disability.
- ◆ If the employer insists on pursuing their current course of action, a grievance and/or human rights complaint should be initiated. Grounds would include discrimination on the basis of disability and family status. Cherise would be looking for a decision that would provide for assessment and implementation of accommodation measures as well as compensation for lost time, reimbursement of sick and other leaves taken and payment for pain and suffering.



Case Studies – Accommodation Discussion Sheet

Scenario #4

Accommodation issue(s):

- ◆ In this case, the accommodation relates to a disability.

Additional Issues that may require addressing:

- ◆ Seniority provisions and application. Before we discuss seniority, we must understand that seniority provides a neutral tool in the workplace. Seniority accrues after an employer hiring decision. Given the fact that most workplaces have not been historically “representative”, the application of seniority provisions may have an adverse impact. In this case, where seniority is applied by the letter of the collective agreement, there may be an adverse impact on a member with a disability. This is an issue that unions are grappling with; application of what has been considered a fundamental union principle vs. accommodation of a member with a disability. What makes this dialogue more interesting is the new test for undue hardship. Is it undue hardship to award Birrah the day shift? Would asking the employer to create an additional day shift position be a reasonable way to ensure that both seniority and accommodation provisions are met? Can Birrah be assigned to a job outside the bargaining unit, where seniority isn’t a factor?
- ◆ Another issue to address is the absence of the union in the decision-making process where accommodation has been requested. In this case, neither Birrah nor the manager involved the union in the implementation of an accommodation requirement that could involve basic union rights. Wherever possible, especially where collective agreement provisions are in question, the union should be brought in to assist in problem-solving individual accommodation measures and identifying barriers to full participation in the workplace.

Obtaining Accommodation:

- ◆ At this point, the union should be trying to go back to the manager and re-negotiate an accommodation measure that would put Birrah on the day shift, with no reduction in salary, as required. If this manager is unwilling



Case Studies – Accommodation Discussion Sheet

to bend, going over his/her head OR filing an internal complaint may be an option, depending on time constraints.

- ◆ Where necessary, Birrah may have to take leave and file a grievance and/or a human rights complaint (whichever is applicable). Redress would include the right to work at no loss of salary, on a day-shift position and, a reimbursement of leave provisions as well as compensation in full, for any financial loss incurred.



Case Studies – Accommodation Discussion Sheet

Scenario #5

Accommodation issue(s):

- ◆ In this case, the issue is related to a learning disability.

Additional issues that may require addressing:

- ◆ The first thing that needs to be addressed is this particular manager's insensitivity and inability to implement accommodation measures for Fred. In his view, Fred is not competent where, in fact, it is the manager's incompetent handling of the situation that has created barriers to Fred's full participation in the workplace.
- ◆ In addition, the unwritten rule of not making individuals indeterminate unless they meet bilingual language requirements is problematic and likely to fail the BFOR standard.
- ◆ Should the bilingual requirement for all positions pass the BFOR test, another consideration is the employer's obligation to have Fred properly assessed so that appropriate accommodations can be in place to fairly test Fred for language aptitude. Changes may have to be made to the test or the testing process OR it may be that an entirely different test will better assess Fred's language aptitude.
- ◆ Irrespective of Fred's language aptitude, there are similar unilingual English positions within the branch. An exchange of positions with someone who meets the language aptitude is an option. It may also be that some "job rebundling" is in order so that the tasks requiring language proficiency can be done elsewhere.
- ◆ Finally, we must consider that Fred is in a term position. We cannot allow management to use this as an excuse for removing him from the workforce.



Case Studies – Accommodation Discussion Sheet

Obtaining Accommodation:

- ◆ This issue should be taken up with the joint Employment Equity Committee as soon as possible. In addition, a meeting with the manager should be called to clearly inform him of his obligations with regards to accommodation. If the manager is not responsive, going over his head and/or submitting an internal complaint with the Public Service Commission may assist in resolving this issue.
- ◆ If these steps fail to address the issue, a human rights grievance and complaint should be filed citing discrimination on the basis of a disability. Redress should include the right for Fred to be considered for an indeterminate position (in compliance with PSEA staffing processes). In addition, Fred should be asking for implementation of appropriate accommodation measures and permanent barrier removal in the workplace and within the staffing process. Fred should also be asking for reimbursement of any financial loss incurred.



Case Studies – Accommodation Discussion Sheet

Scenario #6

Accommodation issue(s):

- ◆ This is a case that involves religious affiliation.

