

Disability and the Duty to Accommodate in the Canadian Workplace

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I An Overview of the Accommodation Duty

A. The Principles

The essence of the duty to accommodate is straight-forward to state: employers and unions in Canada are required to make every reasonable effort, short of undue hardship, to accommodate an employee who comes under a protected ground of discrimination within human rights legislation. In most cases, the protected ground requiring an accommodation is a disability, although several recent accommodation cases have involved other grounds such as religion,¹ gender,² and race.³ This paper will focus primarily on disability cases.

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¹ *Jones v. C.H.E. Pharmacy* (2001), 39 C.H.R.R. D/93 (B.C.H.R.T.); *Commission scolaire regionale de Chambly v. Bergevin* (1994), 115 D.L.R. (4th) 609 (S.C.C.).

² *British Columbia (Public Service Employee Relations Commission) v. B.C.G.S.E.U.*, [1999] 3 S.C.R. 3.

³ *Re Town of Geraldton* (1998), 73 L.A.C. (4th) 260 (Murray).

While the general rule is easy to state, the outer boundaries of accommodation are much harder to determine. But this much is clear to date: the duty requires more from the employer than simply investigating whether any existing job might be suitable for a disabled employee. Rather, the law requires an employer to determine whether existing positions can be adjusted, adapted or modified for the employee, or whether there are other positions in the workplace that might be suitable for the employee.

This responsibility requires the employer to look at *all* other reasonable alternatives. To prove that its accommodation efforts were serious and conscientious, an employer is required to engage in a four-step process:

- (i) Determine if the employee can perform his or her existing job as it is.
- (ii) If the employee cannot, then determine if he or she can perform his or her existing job in a modified or 're-bundled' form.
- (iii) If the employee cannot, then determine if he or she can perform another job in its existing form.
- (iv) If the employee cannot, then determine if he or she can perform another job in a modified or 're-bundled' form.

The employer must accommodate up to the point of "undue hardship". While there is no single definition in law of this term, the various decisions on accommodation make it clear that this effort must be substantial. Recent cases have said that the employer's must show that its attempts to accommodate were "serious",⁴ "conscientious",⁵ "genuine",⁶ and demonstrated its "best efforts."⁷ The Supreme Court of Canada has endorsed this threshold, stating that employers must establish that it is "impossible to accommodate individual employees ...without imposing undue hardship."⁸ Once the employee has established a *prima facie* case that she or he has a mental or physical disability that requires employment accommodation, the

⁴ *Krznaric v. Timmins Police Services Board* (1997), 98 C.L.L.C. 230-004 (Ont. Div. Ct.).

⁵ *CUPW v. Canada Post Corp.* (1997), 6 Lancaster's Equity and Accommodation Reporter 5 (May/June) (Ponak).

⁶ *Holmes v. Attorney-General of Canada* (1997), 97 C.L.L.C. 230-022 (F.C. T. D.), upheld on appeal, A-430-97 (QL 1999 FCJ #598), (29 April 1999).

⁷ *CAW, Local 3204 v. Royal Oak Mines* (1997), 6 Lancaster's Equity and Accommodation Reporter 3 (May/June) (R. Bird).

⁸ *British Columbia*, *supra*, note 40, at para. 54.

burden then shifts to the employer to prove that every reasonable effort was made to accommodate the employee's disability.

The duty to accommodate is a fundamental legal obligation. It comes from two sources: (i) the applicable human rights legislation; and (ii) rulings from the Supreme Court of Canada. The Supreme Court rulings are where labour and employment lawyers primarily look for direction in this area. In a series of important decisions that began in 1985,⁹ the Supreme Court of Canada has said that:

- Human rights legislation has a quasi-constitutional place in Canadian law, and all other statutes, policies and practices – public and private – must normally not be inconsistent with it.
- Discrimination may be entirely unintentional, yet it will be in violation of human rights statutes if a person under a protected ground is treated differentially and adversely for no justifiable reason.
- Accommodation is a significant human rights obligation, and must be a central feature in the Canadian workplace.
- The duty rests on three sets of shoulders, with *employers*, *unions* and the *employee seeking the accommodation* all assuming legal responsibility for ensuring the success of an accommodation request.
- The primary responsibility rests with the employer, because it has the ultimate control over the workplace. Once it receives a request, it must initiate the accommodation search.
- The union must co-operate with the accommodation process, and not unreasonably block a viable accommodation option.
- The employee is expected to participate in the accommodation process, and cannot refuse a reasonable accommodation offer.
- Collective agreement provisions are to be respected, but they may have to be waived if they unreasonably block a viable accommodation option or if they treat individuals who are protected by human rights legislation differently without a compelling justification.

In three recent decisions in 1999 and 2000,¹⁰ the Supreme Court of Canada has clarified and broadened the extent of the duty. It has stated that:

⁹ *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970; *Central Alberta Dairy Pool v. Alberta (Human Rights Commission)*, [1990] 2 S.C.R. 489; *O'Malley v. Simpson-Sears*, [1985] 2 S.C.R. 536.

¹⁰ *Québec (Commission des droits de la personne et des droits de la jeunesse) v. Montréal (City)*, [2000] 1 S.C.R. 665; *Grismer v. British Columbia (A.G.)*, [1999] 3 S.C.R. 868; *British Columbia (PSERC) v. British Columbia Government and Service Employees' Union*, [1999] 3 S.C.R. 3.

- Accommodation measures must be taken unless it is *impossible* to do so without imposing undue hardship.
- The undue hardship threshold is high.
- Employers and unions must be sensitive to the various ways that individual capabilities may be accommodated.
- Workplace standards – such as lifting requirements or work schedules – that unintentionally distinguish among employees on a protected human rights ground (i.e., disability, gender, religion, etc.) may be struck down or modified. Employers must build liberal conceptions of equality into workplace practices.
- Courts, labour arbitrators and human rights tribunals are to take a strict approach to exemptions from the duty to accommodate. Exemptions are to be permitted only where they are reasonably necessary to the achievement of legitimate business-related objectives.

In *British Columbia (PSERC) v. British Columbia Government and Service Employees' Union* (“*Meiorin*”),¹¹ its most comprehensive decision on accommodation to date, the Supreme Court said that employers must ask themselves a series of questions when considering an employee request for accommodation. These questions include:

- (i) Have alternative approaches been investigated that do not have a discriminatory effect, such as individual testing?
- (ii) If alternative standards have been investigated and found to be capable of fulfilling the employer’s purpose, why were they not implemented?
- (iii) Is it necessary to have all employees meet the single standard for the employer to meet its legitimate purpose? As well, could standards reflective of group or individual differences and capabilities be established?
- (iv) Is there a way to do the job that is less discriminatory while still accomplishing the employer’s business objectives?
- (v) Is the standard properly designed to ensure that the desired qualification is met without placing an undue burden on those to whom the standard applies?
- (vi) Have other parties in the workplace – the union and the individual employee seeking accommodation – fully assisted in the search for a solution?

The *Meiorin* decision has since become the contemporary touchstone for accommodation analysis by labour arbitrators, human rights tribunals and the courts.¹² The significance of the judgement lies in its

¹¹ *Ibid.*

¹² Several perceptive articles have been written about the importance of *Meiorin*: C. Sheppard, “Of Forest Fires and Systemic Discrimination: A Review of *British Columbia (Public Service Employee Relations*

articulation of a unified three-step test for determining the existence of discrimination, and whether it is unjustified under human rights law. This test signifies not so much a break with the recent developments in human rights and accommodation law as it does a synthesis of the prevailing principles, while discarding what had not worked, and raising the threshold for compliance.

The Supreme Court's three-step test in *Meiorin* simultaneously combines the previously distinct legal approaches towards analyzing "direct" and "adverse effect" discrimination, and, in doing so, ends the prevailing confusion over how and when to apply these tests. When assessing the validity of a challenged standard or practice, a legal decision-maker is required to ask the following three questions:

- i) Has the employer adopted the challenged standard or practice for a purpose *rationally connected* to the performance of the job?
- ii) Has the employer adopted the standard in an *honest and good faith belief* that it is necessary to fulfil the work-related purpose? And
- iii) Is the standard *reasonably necessary*, in that it would be impossible to accommodate an individual employee without imposing undue hardship upon the employer?

With the arrival of this unified test, discrimination analysis is now more straight-forward and more comprehensive. The three step test begins with a general review of the particular work performed, then moves to assessing the employer's subjective intent for creating the standard, and finally focuses on the accommodation of the individual worker and the defences that the employer can erect to attempt to justify either the standard or its particular application. If the employer fails any one of the steps, then it is in breach of its duty not to discriminate. The essence of the new approach in *Meiorin* has been to require employers to accommodate the characteristics of individual employees as much as

Commission) v. B.C.G.S.E.U." (2001), 46 *McGill Law Journal* 533; K. Schucher, "Weaving Together the Threads: A New Framework for Achieving Equality in Workplace Standards" (2000), 8 *Canadian Labour and Employment Law Journal* 325; D. Pothier, "BCGSEU: Turning a Page in Canadian Human Rights Law" (1999), 11 *Constitutional Forum* 19; and T. Witelson, "From Here to Equality: *Meiorin*, *TD Bank*, and the Problems with Human Rights Law" (1999), 25 *Queen's Law Journal* 347.

reasonably possible, while taking a strict approach to any exceptions from the accommodation duty.

B. What is a “Disability”?

All human rights statutes in Canada prohibit discrimination on the grounds of “disability” or “handicap”. The prohibition is also found in Section 15 of the *Canadian Charter of Rights and Freedoms*, which made Canada the first country in the world to include the protection of persons with disabilities in its constitution.

The terms “disability” and “handicap” have been given a broad meaning in Canadian law. (There is no difference in law in the legal meaning attached to these two terms). The leading definition of the terms within the context of human rights legislation is *Entrop v. Imperial Oil Ltd. (No. 6)*, where an Ontario Board of Inquiry defined “handicap” as:

...an illness, injury or disfigurement that creates a physical or mental impairment and thereby interferes with a person’s physical, psychological and/or social functioning.¹³

Put another way, a disability is the consequence of a disease, injury or condition that impairs one or more facets of a person’s ability to perform the daily functions of life. The impairment may be temporary, long-lasting or permanent. It may be an actual disability, or only one that is perceived as such in the eyes of others, or even an impairment that one used to have. While many disabilities are beyond the employee’s control, an impairment may have a quasi-voluntary aspect to it, such as alcoholism, or drug or nicotine addiction.

¹³ (1995), 23 C.H.R.R. D/196, uph’d (1998), 98 C.L.L.C. 230-012 (Ont. Div. Ct.); uph’d in part (2000), 00 C.L.L.C. 23-037 (Ont. C.A.). The Ontario Court of Appeal decision did not disturb the Board of Inquiry’s definition of disability.

The thrust of the contemporary legal approach towards disability is to separate the truly disabling features of a person's impairment from the unnecessary burdens sustained by discriminatory attitudes, laws, practices, and structural barriers. In other words, a person with a disability should be assessed in light of their own true abilities, and not by the filter of our own prejudices, assumptions, stigmas and misunderstandings of their impairment. The Supreme Court of Canada, in *Montreal (City)*,¹⁴ has accepted the social critique of our traditional attitudes towards disability because they locate the problem of disablement solely within the domain of the person with a disability, and thereby ignore the significant role played by society in constructing mutable barriers in the workplace and other environments. In its judgement, the Court urged a broad definition of disability, and directed that it must take into account the social context of the impairment:

The ground "handicap" must not be confined within a narrow definition that leaves no room for flexibility. Instead, courts should adopt a multi-dimensional approach that considers the socio-political dimension of "handicap". The emphasis is on human dignity, respect and the right to equality rather than merely on the bio-medical condition. A handicap may be real or perceived, and a person may have no limitations in everyday activities other than those created by prejudice and stereotypes. Courts will, therefore have to consider not only an individual's biomedical condition, but also the circumstances in which a distinction is made.¹⁵

The courts, human rights tribunals and labour arbitration boards have placed a wide number of impairments under the legal definition of "disability" or "handicap" over the past 20 years. All of these conditions may have to be accommodated, depending on the employee's specific degree of impairment and the requirements of the workplace. These have included:

- Obesity¹⁶
- Height¹⁷
- HIV and AIDS¹⁸

¹⁴ *Supra*, note 48.

¹⁵ *Ibid*, para. 77.

¹⁶ *Rogal v. Dalgliesh* (2000), 37 C.H.R.R. D/178 (B.C.H.R.T.); *Hamlyn v. Cominco Ltd.* (1989), 11 C.H.R.R. D/333 (B.C.C.H.R.)

¹⁷ *Fiset v. Gamble* (1992), 18 C.H.R.R. D/81 (B.C.C.H.R.).

¹⁸ *Thwaites v. Canada (Armed Forces)* (1993), 19 C.H.R.R. D/259, uph'd (1994), 21 C.H.R.R. D/224 (F.C., T.D.).

- Depression¹⁹
- Heart attack/heart condition²⁰
- Alcoholism²¹
- Hypertension²²
- Drug Dependence²³
- Hysterectomy²⁴
- Colour Blindness²⁵
- Speech Impediment²⁶
- Broken Foot²⁷
- Knee Pain²⁸
- Panic Attacks,²⁹ and
- Dyslexia³⁰
- Stress³¹
- Tobacco addiction³²
- Fear of flying³³
- among many others.