Additional Issues that may require addressing:

- ◆ In this case, there seems to be no clause in the collective agreement that provides for religious accommodation. The absence of such a clause points to remissions on the part of both union and management to provide for individuals who wish to observe their religious practices.
- ◆ General anti-discrimination provisions in the collective agreement don't comply with pro-active accommodation obligations.
- ◆ As such, Kefir has applied for special leave with pay. The only option provided in response was to take leave without pay. We note that the dominant group is not forced to make similar decisions as their regular day of rest and other designated days off, fall on their traditional religious observance days.
- ◆ In this case, the hours of operation, as well as Kefir's family obligations, have made it impossible for him to mitigate this financial loss. It is noted that his family's financial stability is dependent upon the total of his annual salary. Thus, the loss of a day's pay becomes a severe penalty to Kefir for observance of his religion.

Obtaining Accommodation:

- ◆ At the outset, it may be best to try, **without prejudice**, to negotiate another paid day off for Kefir so that he does not suffer a financial loss. Once this has been accomplished, an internal complaint may be in order. The union should also refer this matter to the joint Employment Equity Committee as well as to their own collective bargaining committee.
- ◆ If an internal complaint does not address the issue adequately, a grievance and/or human rights complaint should be filed. Kefir should be



Case Studies – Accommodation Discussion Sheet

asking for the removal of workplace barriers related to the observance of a religious day as well as full financial compensation.



Case Studies – Accommodation Discussion Sheet

Scenario #7

Accommodation issue(s):

- ◆ This case involves discrimination on the basis of an actual or perceived disability.

Additional issues that may require addressing:

- ◆ Firstly, we must take a close look at the drug testing policy. Does this policy adhere to the three-part test set out in the Meiorin case?
 - 1) Was it adopted for a purpose rationally connected to the performance of the job?
 - 2) Was it adopted in an honest and good faith belief that it was necessary to the fulfillment of that legitimate work-related purpose?
 - 3) Is the policy reasonably necessary to accomplish the legitimate work-related purpose?
- ◆ In this case, it seems questionable as to whether this policy would actually measure present impairment or whether it incorporates accommodation of individual capabilities.
- ◆ Another issue is the mandatory nature of disclosure. Consideration of individual right to privacy should be balanced against the employer's obligation to ensure that the employees working in safety-sensitive jobs are not impaired by alcohol or drugs. The resulting mandatory reassignment and the physical and random drug testing are too broad and fail to accommodate individual differences and capabilities. In fact, Pearson is being penalized for an actual or perceived disability.

Obtaining Accommodation:

- ◆ This issue should be brought directly to the joint Employment Equity Committee (where one exists). Alternatively, the union should arrange a meeting with management or file an internal complaint, immediately, to inform them of the impact of this policy and have it revoked accordingly.



Case Studies – Accommodation Discussion Sheet

Where possible, agreement to review other workplace policies for barriers should be pursued. This could include the identification of a BFOR for safety sensitive positions that complies with jurisprudence and the development of a duty to accommodate in relation to this BFOR that includes the accommodation of substance abuse disabilities.

- ◆ If no immediate response is forthcoming, a grievance and/or human rights complaint should be filed citing discrimination on the grounds of an actual or perceived disability. Redress should include reimbursement of all sick leave taken, reinstatement to Pearson's substantive position, reimbursement of any financial loss and compensation for pain and suffering due to the humiliation experienced by Pearson.



Jurisprudence Summary
Religious Accommodation
Union Liability (Renaud)

Central Okanagan School District No. 23 v. Renaud
Supreme Court of Canada 1992

Renaud, a seventh-day Adventist, was employed as a school custodian. Under the collective agreement, Renaud was required to work an afternoon and evening shift on Fridays. Renaud refused to work the shift because his faith prevented him from working between sundown Friday and sundown Saturday. The school board was willing to accommodate Renaud by replacing his Monday to Friday shift with a Sunday to Thursday shift. Because shift scheduling was in the collective agreement, the school board sought the agreement of the union to this exception to the collective agreement. The union refused to agree to this accommodation and threatened to file a policy grievance if the school board implemented the proposed new work schedule for Renaud. The school board looked for other accommodation but eventually terminated Renaud's employment for failing to complete his regular Friday night shift.

Renaud filed a human rights complaint in British Columbia. His complaint was upheld by the British Columbia Human Rights Council. The Council found that neither the employer nor the union discharged its duty to accommodate Renaud's religious obligations. Both the school board and the union sought judicial review of the decision. The Court overturned the Council's decision. Renaud appealed unsuccessfully to the British Columbia Court of Appeal and further appealed to the Supreme Court of Canada.

Issues:

1. Is an employer relieved of its duty to accommodate an employee when this would require an alteration of the collective agreement which is opposed by the union?
2. What is the liability and role of a union under the duty to accommodate?



Jurisprudence Summary
Religious Accommodation
Union Liability (Renaud)

3. What is the role of an individual alleging discrimination under the duty to accommodate?

Finding: The work schedule in the collective agreement had a discriminatory effect on Renaud and therefore both the employer and the union had a duty to accommodate his religious needs.

An employer must take reasonable measures, short of undue hardship, to accommodate an employee's religious obligations. The word "undue" infers some hardship is acceptable and should be more than "a minor inconvenience".

The Court listed factors to determine undue hardship. These factors should now be considered in light of the amendments made to human rights legislation after the *Renaud* case. For example, the *Canadian Human Rights Act* limits the factor to three: cost, health, and safety.

A union causing or contributing to the discriminatory effect incurs liability. To avoid absolute liability, the union must have the same rights as an employer to justify the discrimination by discharging its duty to accommodate (i.e., up to the point of undue hardship).

A union becomes a party to discrimination in two ways:

- 1) It may cause or contribute to the discrimination by participating in the formulation of the work rule that has a discriminatory effect on an individual (i.e., if a rule forms part of the collective agreement which is jointly negotiated); and,
- 2) it may impede the reasonable efforts of an employer to accommodate, notwithstanding the fact that it did not participate in the formulation or application of a discriminatory rule or practice. If reasonable accommodation is only possible with the union's co-operation and the union blocks the employer's efforts to remove the discriminatory effect, it



Jurisprudence Summary
Religious Accommodation
Union Liability (Renaud)

becomes party to that discrimination. In these circumstances, the union, while it did not have a duty to accommodate initially, incurs a duty not to contribute to the continuation of the discrimination.

If a union is a co-discriminator, then it shares joint liability with the employer to seek accommodation and both are equally liable if nothing is done.

An employer who has control over the workplace is in a better position to propose and formulate accommodation. Thus, the employer can be expected to initiate the process. The employer will not be absolved of its duty when it proposes a measure which in its point of view is the least expensive or disruptive and the union will not be liable if the union refuses to consent to a measure because in its point of view, the measure is disruptive to the collective agreement or otherwise affects the rights of other employees. The duty to accommodate should not substitute discrimination against other employees for the discrimination suffered by an individual. However, the union may not absolve itself of its duty if it fails to put forward alternative measures that are available and less onerous from its point of view. Nonetheless, the union shares the obligation to take reasonable steps or remove or alleviate the source of discriminatory effect.

Where a union contributes to the discrimination only through the failure to co-operate in implementing a reasonable accommodation, the employer must canvass other methods of accommodation before the union can be expected to assist in finding or implementing an accommodation. The union's duty arises when its involvement is required to make accommodation possible, and no other reasonable alternative solution has been found or could reasonably have been found.

An individual alleging discrimination also has a duty to assist in securing an appropriate accommodation. When reasonable accommodation is proposed, the individual has a duty to facilitate the implementation of the proposal. If the individual fails to take reasonable steps or accept reasonable accommodation, the complaint may be dismissed.



Jurisprudence Discussion Sheet
Religious Accommodation
Union Liability (Renaud)

Central Okanagan School District No. 23 v. Renaud
Supreme Court of Canada 1992

What is the significance of this case?

- ◆ The Supreme Court of Canada enunciated the accommodation duty of the employer, the union and an individual requiring accommodation. Therefore, the duty of each of the parties has universal application throughout Canada. It also clearly articulated the liability of the union in circumstances where it participated in jointly negotiated terms and conditions of employment (i.e., collective agreement), which were discriminatory. Also, in circumstances where the union did not participate in the formulation of a discriminatory policy, procedure, practice, etc. but impeded the employer's accommodation attempts.

How does this decision affect the issue of workplace accommodation? Why?

- ◆ The union must co-operate and play more of a proactive role in accommodation requests and needs. The union should not unreasonably withhold consent when such consent is required. In addition, the employer is required to seek the assistance and co-operation of the union for accommodation requests and needs. Therefore, the union and the employer must work jointly to ensure accommodation requests and needs are properly adhered to.