A finding that an impairing condition amounts to a disability or a handicap is the legal pre-condition to accessing the duty to accommodation. If a complainant is not found to be disabled, or perceived to be disabled, then a tribunal or arbitration board will not find that discrimination has occurred, and the employer's (and, possibility, a union's) obligation to accommodate is not triggered.³⁴ In *C.M. v. Norske*

¹⁹ *University of British Columbia v. Berg*, [1993] 2 S.C.R. 353.

²⁰ *Re Mains Ouvertes-Open Hands Inc.* (2000), 86 L.A.C. (4th) 175 (Weatherill); *Berry v. Farm Meats Canada Ltd.* (1999), 38 C.H.R.R. D/271 (Alta. H.R.P.).

²¹ *Handfield v. Board of School Trustees, School District # 26* (1995), 25 C.H.R.R. D/452 (B.C.H.R.C.).

²² *Horton v. Niagara (Regional Municipality)* (1987), 9 C.H.R.R. D/4611 (Ont. Bd. Inq.).

²³ *Canadian Civil Liberties Association v. Toronto Dominion Bank* (1998), 32 C.H.R.R. D/373 (F.C.A.).

²⁴ *Wilson v. Douglas Care Manor Ltd.* (1992), 21 C.H.R.R. D/74 (B.C.C.H.R.).

²⁵ *Bicknell v. Air Canada* (1984), 5 C.H.R.R. D/1992 (Can. Trib.).

²⁶ *O'Connor v. Town Taxi (1987) Ltd.* (2000), B.C.H.R.T. 9; *Matthews v. Memorial University of Newfoundland* (1991), 15 C.H.R.R. D/399 (Nfld. Bd. Inq.), uph'd 22 C.H.R.R. D/384 (Nfld. S.C.).

²⁷ *Clarke v. Country Garden Florists* (1996), 26 C.H.R.R. D/24 (Nfld. Bd. Inq.).

²⁸ *Boyce v. City of Westminister* (1994), 24 C.H.R.R. D/441 (B.C.C.H.R.).

²⁹ *Cameron v. Fletcher Challenge Canada Ltd.* (1995), 24 C.H.R.R. D/506 (B.C.C.H.R.).

³⁰ *Green v. Public Service Commission of Canada* (1998), 34 C.H.R.R. D/166 (C.H.R.T.), upheld (2000), 38 C.H.R.R. D/1 (F.C.T.D.); *Bigonessse v. Ecole Secondaire du Mont-Bruno* (1996), 30 C.H.R.R. D/61 (Que. Trib.).

³¹ *Re Sault Area Hospitals* (2001), 94 L.A.C. (4th) 230 (Whitaker).

³² *Cominco Ltd. v. U.S.W.A., Local 9705* [2000] B.C.C.A.A.A. No. 62 (Larson).

³³ *NAV Canada v. I.B.E.W.*, [2001] C.L.A.D. No. 497 (Chertkow).

³⁴ *Evans v. Health Care Corp of St. John's* (2000), C.H.R.R. Doc. 00-175e (Nfld. H.R.C.).

Canada,³⁵ a dock worker was caught smoking marijuana on the job and subsequently dismissed pursuant to a company policy on drug and alcohol use at work. The British Columbia Human Rights Tribunal did not find a valid claim for discrimination, ruling that there was no evidence that the dismissed dock worker had a disability, or was perceived by his employer to have one.

Other conditions may not amount to a disability. In *Re Provincial Health Authorities of Alberta*,³⁶ Arbitrator Moreau stated that “fatigue” was not a sickness or disability, even if a medical certificate had been produced by the employees. Simply being tired because of a long shift the work day before, without any underlying medical basis, would not qualify the employees for sick leave.

C. Undue Hardship: What is it?

An employer and/or a union are required by law to accommodate an employee, unless the required accommodation would result in undue hardship to the employer and/or the union. The Supreme Court of Canada, in *Central Alberta Dairy Pool*³⁷ and *Renaud*,³⁸ laid out the important aspects of the “undue hardship” test.

In *Central Alberta Dairy Pool*, the Supreme Court developed a non-exhaustive list of six factors that it said were relevant to what constitutes “undue hardship”.³⁹ They are:

- Financial cost
- Impact on a collective agreement

³⁵ (25 March 2002), (B.C.H.R.T.).

³⁶ (1998), 77 L.A.C. (4th) 170 (Moreau).

³⁷ *Supra*, note 47.

³⁸ *Supra*, note 47.

³⁹ Note that in Ontario, the *Human Rights Code*, in s. 17(2), lists only three factors that would amount to an undue hardship consideration: cost, health and safety requirements, and outside sources of funding. The Ontario Human Rights Commission states, in its Policy and Guidelines on Disability and the Duty to Accommodate (Toronto, OHRC, 2000), that there are “no other considerations, other than those that can be brought into those three standards” that can be properly considered under Ontario law (p. 27). However, labour arbitrators in Ontario have regularly relied upon the longer *Central Alberta Dairy Pool* list. This question remains to be resolved in law.

- Problems of employee morale
- Interchangeability of the work force and facilities
- Size of the employer's operations; and
- Safety

In addition to these six classic undue hardship factors, an unarticulated seventh factor now appears to be emerging: the legitimate operational requirements of a workplace. While labour arbitrators and human rights tribunals have not yet formalized this new factor, recent decisions indicate an allowance for undue hardship in the workplace that does not easily fit within the classic six factors.

A labour board or human rights tribunal that is applying these factors will balance them with the right of the employee seeking an accommodation to be free from discrimination. Rarely will all of these factors come into play in any one single case. While the Supreme Court itself did not lay out these undue hardship factors in any order of importance, it is clear from the subsequent caselaw that some of these factors have significantly more weight than others. Financial cost, safety, and the size of the employer's operations are frequently invoked by employers, and legal decision-makers have treated them with some consideration. Provisions of a collective agreement have been given an intermediate importance, as have the legitimate operational requirements of a workplace. Relatively little regard has been given to the defence of employee morale. The issue of the interchangeability of the workforce and operations has generally been subsumed within the size of the employer factor.

As noted earlier, the amount of hardship to satisfy the accommodation duty must be substantial. *Renaud* involved a case of religious accommodation, but the ruling applies equally to issues of disability. The Supreme Court emphasized that an accommodation request which involved some inconvenience or operational upset would be insufficient to meet the test. In *Renaud*, the Court said:

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...Minor interference or inconvenience is the price to be paid for religious freedom in a multicultural society.⁴⁰

The various factors have been commented upon in various accommodation decisions during the past 10 years:

Financial Cost:

This is the most common factor cited by an employer when raising an undue hardship defence. Cost is a factor very much tied to the size and viability of the enterprise. As with the other factors, the employer would have to prove that the cost would be substantial in order to be found to be “undue.” In *Quesnel v. London Educational Health Centre*,⁴¹ an Ontario Board of Inquiry under the *Human Rights Code* stated that:

...cost would amount to undue hardship only if it would alter the *essential nature* or *substantially affect the viability* of the enterprise responsible for the accommodation.

The Supreme Court of Canada, in *Grismer v. British Columbia Superintendent of Motor Vehicles*⁴², has recently offered a more imprecise assessment of cost, but warned that legal decision-makers must be cautious about accepting a low threshold:

...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.⁴³

Furthermore, an employer seeking to argue that a proposed accommodation could not have been accomplished without substantial costs amounting to undue hardship must be prepared their case with detailed financial and accounting evidence. The Supreme Court of Canada stated in *Grismer* that “impressionistic evidence of increased expense will not generally suffice.”

⁴⁰ *Supra*, note 47, at para. 19.

⁴¹ (1995), 28 C.H.R.R. D/474 (Ont. Bd. Inq.).

⁴² *Supra*, note 48.

⁴³ *Ibid*, at para. 41.

Finally, factors such as the financial cost of methods of accommodation are to be applied with common sense and flexibility in the context of the factual situation of any particular case. The Supreme Court of Canada observed in *Chambly v. Bergevin*⁴⁴ that what may be entirely reasonable in times of prosperity could impose an unreasonable financial burden upon an employer in times of economic restraint.

In sum, costs will only amount to an undue hardship if they can be established to be:

- related to the accommodation;
- provable, and not based on surmise or speculation; and
- so substantial that they would either change the essential nature of the operation, or substantially impact upon its financial viability.

Safety:

The issues to examine here are whether the proposed accommodation would pose a safety risk to (i) other employees or to (ii) the employee seeking an accommodation. For example, if an employee whose religious beliefs compelled him to wear a beard, then an employee might be justified in removing him from his particular position in a sawmill because he was unable to shave his beard in order to wear a mandatory breathing apparatus in times of emergency. In such a case, the established danger would extend beyond the affected employee to other sawmill workers who relied upon this employee for assistance in emergencies. In such a case, where there would be a real and significant increase in the magnitude of risk, the undue hardship safety factor would be proven.⁴⁵

However, if the only safety issue is to an employee himself or herself, then the undue hardship threshold will be usually much higher. Suppose an employee could not wear a hard hat on a construction site for religious reasons. This employee understood and accepted the small amount of risk involved, and there was no safety risk to other employees. In such a case, the likelihood of the employer establishing an undue hardship

⁴⁴ [1994] 2 S.C.R. 525, at p. 546. Also see *Meiorin, supra*, note 4, at para. 63.

⁴⁵ *Pannu v. Skeena Cellulose Inc.*, [2000] B.C.H.R.T.D. No. 56.

would be remote.⁴⁶

These considerations are expressed in the 2000 accommodation guidelines issued by the Ontario Human Rights Commission. In these guidelines, the Commission states the factors it considers relevant to the health and safety risk:

- The willingness of a person with a disability to assume the risk in circumstances where the risk is to his or her own health or safety;
- Whether the modification or waiving of the requirement is reasonably likely to result in a serious risk to the health or safety of others;
- The other types of risk legally tolerated at the place of work; and
- The types of risks tolerated within society as a whole.

The Supreme Court in *Meiorin* and *Grismer* clearly indicated that zero-tolerance safety rules, while defensible from a purposive point of view, may fail the accommodation duty if they do not build in concepts of equality. It warned that such standards cannot be inflexibly or blindly applied. In the two decisions, agencies of the British Columbia government had consulted with external technical experts to develop new standards for forest fire fighting (*Meiorin*) and for highway traffic safety (*Grismer*). Yet, in neither case did the government agency nor the technical experts truly consider ways to ensure that disadvantaged persons were not disproportionately affected by the standards, even while maintaining reasonable safety standards. The Court ruled that, when developing and applying safety standards, employers and institutions must accept that some moderate level of risk might be reasonably necessary in order to ensure the success of an accommodation. As well, employers must present “cogent” evidence to establish to safety argument, because “anecdotal or impressionistic evidence” concerning the magnitude of risk will invariably be insufficient.⁴⁷

Size of the Operation

The larger the operation, the more likely it is that it can afford to permit a wider range of accommodations for an employee with a disability. What may amount to a prohibitively expensive or disruptive accommodation for a small workplace may be found to be entirely affordable or doable for a larger one. In *Chambly, Commission scolaire regionale v. Bergevin*, the Supreme Court of Canada ruled that:

⁴⁶ See the remarks of Madame Justice Wilson in *Alberta Human Rights Commission v. Central Alberta Dairy Pool*, *supra*, note 47, regarding the Supreme Court of Canada’s re-appraisal of its earlier decision in *Canadian National Railway Co. v. Canada (Human Rights Commission)*, [1987] 1 S.C.R. 1114 (“Bhinder”).

⁴⁷ For a creative application of the new safety standard, see *Shuswap Lake General Hospital v. B.C.N.U.*, [2002] B.C.C.A.A.A. No. 21 (Gordon).

...in a large concern, it may be a relatively easy matter to replace one employee with another. In a small operation replacement may place an unreasonable or unacceptable burden on the employer.⁴⁸

Interchangeability of the Workforce and Facilities

This factor relates to the flexibility of the operations. The board or court reviewing the accommodation dispute is to ask: are the workforce and/or facilities large enough or complex enough or adaptable enough to be able to implement (for example) a flexible work schedule or a light-duty work load or a re-bundling of work assignments, without undue hardship? This factor is frequently linked to the size of the operations, since many larger workplaces would have the variety of jobs and classifications to be able to create flexible accommodations for particular needs.

Provisions of a Collective Agreement:

A viable accommodation can override the provisions of a collective agreement, unless the proposed accommodation would *significantly* interfere with the rights of other employees. However, recent rulings have said that, before trumping a collective agreement, other less intrusive accommodations must be investigated first by the employer.

Only when no other appropriate accommodation is possible should a proposal that would interfere with collective agreement rights be adopted. Even then, a proposed accommodation that would cause the loss of another employee's job (i.e., bumping a senior employee out of a job), or granting super-seniority to an accommodated employee (i.e., red-lettering her or him, so that he or she couldn't be bumped) would amount to an undue hardship because of its impact upon the job interests of other employees.

In *Renaud*, the Supreme Court stated that:

The employer must establish that actual interference with the rights of other employees, which is not trivial but *substantial*, will result from the adoption of the accommodating measures... *While the provisions of a collective agreement cannot absolve the parties from the duty to accommodate, the effect of the agreement is relevant in assessing the degree of hardship occasioned by interference with the terms thereof.* Substantial departure from the normal operation of the conditions and terms of employment in the collective agreement may constitute undue interference in the operation of the employer's business.⁴⁹

[Italics added]

Seniority rights have been the biggest area of friction when accommodation proposals run up against negotiated provisions in a collective agreement. The emerging rules on reconciling this tension state that:

⁴⁸ [1994] 2 S.C.R. 525, at p. 546.