What impact does this decision have -on the union, the employer, the member and co-workers?

- ◆ This case has great significance for the union. The union has a duty to accommodate and will be held solely or jointly liable if it does not fulfill this duty under the circumstances stated by the Supreme Court of Canada.



Jurisprudence Discussion Sheet
Religious Accommodation
Union Liability (Renaud)

- ◆ The employer is now required to actively seek the participation and co-operation of the union representatives.
- ◆ The individual member has a duty to co-operate and not unreasonably withhold accommodation suggestions.



Jurisprudence Article
Family Status Accommodation
Childcare (Johnstone)

Attorney General of Canada v. Fiona Johnstone and Canadian Human Rights Commission [2014 FCA 110]

Developments in Family Status Accommodation Law

Significance:

The Federal Court of Appeal confirms that childcare obligations are protected under human rights legislation and develops the Johnstone test to establish a prima facie case of discrimination.

Summary:

Ms. Johnstone was a Canada Border Services Officer required to work rotating, irregular and unpredictable shifts in a 24/7 operation. Her husband was subject to the same unpredictable work hours. When Ms. Johnstone returned from maternity leave, she found it was impossible to arrange childcare for her children. She requested regular static shifts on 3 adjacent days per week with enough hours to maintain her full-time status. This would allow her to reasonably arrange for childcare, but not affect her pension, benefits, or employment opportunities. Her employer refused her request despite the fact they had accommodated others for medical or religious reasons by providing static shifts.

Issues:

1. Does human rights legislation extend to childcare obligations?
2. Is the test for establishing a case of discrimination based on family status higher than that of other prohibited grounds?

Quotes:

“Protection from discrimination from childcare obligations flows from family status in the same manner that protection against discrimination on the



Jurisprudence Article
Family Status Accommodation
Childcare (Johnstone)

basis of pregnancy flows from the sex of the individual. In both cases, the individual would not require accommodation were it not for the underlying ground (family status or sex) on which they were adversely affected.”

“... the precise types of childcare activities that are contemplated by the prohibited ground of family status need to be carefully considered. Prohibited grounds of discrimination generally address immutable or constructively immutable personal characteristics, and the types of childcare needs which are contemplated under family status must therefore be those which have an immutable or constructively immutable characteristic.”

“It is also important not to trivialize human rights legislation by extending human rights protection to personal family choices, such as participation of children in dance classes, sports events like hockey tournaments, and similar voluntary activities. These types of activities would be covered by family status according to one of the counsel who appeared before us, and I disagree with such an interpretation.”

Findings:

In 2014 the Federal Court of Appeal found:

1. Ms. Johnstone was discriminated against on the ground of family status, which includes childcare obligations.
2. Not every conflict between work and family obligations will trigger the duty to accommodate. Like other grounds of discrimination, family status protects an individual’s “immutable characteristics”. The court determined this referred to parental obligations protected by the Canadian Human Rights Act – those obligations whose non-fulfilment engages the parent’s legal responsibility to the child. (For example, under child welfare or criminal legislation.) A parent cannot leave a young child unattended in order to attend work, as this would be



Jurisprudence Article
Family Status Accommodation
Childcare (Johnstone)

considered neglect. On the other hand, personal choices like participation in music lessons or sports are not protected by legislation.

3. The threshold to show prima facie discrimination for family status was no higher than for other grounds of discrimination. To find otherwise would create a hierarchy of discriminatory grounds. To establish a prima facie case of discrimination for family status the complainant must show (the Johnstone test¹);
 - i. that a child is under his or her care and supervision;
 - ii. that the childcare obligation at issue engages the individual's legal responsibility for that child, as opposed to personal choice;
 - iii. that efforts were made to meet those childcare obligations through alternative solutions, and that no such alternative solution is reasonably accessible, and
 - iv. that the impugned workplace rule interferes in a manner that is more than trivial or insubstantial with the fulfillment of the childcare obligation.

¹ Jurisprudence continues to evolve. Courts and Tribunals are at times rejecting the *Johnstone test* on the basis that it is more stringent than the prima facie test for other prohibited grounds. They argue the test for family status discrimination should be the same as for other forms of discrimination. (See *Misetich v. Value Village Stores Inc.* 2016 HRTO 1229)



**Jurisprudence Article
Family Status Accommodation
Eldercare (Misetich)**

Misetich v. Value Village Stores Inc. [2016 HRTO 1229]

Significance:

The Ontario Human Rights Tribunal criticized the Johnstone and other tests for family status accommodation because they impose a more rigorous test for discrimination than is applied to other protected grounds, such as race, age, or disability.

Summary:

The employer proposed the employee move into a new position to accommodate her physical restrictions. The new schedule required the employee to work days, evenings and weekends. The employee advised that the new schedule was discriminatory on the basis of family status because it prevented her from preparing evening meals for her 86-year-old mother.

The employer requested medical proof from the employee regarding her mother's needs, asking questions including whether she was the primary caregiver, and whether there were alternative means available to provide the care.

The employee refused to provide information about the nature of her eldercare responsibilities. In light of her failure to report for work, she was terminated.

Quotes:

"The applicant took an intransigent position regarding her human rights. When the respondent attempted to move the applicant to less physically demanding work in retail and schedule her on a variety of shifts, the applicant took the position that it could not do so because of her family status. The applicant believed that all she needed to do was to assert her family status and that would be the end of it. The applicant was wrong. The



**Jurisprudence Article
Family Status Accommodation
Eldercare (Misetich)**

applicant was required to provide sufficient information to support her eldercare responsibilities. She failed to do so.”

“...by developing different tests, the test for family status discrimination has become, perhaps inadvertently, higher than for other kinds of discrimination.”

“In order to establish family status discrimination in the context of employment, the employee will have to do more than simply establish a negative impact on a family need. The negative impact must result in real disadvantage to the parent/child relationship and the responsibilities that flow from that relationship, and/or to the employee’s work.”

“Assessing the impact of the impugned rule is done contextually and may include consideration of the other supports available to the applicant. These supports are relevant to assessing both the family-related need and the impact of the impugned rule on that need. For instance, if the applicant is a single parent, both the family-related need and the impact of the impugned rule on the family-related need may be greater.”

Findings:

The Human Rights Tribunal of Ontario found that the complainant had not been discriminated against because she had not provided adequate details to her employer to show there was a negative impact on her family relationship.

The Ontario Human Rights Commission intervened in the case to ensure the Johnstone test (as outlined in the Federal Court of Appeal’s decision in *Johnstone v. Canada Border Services*) was not adopted in the province of Ontario.

The Tribunal agreed with the Ontario Human Rights Commission’s position that the Johnstone test imposed an onerous and unique test for



Jurisprudence Article Family Status Accommodation Eldercare (Misetich)

establishing discrimination on the basis of family status. The decision sets out the following rationale for coming to this conclusion:

1. There is no principled basis for developing a different test for discrimination depending on the prohibited ground of discrimination alleged.
2. The different tests for family status discrimination have resulted in inconsistency and uncertainty in the law.,
3. The different tests for family status discrimination are higher than for other kinds of discrimination. (The Ontario Human Rights Tribunal noted that according to *Johnstone*, the childcare obligation at issue must engage a legal responsibility, that many obligations that caregivers have are essential to the parent/child relationship but do not engage a legal obligation.)
4. The test of legal responsibility outlined in *Johnstone* is difficult to apply in the context of eldercare where an adult child's legal responsibility to care for a parent is not as clear as a parent's legal responsibility to care for a minor child.
5. The *prima facie* test for discrimination has been conflated with the test for accommodation resulting in applicants having to establish self-accommodation was not possible in order to prove discrimination.

NOTE: It is important to remember that the jurisprudence on family status discrimination will continue to change in coming years.

How to Win a Duty to Accommodate Grievance

In assessing whether employers have fulfilled their duty to accommodate in the context of a human rights complaint or grievance, the following fundamental elements must be proven by the parties:

1. The complainant/grievor must establish that the workplace standard being challenged is *prima facie*, discriminatory. To establish a *prima facie* case of discrimination, a claimant must show:
 - i) They fall under a prohibited ground;
 - ii) They have been disadvantaged in their employment; and
 - iii) The prohibited ground was a factor in the adverse impact.
2. Once a *prima facie* case of discrimination is established, the employer is required to prove that the challenged standard is a *BFOR* and is therefore valid.
3. To establish a *BFOR*, the employer must meet the three-step legal test:
 - i) There is a rational connection of the standard, rule, policy et. To the performance of the job;
 - ii) The employer has adopted the standard, rule, policy etc. in good faith; and
 - iii) The standard is reasonably necessary for the accomplishment of that legitimate work-related purpose. To demonstrate that it is reasonably necessary, the employer must show that it is impossible to accommodate without imposing undue hardship* on the employer.