⁴⁹ *Supra*, note 47, at para. 20.

- Collective agreement rights are important, and accommodation proposals that do not interfere with bargained entitlements must be exhaustively explored first.
- Significant job rights – such as an incumbent’s job position – are not to be interfered with by an accommodation. This would amount to an undue hardship.
- Less important job entitlements, where no actual loss of a position is involved, would be eligible candidates for an accommodation. An example would be a posted vacancy. Here, the interference with collective agreement rights, while real, would not be seen as significant, because no incumbent would be displaced from his or her actual job.

The Legitimate Operational Requirements of a Workplace

While not yet a clearly stated and defined undue hardship factor, the legitimate operational requirements of a workplace has been accepted by a number of recent arbitration decisions. For example, several recent labour arbitration decisions have indicated that an employer which has attempted to accommodate an employee with a serious substance-abuse problem has satisfied the undue hardship threshold where the employee has made several unsuccessful attempts to return to the workplace, and continued rehabilitation holds no assurance of a future success.⁵⁰ Similarly, an employer is not required to accommodate an employee request for a significant number of paid religious holidays that exceeds the standard Christian holidays bargained during collective negotiations.⁵¹ Nor is a large employer obligated to continue to employ an employee with depression whose illness had resulted in frequent and unpredictable absences.⁵² In these cases, the cited undue hardship does not fall within cost or safety or any of the other classic factors. While this inchoate factor remains vague and imprecise, which increases the possibility of its misuse, arbitrators and the courts have expressed a functional need to find a place for it within the accommodation analysis.

Employee Morale

⁵⁰ *Re International Forest Products Ltd.* (2001), 101 L.A.C. (4th) 111 (Munroe); *Re Uniroyal Goodrich Canada Inc.* (1999), 79 L.A.C. (4th) 129 (Knopf); *Re Toronto District School Board* (1999), 79 L.A.C. (4th) 365 (Knopf).

⁵¹ *Ontario (Ministry of Community and Social Services) v. O.P.S.E.U.* (2000), 50 O.R. (3^d) 560 (C.A.).

⁵² *C.U.P.W. v. Canada Post Corp.* [2001] B.C.J. No. 680 (C.A.).

The Supreme Court in *Renaud* said that, while the impact of a proposed accommodation on other employees must be a consideration in determining whether undue hardship exists, some caution and care must be applied with this factor. The Court clearly distinguished between concerns over legitimate rights (i.e. protection of seniority) and concerns based on stereotypical or discriminatory reactions (i.e. an unwillingness to work alongside a person with a disability, without seeking to understand the true abilities of the person). It stated that:

The reaction of employees may be a factor in deciding whether accommodation measures would constitute undue interference in the operation of the employer's business. In *Central Alberta Dairy Pool*, Wilson J. referred to employee morale as one of the factors to be taken into account. It is a factor that must be applied with caution. 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.⁵³

The concerns raised by the Supreme Court over the potential misapplication of the employee morale defence have significantly restricted its subsequent use as a serious undue hardship factor. In *Meiorin*, the Court insisted that "...the attitudes of those who seek to maintain a discriminatory practice cannot be reconciled" with human rights legislation.⁵⁴

II The Employer's Duty to Accommodate

A. The Obligations on the Employer

The multifold ways that the Canadian workplace has been transformed by the accommodation duty is illustrated by the range of new legal responsibilities now resting on an employer's shoulders that were virtually non-existent only fifteen years ago. Before the arrival of the duty in Canadian law, a physical or mental disability would often mean the end not only of an employee's employment, but frequently the end of his or her employability. Now, the upshot of the accommodation duty has transformed the practice of

⁵³ *Supra*, note 47, at para. 30.

⁵⁴ *Supra*, note 48, at para. 80. Also see *Chambly*, *supra*, note 86.

disability management, and increased the presence and duration of employees with disabilities in the workplace.

The employer bears the legal responsibility to initiate the process of accommodation. The Canadian Human Rights Tribunal has said that, at the very least, this involves:

...an examination of the employer's current medical condition, the prognosis for recovery and the employee's capabilities for alternative work.⁵⁵

The application of the duty has been regularly employed by arbitrators and human rights tribunals in a wide variety of disabilities and impairments. Where employers have not utilized sufficient creativity, investigation efforts, or co-operation in devising an accommodation, legal decision-makers have directed them to return to the disability management drawing board. In recent decisions, labour arbitrators and human rights tribunals have found inadequate accommodation attempts by employers in cases involving back injuries,⁵⁶ an employee whose sight impairment required an enlarged computer screen,⁵⁷ a neck injury to a meat plant worker,⁵⁸ municipal labourers who suffered from asymptomatic Crohn's disease and scoliosis,⁵⁹ a telephone customer service agent with voice box nodules that resulted in hoarseness,⁶⁰ a clerical employee with reactive depression,⁶¹ and prostrate problems that required an employee at a meat-packing plant to take frequent washroom breaks.⁶² As well, legal decision makers will look closely at an employer's undue hardship explanation, in order to determine whether its defence is persuasive or merely pre-textual.⁶³

Re-Bundling

⁵⁵ *Conte v. Rogers Cablesystems* (1999), 00 C.L.L.C. 230-005 (C.H.R.T.).

⁵⁶ *Wu v. Ellery Manufacturing*, 2000 B.C.H.R.T.D. 53; *Rozon v. Barry Marine*, 2000 B.C.H.R.T.D. 15; *Johnman v. Chillwack Furniture World Ltd.* (1999), 99 C.L.L.C. 230-016 (B.C.H.R.T.).

⁵⁷ *Knight v. Vancouver Ticket Centre Ltd.* (1998), 34 C.H.R.R. D/127 (B.C.H.R.T.).

⁵⁸ *Re Canada Safety Ltd.* (1998), 77 L.A.C. (4th) 152 (Tettensor).

⁵⁹ *Mercier c. Ville de Montréal* (1998), 33 C.H.R.R. D/149 (Que. C.A.) upheld [2000] 1 S.C.R. 665.

⁶⁰ *Conte v. Rogers Cablesystems Ltd.* (1999), 00 C.L.L.C. 230-005 (C.H.R.T.).

⁶¹ *Metsala v. Falconbridge Ltd.* (2001), 8 C.C.E.L. (3^d) 120 (Ont. Bd. Inq.).

⁶² *Re Maple Leaf Pork* (1999), 83 L.A.C. (4th) 78 (Beck).

⁶³ *Berry v. Farm Meats Canada Ltd.* (2000), 86 Alta. L.R. (3^d) 95 (Q.B.).

The considerable weight that the duty places upon the employer is demonstrated in a 1995 award from Alberta. In *Re Calgary District Hospital Group*⁶⁴, a nurse with a back-related injury was preparing to return to work. Her back injury had left her unable to perform several key aspects of her regular position, including the lifting and transferring of patients. The employer had determined that, because of her physical limitations, it was unable to place her into another nursing position. The union maintained that the hospital had not examined ways to re-arrange the nursing positions in order to find an accommodation.

The arbitration board agreed with the union. It found that, although the nurse was unable to perform the duties of any of the nursing positions as they were currently structured, the employer had not taken the additional step of determining whether any nursing position could be modified to accommodate her. In its award, the board said it is not sufficient for the employer to show that its employee could not perform any of the current job descriptions. It must also be able to show that the job descriptions cannot be altered without undue hardship:

The duty to accommodate requires more than determining that an employee cannot perform *existing* jobs...Having determined that the Grievor could not perform any existing job, the employer was obligated to turn its attention to whether, and in what manner, existing nursing jobs could have been *adjusted, modified or adapted* – short of undue hardship to the hospital – in order to enable the Grievor to return to work despite her physical limitations.⁶⁵

[Italics added]

As part of the remedy, the board ordered the hospital to “...conduct a thorough examination of its work place in order to ascertain how, without incurring undue hardship, it can adapt or modify a nursing job (or jobs) so that the Grievor’s physical disability can be accommodated.”⁶⁶

⁶⁴ (1995), 41 L.A.C. (4th) 319 (Ponak).

⁶⁵ *Ibid*, at p. 326.

⁶⁶ *Ibid*, at p. 327. Also see *Re Canada Post (Milligan)* (1994), 38 L.A.C. (4th) 1 (M. Picher); and *Re York County Hospital* (1992), 26 L.A.C. (4th) 384 (Watters) (“If the duty to secure light work was dependent on existing vacancies, the duty to accommodate would be largely illusory, and would clearly not be in accord with the requirements of the *Human Rights Code*.”).

Other recent labour arbitration awards have reinforced this point. In *Re Greater Niagara General Hospital*,⁶⁷ the arbitration board ordered the employer to re-examine existing positions in a nursing unit to determine if they could be re-structured into a new “bundle of duties” that would allow the grievor, a nurse, to work within the limitations of her permanent back injury. That is, the hospital was required to determine if those lighter duties performed by all nurses in the unit could be re-assembled into a specific light-duty position for the grievor. As the board acknowledged, this form of accommodation could only work in a larger workplace, where there are enough employees to allow such a re-bundling and, yet, not unduly burden these other employees with only heavy tasks in their own re-assembled positions. And in *Re Community Lifecare Inc.*,⁶⁸ a health care aide in a nursing home developed a bad back and required a permanent light duty position. The arbitrator accepted the prevailing principle that an employee seeking an accommodation position must be able to perform the essential aspects of the job. On the facts of the case, he found that the employer could have re-bundled the duties from various departments into a productive and permanent light-duty position, but had not even considered the possibility. As well, he noted that the nursing home had not submitted any evidence to demonstrate the financial impact of the accommodation.⁶⁹

As part of the re-bundling requirement, employers must be prepared to apply various workplace standards flexibly when faced with an accommodation request. Maintaining that *all* employees must be able to perform *all* functions of an assigned job has resulted in employers being found in breach of their accommodation obligations. In *Re Canada Safeway*,⁷⁰ the employer had adopted a requirement that a cashier must be able to perform every aspect of the job description as a pre-condition. An employee who developed a repetitive strain injury and subsequently sought to return to work after recuperation was required by her employer to pass tests demonstrating that she could meet the full requirements of the cashier position, without modifications. Arbitrator Sims ruled that the employer gave insufficient thought to

⁶⁷ (1995), 50 L.A.C. (4th) 34 (H.D. Brown).

⁶⁸ (2001), 101 L.A.C. (4th) 87 (Howe).

⁶⁹ Also see *Irvine v. Canadian Armed Forces* (2001), C.H.R.R. Doc. 01-230 (C.H.R.T.); and *Re Canada Safeway Ltd.* (1998), 77 L.A.C. (4th) 152 (Tettensor).

⁷⁰ (2000), 89 L.A.C. (4th) 312 (Sims). Also see *Rozon v. Barry*, [2000] B.C.H.R.T.D. No. 18.

reconfiguring the job duties, such as re-bundling the work, retraining the employee, introducing job aids, or searching for productive alternative duties.

Larger Workplaces

The particular obligation on employers who operate larger workplaces is illustrated in *Re T.T.C. Bottling Ltd.*⁷¹ The employee, a quality control inspector who worked with acids and caustics, suffered from severe epileptic seizures. Several seizures had occurred in close succession at work. With the available medical evidence indicating that future severe seizures were unavoidable, the employer terminated the employee for safety reasons. The arbitrator accepted that the continued employment of the employee in his regular position created an unacceptable safety risk to the grievor and to other employees as well. Nevertheless, the arbitrator was satisfied that the size of the operations would allow the grievor to be accommodated in a different, redesigned job, with a regular rather than a rotating shift, and special training arrangements for other employees to work around the employee, among other conditions.

Training

The employer's obligation to accommodate includes the provision of training to the employee, provided that the costs of such training would not amount to an undue hardship and the training would fit within the operational requirements of the workplace. In *Re York County Hospital*,⁷² the grievor, a nurse, was unable to return to her full nursing duties after suffering a work-related injury. The employer wanted to place her in a part-time clerical position, but the grievor aspired to become an educator with the hospital, which would have required training. The arbitration board ruled in favour of the union, deciding that the clerical position was not the only available accommodation:

⁷¹ (1993), 32 L.A.C. (4th) 73 (Christie).

⁷² (1992), 26 L.A.C. (4th) 384 (Watters).

[W]e accept that the grievor received very little, if any, training. In retrospect, and in view of the grievor's present career goals, it would have been prudent for the employer to have arranged for training in the education department.⁷³

Safety Standards

The employer's decision to exclude an employee or a job applicant from a job because of a health or safety risk must be based upon a medically or technically verifiable standard that is unable to yield to an accommodation. Stringent tests, even if they are introduced for the best of reasons and bear the endorsement of an expert, may nevertheless fail the accommodation test if the circumstances establish that they will not permit a tolerable degree of risk that would otherwise allow an employee with a disability to perform the job. In *Kearsley v. City of St. Catharines*,⁷⁴ an applicant for a fire-fighter's position passed the required physical fitness tests, but was discovered to have an asymptomatic heart condition (atrial fibrillation) which posed a very small risk of a stroke. Consequently, the municipality declined to hire him. An Ontario human rights board of inquiry upheld the job applicant's complaint, ruling that the preferred medical evidence established that the increased risk of stroke in the applicant's case was insignificant and irrelevant to the physical demands of a fire-fighter's position.

Independent Assessment

Aside from training, the employer is also responsible for conducting its own, independent assessment of an employee's accommodation requirements and whether its employee has the capacity to resume work. Accepting the conclusions of another organization or agency, without making its own determinations, can amount to a breach of the duty. In *Re Air Canada*,⁷⁵ the employer relied exclusively on the medical reports produced by the Workers' Compensation Board in deciding that it was unable to accommodate the

⁷³ *Ibid*, at p. 405. Also see *Re Exchange-A-Blade Ltd.*, [2000] B.C.C.A.A.A. No. 343; and *Re Metropolitan Toronto Reference Library Board* (1995), 46 L.A.C. (4th) 155 (Burkett).

⁷⁴ (2002), C.H.R.R. Doc. 02-052 (Ont. Bd. Inq.).

⁷⁵ (1998), 74 L.A.C. (4th) 233 (Dissanayake).

employee. It assumed that, as long as it complied with the WCB's findings, it was also fulfilling the duty to accommodate. The arbitrator upheld the grievance, holding that the WCB has no responsibility to comply with the *Human Rights Code*. He ruled that the employer had failed to turn its own mind to address how the grievor's disability might be accommodated. This award follows two earlier decisions, *Re Pharma Plus*⁷⁶ and *Re Canadian Pacific*,⁷⁷ where the arbitrators held that the WCB cannot be the final arbiter of the employer's duty to accommodate an employee with a disability under the collective agreement and the applicable human rights legislation.

Inconsistent Standards

An employer's failure to develop its own standards on medical absenteeism, or to create policies on physical requirements, can defeat its claim that it reasonably accommodated an employee. In *Mills v. Via Rail Canada Inc.*,⁷⁸ the employer fired a cook after he failed to maintain average attendance levels. The human rights tribunal ruled that Via Rail discriminated against the cook, who had ongoing back problems, because the employer applied inconsistent or makeshift standards to judge his fitness to work. For example, the tribunal found that Via Rail had no physical standards for on-board train jobs against which to measure his ability. As well, it had not established any standards about how long an employee could be absent before the efficient performance of on-board train work suffered. Without satisfactory evidence on its policies and standards, Via was unable to defend the termination with a *bona fide* occupational requirement.

Temporary Disability

⁷⁶ (1993), 33 L.A.C. (4th) 1 (Mitchnick).

⁷⁷ (1996), 57 L.A.C. (4th) 129 (M. Picher).

⁷⁸ (1999), 99 C.L.L.C. 230-016 (C.H.R.T.).

The duty to accommodate applies in virtually all cases involving a disability even where the impairment is temporary or of short duration. The basis of this principle is generally found in the broad definition given to the term “disability” in the human rights legislation. In Ontario, for example, ‘disability’ is defined as “any degree of physical disability, infirmity, malformation or disfigurement”.⁷⁹ On this basis, an arbitrator has found a disability to encompass a broad range of impairments, including an injury that caused only the loss of a single day of work.⁸⁰ In Newfoundland, where the *Human Rights Code* contains a virtually identical definition,⁸¹ a human rights board of inquiry has ruled that a broken foot was a disability, and the *Code* did not restrict what can be considered a physical disability on the basis of whether the impairment is temporary or permanent.⁸² Similarly, in Alberta, a human rights panel has stated that an episode of appendicitis, while involving only a short hospitalization and recovery, amounted to a disability under the *Human Rights, Citizenship and Multiculturalism Act*,⁸³ and dismissed a preliminary argument going to jurisdiction.⁸⁴ The guiding principle is expressed in *Cominco Ltd. v. U.S.W.A., Local 9705*.⁸⁵

...it seems to me that it is inappropriate to determine whether a person may be disabled by reference to whether the condition is temporary or permanent. As a pure matter of principle, a person can be disabled for even a relatively short period of time and then fully recover. Subject to issues of substance, the issue should turn, not on whether the disablement is temporary or permanent, but the degree to which normal function is impaired.⁸⁶

Earlier caselaw which had excluded a temporary condition from the protection of human rights legislation no longer appears to be accepted as good law.⁸⁷

Pregnancy

⁷⁹ *Human Rights Code*, R.S.O. 1990, c. H.19, as amended, s. 10.

⁸⁰ *Re Canadian Waste Services Inc.* (2000), 91 L.A.C. (4th) 320 (Lynk).

⁸¹ S.N.L. 1990 c.H-14., s. 2(1).

⁸² *Clarke v. Country Garden Florists* (1996), 26 C.H.R.R. D/339.

⁸³ R.S.A. 1980, C. h-11.7, as amended, s. 38(1)(i).

⁸⁴ *Masters v. Willow Butte Cattle Co. Ltd.* (2002), C.H.R.R. Doc. 02-059.

⁸⁵ [2000] B.C.C.A.A.A. No. 62 (Larson).

⁸⁶ *Ibid*, at para. 181.

⁸⁷ *Quimette v. Lily Cups Ltd.* (1990), 12 C.H.R.R. D/19 (Ont. Bd. Inq.).

Pregnant employees are clearly entitled to request an accommodation short of undue hardship. This was the focus of the decision in *Re Dominion Colour Corp.*,⁸⁸ where an employee in a lead oxide processing plant was laid off when the employer claimed that it could not find a way to accommodate her inability to be exposed to lead during her pregnancy. Arbitrator Ellis noted that pregnancy raises different accommodation considerations from cases involving either permanent or temporary disabilities. For example, the length of time required to accommodate a pregnant employee – roughly eight months – is longer than most temporary disabilities. Furthermore, the physical work capacity of a pregnant employee often declines over an eight-month period, followed by an extended period off work. Nonetheless, while the factors determining undue hardship may be differently applied in pregnancy, the principle remains the same: every effort to find a reasonable accommodation must be made. In *Dominion Colour*, the arbitrator found that the employer had failed to turn its mind to other potential accommodations, such as placing the pregnant employee in another of its plants, or re-assigning her to low-lead areas in the home plant.⁸⁹

Ongoing Obligation to Accommodate

The employer's duty to accommodate includes an ongoing obligation to reassess opportunities to accommodate as employment circumstances change. These changes would include an improvement in an employee's health, resulting in an unfeasible accommodation now becoming viable. Or it could include an increase in the staffing level of a workplace, meaning that an employer may no longer incur undue hardship by providing an accommodation. In *Jeppesen v. Ancaster*,⁹⁰ an applicant for a municipal fire fighter's job

⁸⁸ (1999), 83 L.A.C. (4th) 330 (Ellis).

⁸⁹ Also see *O.P.S.E.U. v. Hotel Dieu Hospital*, [2001] O.L.A.A. No. 659 (Chapman), where a hospital's refusal to allow a nurse with lifting restrictions during pregnancy to return to work was struck down because the hospital did not turn its mind to re-bundling and adapting the present load of tasks; *Gareau v. Lawrence* (2001), 2001 B.C.H.R.T.D. No. 11, where an employer's failure to provide objective evidence to justify its safety concerns regarding a pregnant employee working as a pub server defeated its undue hardship argument; and *Mazuelos v. Clark*, [2000] B.C.H.R.T.D. No. 1, where the employer of a live-in nanny made no serious efforts to objectively determine if the employee could perform the work once she disclosed that she was pregnant.

⁹⁰ (2001), 2001 C.L.L.C. 145,103 (Ont. Bd. Inq.).

was initially refused employment because of a visual disability. At the time, the municipal fire service provided both firefighting and ambulance services, and it required its employees to hold separate driver's licences to operate both ambulances and fire trucks. The applicant's visual disability meant that he was able to acquire a licence to drive a fire truck, but not an ambulance. However, when staffing levels increased, and more firefighter openings became available several months later, the applicant applied again. He requested an accommodation – to drive only a fire truck – which the firefighting service turned down. An Ontario human rights board of inquiry upheld the subsequent complaint, ruling that the employer had never specifically considered whether the hiring of new firefighters afforded it an opportunity to accommodate the applicant by hiring him to perform firefighting duties only.

B. Boundaries on the Employer's Duty to Accommodate

The duty to accommodate in Canadian labour law is not limitless. Arbitrators and the reviewing courts have recognized that accommodation always requires a balancing act between two underlying issues: the right of an employee with a disability to equal treatment, and the right of an employer to operate a productive workplace. The employer is not required to accommodate where undue hardship would result, nor is it obligated to create an unproductive position. In any permanent accommodation, an employee has to be able to perform the *essential* job duties of the existing, re-structured or newly-assigned position.⁹¹

This was illustrated in the 1997 decision of the Federal Court, Trial Division in *Holmes v. Attorney-General of Canada*.⁹² A pay clerk working for the federal government developed severe numbness and pain in her right shoulder, making it difficult to perform her duties. Other assignments as a receptionist and

⁹¹ *Re Stelco Inc. Hilton Works* (2001), 99 L.A.C. (4th) 230 (Carrier); *Re Boise Cascade Canada Ltd.* (1994), 41 L.A.C. (4th) 291 (Palmer); *Re Toronto Board of Education* (1994), 39 L.A.C. (4th) 137 (Brent); *Re Pharma Plus Drugmart Ltd.* (1993), 33 L.A.C. (4th) 1 (Mitchnick).

⁹² (1997), 97 C.L.L.C. 230-022 (F.C. T.D.), upheld on appeal, (1999) 42 C.C.E.L. (2^d) 165 (F.C.A.).

a special project clerk proved to be too demanding for her physical limitations. All of the other positions that the employer identified within her skill level required the use of the same, damaged muscles. It eventually determined that she could not perform the essential components of her job duties, nor could she be retrained. Consequently, the employer released her. She filed a complaint with the Canadian Human Rights Commission, which found that the employer had taken reasonable steps to accommodate her, and declined to advance her complaint to a human rights tribunal. On judicial review of the Commission's decision, the Federal Court, Trial Division upheld the denial of the complaint. In its award, the Court stated that the undue hardship standard:

...does not require that an employer act as a placement officer or create a new position expressly for the disabled employee comprising new duties that were previously non-existent and that do not suit its need.⁹³

The Federal Court went on to say:

The employer's obligation is to make a *genuine* effort to accommodate an employee, efforts that are consistent with the type of work for which the worker was hired.⁹⁴

Other recent decisions have illustrated the underlying rule of preserving the employer's ability to operate a productive workplace. In *Re Greater Niagara General Hospital*,⁹⁵ the arbitration board ruled that, while the employer had to consider the accommodation of an employee with a disability in another position other than her or his former duties, this did not entail the creation of an entirely new position. Similarly, in *Re Maple Leaf Foods Inc.*,⁹⁶ it was held that, while employers must try to accommodate employees, this does not mean the work place must be fundamentally changed. The employer is not required to maintain a disabled employee in a position that is not useful or productive in the context of its operations. And in *Glass v. Green River Log Sales (1996) Ltd.*,⁹⁷ the British Columbia Human Rights Tribunal ruled that an employer is not required to provide an employee with a job that consisted only of light duties where the

⁹³ *Ibid*, at p. 145,200.

⁹⁴ *Ibid*, at p. 145,200-1. (Emphasis in original).

⁹⁵ (1995), 50 L.A.C. (4th) 34 (H.D. Brown).

⁹⁶ (1996), 60 L.A.C. (4th) 146 (Kirkwood).

⁹⁷ [2000] B.C.H.R.T.D. No. 50.

medical evidence, the physical demands of the work, and the limited number of available jobs did not permit such an accommodation.

Arbitrator Allan Hope in *Re Alcan Smelters and Chemicals Ltd.*⁹⁸ clarified the right of an employer to discharge an employee for innocent absenteeism, in light of the accommodation duty. He stated that an employer is entitled to terminate an employee where the evidence demonstrates that, at the time of her or his dismissal, the employee was: (i) unable to meet her or his employment obligations; (ii) unable to offer any persuasive medical assurance that s/he would be able to meet these obligations at some predictable point in the near future; and (iii) no accommodation short of undue hardship was possible in any other position in the employer's operations. This is a re-statement of the traditional arbitral rule on innocent absenteeism, which had held, before the emergence of the duty, that an employer could dismiss an employee if the first two conditions were met.⁹⁹

Similarly, in *Re Ontario English Catholic Teachers' Association*,¹⁰⁰ the issue was whether the employer could place the employee in a lower-paid position as part of the accommodation. Arbitrator Burkett decided that an employee who cannot perform the essential duties of his or her job, even with accommodation, can be properly placed into a lower-classified and more poorly paid position, as long as it is (i) consistent with the employee's medical restrictions, (ii) meets the employer's operational needs, and (iii) no other viable accommodation alternative is available. In *Re Pasteur Merieux Connaught Canada*,¹⁰¹ it was ruled that the employer was justified in terminating an employee whose absenteeism rate was high, even though the employer acknowledged that the absences were the result of a series of

⁹⁸ (1996), 55 L.A.C. (4th) 261 (Hope).

⁹⁹ D. Brown & D. Beatty, *Canadian Labour Arbitration* (3d ed.) (Aurora, Canada Law Book, 1999 supp.), at 7:3210.

¹⁰⁰ (1996), 61 L.A.C. (4th) 109 (Burkett). Also see *Re Fenwick Automotive* (1999), 84 L.A.C. (4th) 271 (Kirkwood), where an arbitrator ruled that an employer can legitimately place a pregnant employee into a lower-rated and lower-paying job as an accommodation, if, after exploring all other possibilities, that is the only viable option.