*Undue hardship takes into consideration primarily cost and health & safety.

The Duty to Accommodate - Scenario

You are the union representative for a worker who requires accommodation. The employer has not been cooperative in accommodating the worker and while they are able to continue to work if accommodated, the employer is trying to force them to take sick leave.

Some of their co-workers have started to complain about the worker who requires accommodation. The fact that they (the worker who requires the accommodation) cannot perform all their duties and meet deadlines means that their co-workers have to pick up “the slack”.

Discuss:

- (i) Who are you going to go to for support within the union in this case?**
- (ii) Where will you go to ensure that the worker requiring accommodation has the ongoing support they needs?**
- (iii) Who can help you educate the workers (and the employer) in the workplace about the duty to accommodate?**

Sample Release of Information Form

I authorize my treating medical practitioner to provide the following information to the Human Resource person responsible for my file information:

- verification that I am experiencing an injury or medical condition that currently prevents me from performing some or all of the duties of my job
- whether returning to work is possible, and if so when can I return to work
- what, if any, accommodations should be made to my job duties or in the workplace to enable me to safely return to work

To be clear, you are not required to provide a diagnosis; the release of any medical information is limited to answering the attached medical questionnaire, as well as clarifying the provided answers.

I understand that I will be provided with a copy of this information.

Name

Date

Sample Medical Ability to Work Form

The purpose of this form is to provide the patient with the necessary information that they need to give to their employer to help the employer make decisions about accommodating the patient, providing disability leave, or assessing if the patient can return to work. When completing this form, disclose only information necessary to meet the purpose of the form. Typically, it is not necessary to provide a diagnosis or treatment information.

Physician's name and address:

I saw _____ (patient's name) on _____ (date)

Date of injury or illness, if applicable _____

This patient is medically able to work with limitations or restrictions as of _____ (date).

Restrictions or limitations (see Sections A and B for details)

In my opinion, the restrictions or limitations indicated in Section A are:

- | | | |
|--|--|--|
| ☐ Temporary: | ☐ _____ days | ☐ 4 to 6 weeks |
| | ☐ less than 2 weeks | ☐ 6 weeks to 3 months |
| | ☐ 2 to 4 weeks | ☐ more than 3 months |
|
☐ Permanent: Date of next appointment _____ | | |

My opinion is based on the factors indicated below:

- ☐ Information provided by the patient
- ☐ My examination of the patient and my assessment of the findings and health information

I have provided this form to the patient named above.

Physician's signature

date

SECTION A:

PHYSICAL	Restriction	Limitation	MENTAL	Restriction	Limitation
sitting			Thinking/reasoning		
standing			concentration		
walking			memory		
lifting			critical decision-making		
carrying			interpersonal contact		
pushing/ pulling			alertness		
climbing stairs			Other (specify in section b)		
climbing ladders			ENVIRONMENTAL		
climbing scaffolding			exposure to heat/cold		
crouching			exposure to dust/fumes/odor		
crawling			exposure to chemicals		
kneeling			food handling		
bending/ twisting/ turning			Other (specify in section b)		
repetitive activity			OTHER		
sustained postures			shift/attendance duration		
gripping			consecutive shift attendance		
reaching			shift work		
fine dexterity			overtime		
balance			operating vehicle		

Vision/ Hearing/ speech			Operating equipment		
Other (specify in section b)			Working heights		
			Other (specify in section b)		

Specific Functional Restrictions and/or Limitations

Patient's name _____

Does the patient require medical aids (e.g. splint, brace) or personal protective equipment (e.g. gloves, mask)?

☐ No ☐ Yes (specify in section B)

SECTION B:

Please provide necessary details about any restrictions or limitations you have identified. It is not necessary to provide a diagnosis or treatment information.

I have provided this form to the patient named above.

Physician's signature

date

Reintegration and Accommodation Plan

Plan For: (name and contact information) _____

Supervisor's Name: _____

It is understood by the parties that changes to this plan will be based on the medical practitioner's recommendation and discussed by all parties. A copy of the plan and/or amended plan will be forwarded to the undersigned.

Plan Goals:

Work Schedule: (if graduated or different from the norm)

Worker Expectations/Needs and Obligations (includes accommodation measures):

Continued .../2

Continued from .../1

Employer Expectations and Obligations (includes implementation of accommodation measures):

Monitoring of the Plan:

Signatures of the Parties:

Employee

Manager

Union Rep

Human Resources

Date: _____