¹⁰¹ (1998), 75 L.A.C. (4th) 235 (Knopf).

legitimate accidents or injuries. Arbitrator Knopf stated that there was nothing on the evidence to indicate that the employer would be able to regularly attend in the future:

While there is no continuing disability or medical condition that would signal his inability to attend, his pattern of absences seems to be entrenched. The pattern has been too destructive to the employment relationship.¹⁰²

In *Quinsam Coal Corp. v. U.S.W.A., Local 9347*,¹⁰³ an employer had satisfied its accommodation duty regarding an employee who had been off work for over four years, and who had no reasonable medical prognosis of returning to productive work in the foreseeable future. And, in *Re Maple Leaf Meats*,¹⁰⁴ another case involving employees on long-term disability leave without foreseeable prospects for return, the arbitrator stated that:

While an employer has an obligation to accommodate such an employee to the point of undue hardship, where it is clear that no accommodation could possibly permit the employee to return to work, the set of obligations which attach to an employer under the *Code* do not prevent the discharge of an employee for innocent absenteeism.¹⁰⁵

What happens when an employee already in an accommodated position seeks an additional benefit, such as a promotion to a job vacancy that he or she lacks the qualifications for, or protection against lay-off? The guiding rule is that such an employee should not be in a worse position because of the disability, but nor should he or she be in a superior position to other employees. In *Re Northern Telephone Ltd.*,¹⁰⁶ the employee, who had a heart condition, had been placed in various accommodation positions following his return to work. He subsequently applied for a vacancy that required a specific college diploma that he did not have. The employer awarded the job to an outside applicant, and the employee grieved, arguing that the employer should have given him the position and then arranged the needed training. Arbitrator Herman dismissed the grievance, ruling that there was no evidence that the playing field for the employee was not level. The employee had already been accommodated, and there was nothing to have prevented him from

¹⁰² *Ibid*, at p. 255. But see *Mills v. Via Rail Canada Inc.* (1999), 99 C.L.L.C. 230-016 (C.H.R.T.).

¹⁰³ [2002] B.C.C.A.A.A. No. 88 (Ready).

¹⁰⁴ (2001), 98 L.A.C. (4th) 40 (Whitaker).

¹⁰⁵ *Ibid*, at p. 46.

¹⁰⁶ (2000), 90 L.A.C. (4th) 146 (Herman).

acquiring the additional training on his own, as other employees had done. “His disability did not preclude him from upgrading himself.” In *Re Boliden Westmin Resources Ltd.*,¹⁰⁷ Arbitrator Germaine dismissed a union grievance that had sought to retain accommodated employees on staff following an employee-wide lay-off. To have allowed the grievance, the arbitrator ruled, would have amounted to “an extraordinary sort of job tenure,” meaning that the employer could never lay off employees with disabilities. This, he wrote, would have extended the law beyond justifiable limits. And, in *Tozer v. British Columbia*,¹⁰⁸ an employer was not required to offer an auxiliary employee with a disability additional hours of work to obtain regular status, as that would amount to granting the employee an unjustified preferential entitlement.

Alcoholism has been commonly cited in the human rights and arbitration caselaw as a disability, and deserving of an accommodation. In general, the duty requires employers to permit employees with an alcohol abuse problem the opportunity to address their problem through rehabilitation and abstinence programs. However, where an employer has extended several chances to an employee to tackle his drinking problem, and the employee has dropped out of the rehab centres and shown no real appreciation of the depth of his problem, the employer’s accommodation duty will have been satisfied. In *Re Uniroyal Goodrich Canada Inc.*,¹⁰⁹ Arbitrator Knopf stated that alcoholism is a chronic disease that, while not curable, is certainly treated. Therefore, the issue is not blame and punishment, but whether (i) the employee has been given a reasonable opportunity to successfully deal with the alcoholism and (ii) the employer’s legitimate contractual expectations have been met. This requires examining whether (a) the grievor’s past record, and (b) his or her future prognosis indicates that a viable employment relationship can be re-established. On the evidence of this case, the Arbitrator found that the employer had gone to great lengths to accommodate the grievor, and he showed no substantive indication of past or future success.¹¹⁰

¹⁰⁷ (2000), 87 L.A.C. (4th) 321 (Germaine).

¹⁰⁸ [2000] B.C.H.R.T.D. No. 4.

¹⁰⁹ (1999), 79 L.A.C. (4th) 129 (Knopf).

¹¹⁰ Also see *Re International Forest Products Ltd.* (2001), 101 L.A.C. (4th) 111 (Munroe), where an employee’s repeated unsuccessful attempts at rehabilitation before his dismissal, his chronic absenteeism, and his unsafe work practices while in the workplace, made it impossible to further accommodate without undue hardship. In addition, see *Crouse v. Canadian Steamship Lines Inc.* (2001), C.H.R.R. Doc. 01-119

Employees with a long-term disability present the most challenging accommodation problems. But arbitrators in Canada have been clear that employers are not required to provide an accommodation to an employee who cannot perform the essential duties of an available position *and* whose disability offers no foreseeable prospect of improvement. In *Re Calgary Herald*,¹¹¹ a maintenance technician suffering from a chronic fatigue syndrome was unable to return to full-time work. The employer had arranged for the employee to work on modified duties on a part-time basis. He was unable to work beyond 3 ½ hours a day, or to train for another position; stress aggravated his condition; and he was unable to meet the physical requirements of pulling cable, an essential feature of his duties. The available medical evidence indicated that he would not be able to perform the duties of even a part-time maintenance technician on a reliable basis, and there was no reasonable likelihood of improvement. In dismissing the union grievance, the arbitration board held that:

...the duty to accommodate does not require an employer to create a new job or one that is not productive or one that has the core duties removed.¹¹²

Is an employer required to accommodate an employee whose disability has directly led to a major workplace incident? Arbitrator Owen Shime has recently said no. In *Re Toronto Transit Commission*,¹¹³ a bus driver consumed several beers shortly before resuming a shift. He subsequently drove the bus into the back of a garbage truck, injuring himself and several bus passengers. After the accident, the driver revealed that he was an alcoholic. While alcoholism is recognized as a handicap under the Ontario *Human Rights Code*,¹¹⁴ Arbitrator Shime nonetheless dismissed the driver's grievance. He ruled that the *Code* is not intended as a protective device for employees who commit major employment offences:

While there is an obligation, under the *Human Rights Code*, to accommodate employees who suffer from an illness, clearly such an accommodation does not mandate that such an employee be protected or be absolved from major employment offences merely because of that illness...The grievor,

(C.H.R.T.).

¹¹¹ (1995), 52 L.A.C. (4th) 393 (Tettensor).

¹¹² *Ibid*, at p. 408.

¹¹³ (1997), 72 L.A.C. (4th) 109 (Shime).

¹¹⁴ R.S.O. 1990, c. E-2.

because of his illness, cannot be placed in a better position than other employees who commit similar offences.¹¹⁵

Similarly, in *Re Fording Coal*,¹¹⁶ an employee who brought marijuana onto Company premises and tested positive for recent marijuana use had his termination upheld, despite a finding by the arbitrator that the employee was addicted to the drug. He ruled that the workplace, a mine, was safety-sensitive, and the zero-tolerance standard was reasonable in the circumstances.

In recent cases, arbitrators and tribunals have provided further examples of where the boundaries on accommodation lie. A Québec human rights tribunal in *Tremblay c. Abitibi-Price Inc.*¹¹⁷ ruled that a visual acuity standard for employees was justified, where the employer was able to prove a rational connection between the standard and the actual safety aspects of the job. In *Re Oxford County Board of Health*,¹¹⁸ an employee with a degenerative back disease was unlikely to be able to return to any form of gainful employment. Given that any reasonable accommodation would have to negate any requirement to attend work, the arbitration board found that the employer had satisfied the legal duty, and dismissed the grievance. And in *Coleman v. Manto Holdings Ltd.*,¹¹⁹ an employee who left work when she incurred a leg injury and acted as if she considered the employment relationship over (i.e., she had voluntarily turned in her keys and uniform) was not entitled to subsequently seek an accommodation from her former employer.

C. Some Specific Circumstances

(i) Automatic termination provisions

¹¹⁵ *Ibid*, at pp. 124-5.

¹¹⁶ (2001), 97 L.A.C. (4th) 289 (Devine).

¹¹⁷ (1997), 34 C.H.R.R. D/52 (Que. H.R.T.).

¹¹⁸ (1999), 81 L.A.C. (4th) 268 (Howe).

¹¹⁹ (1999), 35 C.H.R.R. D/508 (N.S. Bd. Inq.).

Are automatic termination provisions consistent with human rights legislation? This issue arises in situations where a collective agreement or an employment contract provision provides that an employee will lose her or his job, even if the reasons are non-blameworthy, should they be absent from work for a pre-established consecutive period of time (usually 12 or 24 months). (Invariably, the employee has suffered from a devastating illness or injury that has caused the extended absence from work.) The answer from arbitrators and the reviewing courts has been predominately “no”. These provisions have been regularly found to be a form of indirect discrimination (a workplace rule that is neutral on its face, but has a discriminatory effect), because they adversely affect persons with a disability.

In *Toronto Star v. CEP and Backhouse*,¹²⁰ the Ontario Court (General Division) ruled in 1997 on a judicial review of an arbitration award that an automatic termination provision (in this case, a two year clause) was ineffective as it pertained to employees with disabilities because it conflicted with the *Ontario Human Rights Code*. It noted that the provision made no reference as to whether the employee could perform any other job that might be available aside from her or his former position. Nor did it require the employer to consider whether any action short of termination was possible. The Court upheld the arbitrator’s ruling that the disabled employee had been treated differently than other employees, and that the difference was based solely upon his disability, a protected ground under the *Code*:

Those other employees are entitled to the benefit of the standard of “just cause” for termination, which entitles an employee to test the employer’s application of that standard at arbitration, bringing to bear all of the established principles and policies applicable to innocent absenteeism in general.

The Grievor, on the other hand, was subject to automatic termination due to his innocent absence as a result of a handicap. Accordingly, under the automatic termination provisions, he does not have the same right as other employees to challenge his termination within the standard of proper cause. In my view, that must be deemed unequal or different treatment from that of the majority of the bargaining unit employees with respect to his employment.¹²¹

¹²⁰ (1997), 143 D.L.R. (4th) 568 (Ont. Ct. Gen. Div.).

¹²¹ *Ibid*, at p. 145,127.

Similarly, in *Re Toronto Hospital*,¹²² the arbitration board nullified the effect of an automatic termination provision in circumstances involving an employee who was off work on a long-term basis with a disability.

In its decision, the board found that:

...the very reason why the grievor was absent, and thus the very reason why the grievor was subject to automatic termination under art. 10.05(h) is because she suffered a work-related injury. She was absent from work because she had a work-related injury. She was terminated because she was absent from work.¹²³

Arbitrators have cautioned employers against a wooden application of attendance policies. While they have stated that employers have a right to expect regular attendance from their employees as a condition of employment, the policies must not be applied in a manner that ignores the reasons for the absence. In a decision that mirrors the automatic termination cases, Arbitrator Dissanayake found in *Ontario (Ministry of Health) and O.P.S.E.U. (Martin)*¹²⁴ that the employer's consideration of attendance records in a job competition was discriminatory. The grievor had been found to be as qualified as the other candidates for the position, but the employer had disqualified him after looking at his employer attendance record. He had been off work for 19 days during the previous year, 17 days of which were the result of a compensable injury. The Ontario Grievance Settlement Board ruled that the attendance policy did not distinguish between workers' compensation absences and other types of absences, and the denial of the position to the grievor constituted direct discrimination on the basis of handicap.¹²⁵

This approach, however, is not without controversy. Several recent arbitration decisions by Arbitrator Solomatenko have held that a release from employment based upon an automatic termination clause, where the grievor was unable to perform the essential duties at the trigger moment of the clause, is valid. In *Re*

¹²² (1992), 31 L.A.C. (4th) 44 (P.C. Picher). Other early awards that ruled in the same manner include: *Ontario Nurses Association v. Etobicoke General Hospital* (1993), 14 O.R. (3d) 40 (Div. Ct.); *Re City of Stratford*, [1991] O.J. No. 620 (Ont. Ct., Gen. Div.), upholding (1990), 13 L.A.C. (4th) 1; *Re Glengarry Industries/Chromalox Components* (1989), 3 L.A.C. (4th) 326.

¹²³ *Ibid*, at p. 66.

¹²⁴ (1993), 31 L.A.C. (4th) 129 (Dissanayake).

¹²⁵ Also see *Re Hamilton Street Railway Co.* (1994), 41 L.A.C. (4th) 1 (Levinson).

Uniroyal Goodrich Canada Inc.,¹²⁶ the arbitrator disagreed with the trend expressed in *Re Toronto Hospital*, stating that:

The foundation of the company's case is that there is no longer an employment relationship because the grievor is not fulfilling his part of the employment contract which is to attend for work. In that context, there is no logic or reason to require the standard of just cause because it is simply inapplicable.¹²⁷

However, as the caselaw on this issue accumulates, the direction taken in *Re Uniroyal Goodrich* appears increasingly anomalous. The prevailing approach has been to strike down the mechanistic application of automatic termination provisions in disability cases, because they are deemed to treat employees with disabilities differently from other employees in the bargaining unit who have recourse to the grievance procedure to challenge a termination on 'just cause' grounds.¹²⁸

The current rule can be summarized as this: An employee who has been absent from work for a pre-established period of time (usually 12 or 24 months) because of a disability cannot be discharged, despite the time-limit provisions of the automatic termination clause, if: (i) the employee can be accommodated in another position where they can productively perform the essential aspects of the job; or (ii) the employee's absence has been caused by a disability and he or she can provide a persuasive medical prognosis that she or he has favourable prospects of returning to work in the foreseeable future. However, if neither of these terms can be satisfied, then the employer would normally have the right to invoke the automatic termination clause.

(ii) Accommodation and the Calculation of Seniority

¹²⁶ (1996), 60 L.A.C. (4th) 260 (Solomatenko). Also see *Re Bauer Inc.* (1999), 82 L.A.C. (4th) 263 (Solomatenko), and *Re Canada Packers* (1992), 28 L.A.C. (4th) 193 (Solomatenko).

¹²⁷ *Ibid*, at p. 269.

¹²⁸ The most recent reported decisions on automatic termination clauses have accepted the majority direction, and disagree with Arbitrator Solomatenko's approach: *Re JAV Residences* (2001), 96 L.A.C. (4th) 190 (Rose); and *Re Maple Leaf Meats Inc.* (2000), 89 L.A.C. (4th) 18 (Tims).

Recent decisions have grappled with the difficult balance between disability and seniority rights. On the one hand, the reviewing courts, labour arbitrators and human rights tribunals have all regularly ruled that a disabled employee must not be disadvantaged in the calculation of seniority because of her or his absence from work due to illness or injury. On the other hand, arbitrators have not generally granted ‘super-seniority’ rights to disabled employees, so as to allow them a greater claim to work than more senior employees. In other words, an employee with a disability must be accorded equal treatment despite her or his condition, not superior treatment because of the condition.

(a) Service Calculation and Indirect Discrimination

The law on the eligibility of an employee’s entitlement to accrue seniority rights while off work because of a disability has been largely settled. A number of decisions over the past five years by the courts, labour arbitrators and human rights tribunals have established that an employer policy or a collective agreement provision that denies or restricts an employee’s accumulation of seniority for this reason constitutes discrimination.

A number of earlier decisions ruled that work days lost because of a disability cannot adversely affect an employee’s benefit rights that accumulate with growing seniority. In *Re Riverdale Hospital*,¹²⁹ the grievor suffered a work-related injury and missed 9 weeks of work. The collective agreement stated that seniority would not accrue if the employee was on an unpaid leave for more than 30 consecutive calendar days. When the grievor returned to work, the employer informed him that his seniority date would be negatively adjusted by 38 calendar days as a result of his absence. Consequently, it took him an extra year of service to qualify for an additional week of vacation, and he grieved the employer’s application of the collective agreement provision.

¹²⁹ (1993), 39 L.A.C. (4th) 63 (Stewart).

The arbitration board applied its authority to interpret the Ontario *Human Rights Code*, as provided for in section 48(12)(j) of the *Labour Relations Act, 1995*.¹³⁰ After examining the seniority provisions of the collective agreement, it concluded that the denial of seniority accumulation while off work for disability reasons was a form of indirect discrimination, and therefore a breach of the *Code*. Since the grievor's absence was due to a disability, he was therefore being treated adversely in comparison to other, non-disabled employees. Thus, the seniority provisions "constituted inequality in treatment with respect to employment". The grievor's seniority was ordered to be re-adjusted, and his vacation entitlement was enhanced. In reaching its decision, the arbitration board adopted the reasoning of an earlier award on the same issue:

The employer's policy on attendance could be said to be neutral on its face in that it does not take into account the reason for absence. Its concern is the absence *per se*. However, in its application it is not neutral because it has an adverse impact on a group protected by the *Code*, i.e., those who suffer compensable injuries or disabilities. The result of the rule is that such persons are denied rights, which they otherwise would have enjoyed.¹³¹

This has become the ascendant view. In *Thomson v. Fleetwood Ambulance Service*,¹³² a collective agreement provision that pro-rated the vacation entitlement of employees based on work attendance was nullified in cases where it reduced the vacations of employees absent from work due to a disability. Similarly, an Ontario human rights board of inquiry ruled in *Thorne v. Emerson Electric Canada Ltd.*¹³³ that a collective agreement provision which froze seniority accumulation during a disability-caused absence was a violation of the *Human Rights Code*. Most recently, the Ontario Court of Appeal in *O.N.A. v. Orillia Soldier's Memorial Hospital*¹³⁴ held that collective agreement restrictions on seniority accrual constitute direct discrimination because the purpose of seniority is to provide a fair method for determining promotions, lay-offs and recalls. For employees with a disability, the right to accrue seniority is at the core of their ability to integrate into the workplace: "Seniority directly affects the ability of employees to access,

¹³⁰ S.O. 1995, c.1.

¹³¹ *Ibid*, at p. 74, quoting *Re Ontario (Ministry of Health)* (1993), 31 L.A.C. (4th) 129 (Dissanayake).

¹³² (1995), 96 C.L.L.C. 230-007 (Ont. Bd. Inq.)

¹³³ (1993), 18 C.H.R.R. D/510 (Ont. Bd. Inq.).

¹³⁴ (1999), 99 C.L.L.C. 230-007 (Ont. C.A.).

remain in, and thrive in the workplace. It is therefore a right that is at the core of human rights legislation as it affects the disabled.”¹³⁵ The Court of Appeal also would have found that the contractual restrictions on seniority accrual constituted indirect discrimination, as the employer did not demonstrate that such an accommodation would have amounted to an undue hardship.

(b) Accommodation, Seniority and Bumping

Recent awards have stated that a disability does not entitle an employee with an illness or injury to displace an incumbent, despite having greater seniority, unless the collective agreement specifically permits such bumping. On the issue of whether the seniority provisions of a collective agreement can be overridden so as to give a disabled employee a greater claim to a vacancy than more senior employees, the prevailing view is that accommodation can trump seniority, but only if there are no other, less intrusive, accommodation possibilities available. Even in the era of human rights in the workplace, seniority is accepted in labour law as a cornerstone of any collective agreement, and cannot be interfered with lightly.

In *Re National Steel Car Ltd.*,¹³⁶ the issue was whether the grievor, a steel fabricator, was unjustly laid-off as a result of the employer’s failure to accommodate him. After suffering a serious injury to his elbow and becoming unable to work as a fabricator, the grievor was permanently accommodated in a janitorial position. Subsequently, he was laid off by seniority during a major company downsizing. The union argued that the employer failed to provide the grievor with modified jobs out of seniority.

The arbitrator found no discrimination. He noted that the employer had determined that the grievor was in the only job he was capable of performing. More importantly for our purposes, he ruled that the duty to

¹³⁵ *Ibid.*, at p. 145,069.

¹³⁶ (1997), 64 L.A.C. (4th) 242 (Rose).

accommodate does not require the employer to displace an incumbent employee. “A disabled employee is entitled to equal treatment, despite the disability, not better treatment because of it.”¹³⁷

Similarly in *Re Royal Oak Mines Inc.*,¹³⁸ a case involving an injured employee’s attempt to find an alternative to his former position that he could no longer perform, the arbitrator ruled that:

I do not believe that the parties intended to give incapacitated employees the right to exercise seniority to bump junior employees from their jobs which they acquired through the posting system.¹³⁹

Not surprisingly, arbitrators have also dismissed grievances where employees seeking an accommodation have requested the opportunity to bump more senior employees. Seniority is considered a prized employee right, and only very clear collective agreement language would permit an override. In *Re Metropolitan Toronto*,¹⁴⁰ the arbitration board held that the duty to accommodate does not provide an injured employee with super seniority. As well, in *Re Greater Niagara Regional Hospital*,¹⁴¹ a union successfully argued that, while a disabled employee from another bargaining unit could fill a vacancy in its unit, she could not carry over her competitive seniority and thereby gain greater job security than other employees in the unit. In *Re Government of Alberta*,¹⁴² Arbitrator Sims ruled that the displacement of an incumbent goes beyond the duty to accommodate because it would amount to undue hardship. And, in *Re Town of Geraldton*,¹⁴³ a decision that concerned race rather than disability, the employer’s retention of a junior employee for reasons of affirmative action in the midst of lay-offs was found to be contrary to the collective agreement, and was not saved by either the *Charter* or the *Ontario Human Rights Code*.

However, in *Re Bayer Rubber Inc.*,¹⁴⁴ Arbitrator Watters suggested that the duty to accommodate might override seniority rights as a last resort. In this case, the arbitrator ruled that a junior disabled employee

¹³⁷ *Ibid*, at p. 249. Also see *Re Smokey River Coal Ltd.* (1998), 75 L.A.C. (4th) 104 (Power).

¹³⁸ (1997), 63 L.A.C. (4th) 246 (Bird).

¹³⁹ *Ibid*, at p. 363.

¹⁴⁰ (1995), 52 L.A.C. (4th) 206 (Springate).

¹⁴¹ (1995), 47 L.A.C. (4th) 366 (Brent).

¹⁴² (2001), 100 L.A.C. (4th) 326 (Sims).

¹⁴³ (1998), 73 L.A.C. (4th) 260 (Murray).

¹⁴⁴ (1997), 65 L.A.C. (4th) 261 (Watters).

could not bump a more senior employee from his position, unless the employer had first conducted a thorough review of the workplace and could come up with no other reasonable accommodations.

In sum, the duty to accommodate does not usually extend to permitting an employee with a disability to bump an incumbent from her or his position.¹⁴⁵ However, the duty could allow a disabled employee to be placed in a vacant position, even though she or he had less seniority, skill and ability than another employee, if that accommodation caused the least amount of interference to the employment rights of other employees.¹⁴⁶

(iii) Modified Duties

Does an employer have to provide a full-time light duties position to an employee with a disability? The best answer to this is: it depends upon how much undue hardship would result. If the employer runs a large enough operation that it could “re-bundle” or re-structure the existing jobs to create a permanent accommodation of non-demanding duties for the employee, without causing exorbitant costs or a disruption to its workplace operations, then the duty would require this to be done.¹⁴⁷

A good example of this is *Re Peel Board of Education*.¹⁴⁸ A teacher at a large school board developed multiple sclerosis, and had to reduce his teaching load to two-thirds of a full work day. The school board was amenable, but it also reduced the teacher’s work status to a part-time employee, which significantly

¹⁴⁵ See *Re Better Beef Ltd.* (1994), 42 L.A.C. (4th) 244 (Welling) (The duty to accommodate “does not go so far as to require an employer in a unionized workplace to displace an incumbent and give the position to another disabled employee.”). Also see *Beznouchuk v. Spruceland Terminals Ltd.* (1999), 00 C.L.L.C. 230-004 (B.C.H.R.T.). But see *Trenergy Inc. v. U.S.W.A., Local 6519*, [2001] O.L.A.A. No. 333 (Dissanayake), where the arbitrator held that an employee with a disability should be able to bump a more junior incumbent.

¹⁴⁶ *Re Union Carbide Canada* (1991), 21 L.A.C. (4th) 261 (Hinnegan).

¹⁴⁷ *Re Community Lifecare Inc.* (2001), 101 L.A.C. (4th) 87 (Howe); *Re Greater Niagara General Hospital* (1995), 50 L.A.C. (4th) 34 (H.D. Brown). These cases implicitly overturn *Re Canada Post* (1993), 32 L.A.C. (4th) 289 (Jolliffe), which had suggested that a large employee might not have to offer light duties on a permanent basis as an accommodation measure.

¹⁴⁸ (1998), 73 L.A.C. (4th) 183 (Albertyn).

affected his access to various full-time benefits under the collective agreement. The teacher's union argued that he should be permitted to remain on his full-time contract, with a right to treat the unworked one-third portion of each day as sick leave. The employer acknowledged that its operations were large enough to absorb the cost difference without undue hardship. Its point of difference was its unwillingness to treat an employee as having full-time status when, in fact, he was only able to work part-time. The arbitration board upheld the grievance, ruling that the teacher's disability was not a justifiable basis to deprive him of his status as a full-time employee. Other cases involving larger employers have come to the small conclusion.¹⁴⁹

However, where the employer is small and can demonstrate that it has explored every available, reasonable step, and there were no full-time, permanent positions – either existing or restructured – that would provide an accommodation for the employee within her or his limitations short of undue hardship, then the duty will usually demand no more. In *Edgell v. Board of School Trustees, District No. 11*,¹⁵⁰ the employer had: accepted the grievor's lengthy medical absences without prejudice to her job status or seniority; requested information from her doctor regarding her capacities; modified her job duties; met with the grievor and the union to discuss options; allowed her to work a temporary four hour modified shift; hired extra people to fulfil the duties that the grievor was unable to perform; permitted her to work eight hours of light duty during the summer months; investigated the possibility of restructuring the custodial duties; and considered the grievor for other jobs. The employer did not unilaterally restructure the custodial duties to provide the grievor with eight hours of light work because this would have meant, in light of the small custodial staff, that some other employee would have had to perform nearly eight hours of heavy duties. In the

¹⁴⁹ A similar issue arose in *Re British Columbia Public School Employers' Association* (1998), 78 L.A.C. (4th) 289 (Jackson). Here, a teacher with a learning disability was permitted to teach only physical education classes and be excused from teaching academic high school courses. Also see *Re Canada Safeway Ltd.* (1998), 77 L.A.C. (4th) 152 (Tettensor) (“The Employer is directed to give careful consideration to the jobs performed by miscellaneous workers to ascertain how they could be adapted or modified, without incurring undue hardship, so that the Grievor's physical restrictions can be accommodated. The authorities make it clear that some cost and disruption does not necessarily constitute undue hardship.”).

¹⁵⁰ (1996), 97 C.L.L.C. 230-009 (B.C.C.H.R.).

circumstances, the British Columbia Council of Human Rights found that this would amount to a “significant interference” with the rights of other employees, and held that the employer had met its accommodation duty.

Similarly, in *Re Community Unemployed Help Centre*,¹⁵¹ an employee was terminated because of her ongoing absences due to illness. The employer was small, its resources were limited, and the lengthy and frequent absences had caused a serious negative impact upon the other staff. Arbitrator Freedman found that the point of undue hardship had been reached, and the employee’s dismissal was upheld at arbitration. And in *Beznouchuk v. Spruceland Terminals Ltd.*,¹⁵² a small employer had diligently investigated a number of accommodation options at work for an employee with chronic back problems. The only viable options would have required either radically changing the job content (which would have placed an unduly heavy physical burden on other employees), or bumping an incumbent employee out of his job (which would go beyond the boundaries of the duty). Accordingly, the British Columbia Human Rights Tribunal dismissed the employee’s human rights complaint.¹⁵³

(iv) Counselling for Non-Attendance

What are the employer’s obligations regarding the counselling of an employee with a disability about attendance requirements? The law clearly requires employers to counsel and warn employees that their level of absenteeism is reaching a point where non-culpable dismissal is a possibility. The failure by an employer to warn an employee that her or his absence was excessive nullified a termination in a recent case, even though the grievor had no reasonable prospects for a return to active employment in the foreseeable future.¹⁵⁴

¹⁵¹ (1997), 67 L.A.C. (4th) 33 (Freedman).

¹⁵² (1999), 00 C.L.L.C. 230-004 (B.C.H.R.T.).

¹⁵³ Also see *Glass v. Green River Log Sales (1996) Ltd.*, [2000] B.C.H.R.T.D. No. 50.

¹⁵⁴ *Re Abitibi-Price Inc.* (1992), 31 L.A.C. (4th) 211 (Devlin).

When an employer warns an employee at an early stage about innocent absenteeism, does that constitute discrimination or discipline? Recent awards say no. In *Re City of Oshawa*,¹⁵⁵ the issue was whether an initial counselling letter bringing the attendance concerns of the employer to the employee's attention was justified under the collective agreement. The employer's letter focused upon the high number of work days that the employee had missed due to a WCB injury. The arbitrator said that such counselling is non-disciplinary, and cannot be challenged under the 'just cause' provisions. Furthermore, the counselling would not offend the Ontario *Human Rights Code*, where it was coupled with an exploration of whether accommodation was required. In such circumstances, a counselling letter may be of assistance in encouraging an employee to take greater precautions with respect to disabling injuries or to develop a greater tolerance for minor pain.

(v) Disability Discovered Only After Termination

On occasion, an employer, and even an employee, will be unaware of the disability until after the employee's termination for apparently culpable reasons. While the duty upon an employer to accommodate is not triggered until the employee notifies the employer of the need, the duty remains alive even if the notification does not occur until after the termination.

In *Re Ottawa Civic Hospital*,¹⁵⁶ the employer only learned of the grievor's drug and alcohol dependency after terminating her for excessive absenteeism. The arbitration board ruled that: "Even if the [*Human Rights*] *Code* does not apply to a dismissal which occurred before a handicap is known, this legislation would apply to a refusal to reinstate the complainant once the disability has been revealed."¹⁵⁷ Similarly,

¹⁵⁵ (1996), 56 L.A.C. (4th) 335 (Brandt).

¹⁵⁶ (1995), 48 L.A.C. (4th) 388 (R. Brown).

¹⁵⁷ *Ibid*, at p. 399.

in *Re Canada Safeway Ltd.*,¹⁵⁸ medical information about the mental disability of a terminated employee was provided to the employer only after the dismissal. He had been fired following a long history of poor performance, lack of response to criticism, and baffling behaviour. Just before the commencement of the arbitration hearing, almost two years later, the employee was diagnosed as suffering from controllable schizophrenia. In its award, the arbitration board ruled that the employer had cause at the time of the termination to suspect a mental illness. Since the illness was controllable, it directed that the employee be reinstated, subject to specific conditions, and without back pay:

We believe that it would be unjust to allow an employer to dismiss a blameless employee who has the capacity to do some bargaining unit job...As we see it, this work rule will not jeopardize the productive capabilities of the work place. At the same time, it recognizes that an employee whose shortcomings are not attributable to unsatisfactory work choices will have employment tenure of a kind different from those who intentionally or carelessly harm employer interests.¹⁵⁹

In a recent case involving the employer's knowledge at the time of a workplace test rather than a dismissal – *Green v. Public Service Commission of Canada et al*¹⁶⁰ – the Canadian Human Rights Tribunal rejected the employer's position that it was unable to accommodate an employee with auditory dyslexia when it was unaware of her disability at the time she took an employment promotion test. Although the federal Treasury Board had an accommodation policy, the Tribunal found that it took no steps "to address the aptitude test as a systemic barrier for persons with diagnosed learning disabilities."

In 1995, the Supreme Court of Canada ruled unanimously in *Cie minière Québec Cartier v. Québec*¹⁶¹ that a Quebec arbitrator had exceeded his jurisdiction by admitting post-discharge evidence in the course of annulling the dismissal of an employee with an alcohol abuse problem. The initial reaction among Canadian labour arbitrators was that *Québec Cartier* had overturned two decades of arbitral caselaw

¹⁵⁸ (1992), 26 L.A.C. (4th) 409 (Wakeling), aff'd 10 Alta. L.R. (3d) 51 (S.C.). Also see *Re St. Paul's Hospital* (1995), 47 L.A.C. (4th) 423 (Bluman) ("the Grievor's failure and/or refusal to acknowledge her addiction is a recognized symptom of this kind of disease").

¹⁵⁹ *Ibid*, at p. 442. Also see *Weitmann v. City of Calgary* (2000), 38 C.H.R.R. D/71 (Alta. H.R.P.).

¹⁶⁰ (1998), 34 C.H.R.R. D/166 (C.H.R.T.), upheld (2000), 38 C.H.R.R. D/1 (F.C.T.D.).

¹⁶¹ (1995), 125 D.L.R. (4th) 577.

which had allowed post-discharge evidence to be considered in appropriate cases.¹⁶² However, most arbitrators faced with the issue after *Québec Cartier* have distinguished the Supreme Court's judgement as being confined to the particular wording of Québec labour legislation. Thus, the admissibility of post-discharge evidence in alcohol and drug abuse cases, as well as in the post-termination diagnosis of a disability, appears to remain in place in Ontario,¹⁶³ Manitoba,¹⁶⁴ and the federal jurisdiction.¹⁶⁵ However, arbitrators in Alberta have applied *Quebec Cartier*.¹⁶⁶ And in British Columbia, there is a divergence of views, with the prevailing cases stating that post-discharge evidence should not, *per se*, be admissible.¹⁶⁷

(vi) Employer Requests for Medical Information

When an employee requests an accommodation, the adequacy of the medical diagnosis is sometimes in question. The direction of the current caselaw states that the employer is entitled to request, and receive, an adequate diagnosis from the employee's physician concerning his or her fitness. Otherwise, it is not in

¹⁶² Kenneth Swan, "The Arbitrator as Social Engineer", [1998] *Labour Arbitration Yearbook* 3; Morgan Cooper and Andrew Luchak, "Post-Discharge Evidence of Rehabilitation: Can It Be Used At Arbitration?" [1996-96] *Labour Arbitration Yearbook* 13.

¹⁶³ *St. Laurent Paperboard Inc. v. I.P.W.C., Local 949*, [2000] O.L.A.A. No. 642 (Surdykowski); *Re Great Atlantic & Pacific Co. of Canada Ltd.* (1997), 65 L.A.C. (4th) 306; *Re Standard Products (Canada) Ltd.* (1996), 56 L.A.C. (4th) 88 (Davie); *Re City of Toronto* (1996), 52 L.A.C. (4th) 118 (Haefling); *Re Peel Memorial Hospital* (1996), 52 L.A.C. (4th) 254 (Howe). Also see the Supreme Court of Canada's apparent change of mind on post-discharge evidence in *Toronto Board of Education v. O.S.S.T.F., District 15*, [1997] 1 S.C.R. 487.

¹⁶⁴ *Re Province of Manitoba* (1996), 52 L.A.C. (4th) 186 (Freedman).

¹⁶⁵ *McCormick v. Canada (Attorney-General)*, [1998] F.C.J. No. 1904 (T.D.); *Re Bell Canada* (1996), 58 L.A.C. (4th) 1 (Dissanayake); *Re Canada Post* (Unreported, 19 January 1996, Shime); and *Re Bell Canada* (Unreported, 22 September 1995, Devlin).

¹⁶⁶ *Civil Service Union, Local 52 v. Edmonton (City)*, [2000] A.G.A.A. No. 77 (Jolliffe).

¹⁶⁷ Those rulings which have allowed post-discharge evidence in British Columbia include: *Re School District No. 39 (Vancouver)* (1998), 66 L.A.C. (4th) 135 (Glass); *Re Mitchell Island Forest Products Ltd.* (1997), 60 L.A.C. (4th) 73 (Blasina); *Re Quinette Operating Corp.* (1996), 57 L.A.C. (4th) 356 (Taylor); and *Re Alcan Smelters and Chemicals Ltd.* (1996), 55 L.A.C. (4th) 261 (Hope). However, the British Columbia Labour Relations Board has ruled during a review of an arbitral award in *Westin Resources Ltd.* (1998), 45 C.L.R.B.R. (2d) 54, affirming (1997), B.C.L.R.B. L.D. No. B335/97, that the Québec legislation could not be distinguished from the B. C. Code, and the ruling in *Québec Cartier* was directly applicable. Also see *Re International Forest Products Ltd.* (2001), 101 L.A.C. (4th) 111 (Munroe); *Re Slocan Group – MacKenzie Operations* (2001), 97 L.A.C. (4th) 387 (Taylor); and *Re Brewers Distributor Ltd.* (1998), 76 L.A.C. (4th) 1 (Munroe).

a position to adequately assess the employee's accommodation needs. However, absent a contractual or statutory right, the employer cannot compel an employee to submit to a medical examination by a doctor not of the employee's own choosing.¹⁶⁸

When an employee wishes to return to the workplace after an injury or illness, he or she bears the initial onus to prove that he or she is medically fit to perform.¹⁶⁹ Once this has been provided, then the onus shifts to the employer to establish that the employee is not medically fit.¹⁷⁰ In *Kautex Corp.*,¹⁷¹ Arbitrator Brent stated that, if the employer can establish that it has legitimate concerns about the medical evidence presented by the employee, it is entitled to require further and better diagnose. A medical report from the employee's physician that fails to deal with the issue of accommodation will be given negligible weight by an arbitrator.¹⁷²

In *Brimacombe v. Northland Road Services Ltd.*,¹⁷³ a heavy equipment mechanic experienced dizziness and fatigue. The employer did not have a light-duty position to offer him, no conclusive diagnosis was made about his condition, and he had spent 20 months off work. The mechanic eventually filed a human rights complaint, arguing that the company had discriminated against him for the 20 month period. The British Columbia Human Rights Council dismissed the complaint. It ruled that, in the absence of a conclusive diagnosis, it would have been too difficult for the employer to accommodate the employee. Without knowing the nature of his illness, the employer could not properly assess his capabilities and limitations. Similarly, in *Re Hudson Bay Mining and Smelting Co.*,¹⁷⁴ an employer insisted that an employee with a history of back problems undergo an ergonomics test to determine his fitness for a posted position involving significant lifting of heavy bags. The arbitrator ruled that the employer had the right to require the test, since

¹⁶⁸ *Re Proboard Ltd.* (2001), 97 L.A.C. (4th) 271 (Burkett).

¹⁶⁹ *Ibid.*

¹⁷⁰ *Re Fort James Canada Inc.* (2001), 94 L.A.C. (4th) 423 (E. Newman).

¹⁷¹ (1996), 5 Lancaster's Equity and Accommodation Reporter 6 (Sept.) (Brent).

¹⁷² *Re Quality Meat Packers Ltd.* (2001), 97 L.A.C. (4th) 215 (Bendel).

¹⁷³ [1998]B.C.H.R.T.D. No. 34.

¹⁷⁴ (2001), 93 L.A.C. (4th) 289 (Springate).

the employee's back injury posed potential risks to himself and his co-workers. However, the arbitrator also stated that, if the medical examination concluded that the employee suffered from a disability, the employer would have to accommodate him through such means as modified duties or the re-bundling of job responsibilities.

What happens if a company contacts an injured employee's doctor, without his or her consent, for information regarding the extent of the disability? If the collective agreement does not contain an explicit provision which prohibits such communication, then no industrial relations infraction has occurred. In *Re Bowater Mersey Paper Co.*,¹⁷⁵ Arbitrator Outhouse ruled that that it is up to the employee's doctor, rather than the employer, to maintain medical confidentiality:

If the employer contacts a doctor to make inquiries about an employee's fitness for work, then it is up to the doctor to decide whether or not to answer the employer's inquiries...[I]t is difficult to see any violation of the collective agreement on the part of the Employer, unless of course the agreement prohibited communication with an employee's doctor, which is not the case here.

Occasionally, conflicting medical advice is offered as to whether an employee with a disability is fit to return to work. In *Re Bowater Pulp and Paper Canada Inc.*,¹⁷⁶ the employee's physician said that his patient was physically capable of returning to some suitable alternative work following a serious back injury, while the employer's doctor opined that he remained unfit for any job. Arbitrator Haefling assessed the conflicting medical opinions against the accommodation obligations, and ruled that, on the facts of this case, the reports of the employee's doctor more closely conform to the current requirements of the law. The arbitrator ordered the employer to offer the employee an appropriate job placement.

If an employee wishes to call psychiatric evidence in support of his or her claim of mental illness, a recent arbitration ruling has stated that the employer is entitled to have the employee also examined by a psychiatrist of its choosing. In *Re Canada Post*,¹⁷⁷ Arbitrator Burkett stated that, in order to allow a fair

¹⁷⁵ (1998), 76 L.A.C. (4th) 411 (Outhouse).

¹⁷⁶ (2000), 87 L.A.C. (4th) 352 (Haefling).

¹⁷⁷ (1998), 7 Lancaster's Equity and Accommodation Reporter 1 (March/April) (Burkett).

hearing to the employer, it must be able to present its own informed medical expert. Otherwise, the employee's psychiatric evidence could go untested because of the employer's inability to effectively cross-examine or to call contrary evidence.

However, employees with psychiatric illnesses may have a lesser obligation to provide a medical diagnosis, at least at the most acute phases of their disability. Because the mental disability sometimes interferes with the employee's ability to comprehend instructions and situations, arbitrators¹⁷⁸ and human rights tribunals¹⁷⁹ have ruled that the failure to provide a medical diagnosis in these circumstances would not disentitle the employee to accommodation or the protection of human rights legislation.

(vii) Lower-Paying Positions

Can employees with a disability be placed in a lower-paid, lower-ranked position as an accommodation? The answer appears to be yes, but only if all other less disadvantageous alternatives have been genuinely explored and rejected because they are not feasible. In *Re Fenwick Automotive*,¹⁸⁰ the union challenged the employer's re-assignment of a pregnant employee to a lower-paying position, arguing that she should be paid her prior wage rate during the temporary re-assignment. Arbitrator Kirkwood rejected the union's argument. He stated that, while the employer is required to accommodate the employee's needs that are solely affected by her pregnancy and which prevent her from performing her former job, the employer is not required to pay her differently from other employees who are performing the same job that she was now been re-assigned to.

However, where the employer is unable to prove that the lower-paying accommodation position is the only suitable job available, then its assignment will not satisfy the legal duty. In *Poulin v. Quinette Operating*

¹⁷⁸ *Re Canada Safeway* (1992), 26 L.A.C. (4th) 409 (Wakeling), aff'd 10 Alta. L.R. (3d) 51 (S.C.).

¹⁷⁹ *Mager v. Louisiana-Pacific Canada Ltd.* (1998), 98 C.L.L.C. 230-032 (B.C.H.R.T.).

¹⁸⁰ (1999), 84 L.A.C. (4th) 271 (Kirkwood).

Corp.,¹⁸¹ the employer had placed an employee with a neck and arm injury into a lower-paying position, and he subsequently filed a human rights complaint. The British Columbia Human Rights Tribunal said that the employer had not established that it conducted a thorough accommodation search, and upheld the complaint:

...in order to establish that it reasonably accommodated Mr. Poulin by placing him in building maintenance, Quinette was required to demonstrate that there was no higher-paying position within Mr. Poulin's abilities that it could have offered to him short of undue hardship...Quinette submitted that it would be unreasonable to expect it to accommodate Mr. Poulin in a way that would interfere with the normal operation of seniority under the collective agreement. However, it did not lead evidence to prove that placing him in a suitable higher-paying position would have interfered with seniority, or that the interference would have constituted undue hardship.¹⁸²

(viii) Last Chance Agreements

When an employee is exhibiting problematic work behaviour – such as serious absenteeism, or drug or alcohol use – unions and employers will sometimes sign a “last-chance agreement” (LCA) as an alternative to applying discharge or discipline. These agreements take many shapes, but they usually state that, if there is any repetition of the problematic behaviour, the employee is automatically dismissed. LCAs also commonly state that the employee will have no right to grieve or arbitrate the firing, except on the narrow ground as to whether the employer has proven that the problematic behaviour has in fact been repeated.

In light of the coverage by human rights legislation of employees who suffer from depression or substance abuse, and whose problematic behaviour can be linked to their disability, are these last-chance agreements always valid? Recent decisions state that the duty to accommodate will sometimes override an LCA.

In *Fantom Technologies Inc.*,¹⁸³ an employee with a drug and alcohol addiction was required to take substance abuse treatment under a last-chance agreement. As well, any further lateness or absences would

¹⁸¹ [2000] B.C.H.R.T.D. No. 48.

¹⁸² *Ibid*, at para. 39. Also see *Re Cape Breton Healthcare Complex* (2000), 90 L.A.C. (4th) 403 (Ashley).

¹⁸³ (1998), 70 L.A.C. (4th) 241 (Beck).

be grounds for termination, without any right to grieve. The employee was subsequently late and absent on several occasions, and, pursuant to the agreement, he was fired. Arbitrator Beck held that both the last-chance condition and the ‘cannot-grieve’ clause were discriminatory, and therefore invalid:

...a condition was imposed upon [the employee] because of his handicap, which subjected him to a review process particular to him, and not imposed upon his fellow employees. And the fact that he agreed to it, and was advised by his union in doing so, does not render the [last-chance] Agreement any less unenforceable.

The employee was ordered to be returned to work. The arbitrator noted that the employer had not presented any evidence that the employee’s absenteeism was so bad that it could no longer be tolerated, short of undue hardship, by the employer. And in *AFG Industries Ltd.*,¹⁸⁴ an earlier decision by Arbitrator Beck on the same issue, he ruled that, to establish evidence of undue hardship, the employer would have to show that the employee’s absences were costly, were disruptive to its schedule, had a significant impact upon other employees, or otherwise created legitimate safety concerns.¹⁸⁵

The decision in *Fantom Technologies Inc.* followed two decisions by the Ontario Divisional Court. In both *Gaines Pet Foods*¹⁸⁶ and *O.P.S.E.U. v. Ontario (Ministry of Community and Social Services)*,¹⁸⁷ the Court refused to enforce last-chance agreements involving employees with disabilities, where the employer had not otherwise proven that it was unable to accommodate the employee short of undue hardship. More recently, Arbitrator Michel Picher stated in *Re Slater Steels*¹⁸⁸ that a last chance agreement which failed to appreciate a grievor’s mental disorder breached the *Ontario Human Rights Code*, and was therefore inoperative:

In light of that determination, I am satisfied that the restriction of jurisdiction which is placed upon an arbitrator by the terms of the last chance agreement must be viewed as inoperative, to the extent that

¹⁸⁴ (1997), 68 L.A.C. (4th) 129 (Beck).

¹⁸⁵ Also see *Re Trident Automotive* (1998), 77 L.A.C. (4th) 372 (Craven), and *Re Community Unemployed Help Centre* (1997), 67 L.A.C. (4th) 33 (Freedman).

¹⁸⁶ (1994), 16 O.R. (3d) 290 (Div. Ct.).

¹⁸⁷ (1996), 96 C.L.L.C. 230-016 (Ont. Div. Ct.).

¹⁸⁸ (1998), 76 L.A.C. (4th) 241 (M. Picher).

that agreement itself is discriminatory in its treatment of [the grievor], in a manner contrary to the protections which he has under the *Ontario Human Rights Code*...¹⁸⁹

Similarly, a LCA that was drawn up to curb excessive absenteeism, where alcohol abuse was the source of the work attendance problems, may be unenforceable if the employer did not allow the employer a leave from work to enter an alcohol rehabilitation program.¹⁹⁰ And where an employee with a substance-abuse addiction could mount persuasive evidence that there was a reasonable expectation of reasonable attendance in the future, his breach of the LCA was not fatal.¹⁹¹

A last chance agreement term that imposes a stricter condition on an employee than other employees may also fail this new requirement. In *Re World's Biggest Book Store*,¹⁹² an employee with a cognitive disability had been reinstated to work on a last chance agreement that required her to maintain a stricter non-absenteeism rate than was required of other employees. While the average employee absenteeism rate at the store was 7% annually, the grievor's last chance agreement stipulated that she would be automatically dismissed if she was absent more than once in a two month period. "No other employee had to meet such a restrictive requirement," ruled Arbitrator Brunner. He held that this provision amounted to discrimination on the grounds of disability under the *Ontario Human Rights Code*, and sustained the union grievance. And in *Re Camcar Textron Canada Ltd.*,¹⁹³ a LCA that required an employee with an alcohol addiction to maintain the plant average for attendance over a 24 month period was ruled to be direct discrimination because no other employee was subject to automatic termination for failing to maintain an average attendance rate.¹⁹⁴

¹⁸⁹ *Ibid.*, at p. 247.

¹⁹⁰ *Mainland Sawmills v. I.W.A., Local 2171*, [2002] B.C.C.A.A.A. No. 69 (Foley).

¹⁹¹ *Re Canada Post* (2001), 96 L.A.C. (4th) 298 (Norman).

¹⁹² (1999), 83 L.A.C. (4th) 1 (Brunner).

¹⁹³ (2001), 99 L.A.C. (4th) 305 (Chapman).

¹⁹⁴ Also see *Re Ottawa-Carleton (Regional Municipality)* (2000), 89 L.A.C. (4th) 412 (Mitchnick); and *Re Ottawa Civic Hospital* (1995), 48 L.A.C. (4th) 388 (R. Brown).

What happens when an employer invokes the automatic dismissal provisions of a LCA when the employee has breached the attendance requirements due to a temporary disability? In *Re Canadian Waste Services Inc.*,¹⁹⁵ the grievor had been previously reinstated after a glaring absenteeism problem. As part of the LCA, he was required to miss no more than two days in any four week period. (On the evidence, there was no underlying substance abuse problem.) After missing two previous days, the grievor missed a third day within a four week period because of a medically-certified injury to his wrist. The arbitrator reinstated the grievor because the third absent day was due to a “handicap”, as defined by the *Ontario Human Rights Code*. To fall within the scope of “handicap”, the arbitrator looked not to the length of the injury, but to the degree of its incapacity:

For the purpose of this case, it is sufficient to find that Mr. McGee’s wrist injury on 19 July resulted in a physical disability, which directly led to his subsequent absence from work on 21 July. Thus, the circumstances of these events involving Mr. McGee fell within the definition of “handicap”, as per the *Human Right Code*. He is entitled to the protection of the *Code*, which supersedes the provisions of the LCA that triggered his termination.¹⁹⁶

Similarly, another recent decision from British Columbia illustrates the dangers of applying the automatic dismissal provisions in a last-chance-agreement situation when a disability is involved. In *Re Castlegar & District Hospital*,¹⁹⁷ a head nurse with a serious substance addiction problem had been reinstated by an arbitrator as per a LCA. Arbitrator Larson had ruled that the grievor’s addiction to narcotic analgesic drugs was a disability, and he was entitled to an accommodation, under strict conditions. Several years after his return to work, the grievor was caught stealing narcotics from the hospital (his employer) and he was terminated again for breaching the LCA. The arbitrator ruled that the main issue before him on the second termination remained one in which the provisions in the LCA must be balanced by human rights requirements:

The main issue that arises... is whether the Employer has already suffered undue hardship in this case due to the manner in which the grievor’s disease has manifested itself through what would ordinarily be considered serious workplace misconduct, which is to say, the misappropriation of drugs and falsifying records to cover up the resultant defalcation. It is not to be forgotten, however, that drug

¹⁹⁵ (2000), 91 L.A.C. (4th) 320 (Lynk).

¹⁹⁶ *Ibid*, at p. 332.

¹⁹⁷ (2000), 86 L.A.C. (4th) 81 (Larson).

addiction is to be treated as a disease, no different from diabetes or arthritis, both of which are chronic illnesses capable of disablement but that can be effectively managed through proper medical therapies.¹⁹⁸

Arbitrator Larson then added two additional requirements: (i) addictions to alcohol or drugs often led to compulsive behaviour, which must be factored into the accommodation efforts; and (ii) the employer's requirement to prove undue hardship may be lessened where safety concerns are involved.

Any actions by the employee that are direct outcomes of the compulsive nature of the disease, meaning that the employee is unable to control his behaviour cannot, therefore, be counted as misconduct in any culpable sense, although the amount of hardship that an employer must accommodate is less in positions that are safety sensitive.¹⁹⁹

In this case, Arbitrator Larson reinstated the grievor, primarily on medical evidence which stated that the relapse suffered by the grievor was a powerful negative reinforcement, making it less likely that he would resume his use of narcotics.²⁰⁰ However, he was ordered to be returned to a general duty nurse, with no access to hospital drugs.

However, arbitrators are also vigilant to ensure that the integrity of last-chance agreements are not undone by an employee's repeated lapses, even if the breaches of the agreement have a source in the grievor's disability. In *Re Seneca College*,²⁰¹ an arbitration board chaired by Pamela Picher stated in 1999 that:

The willingness of parties themselves to settle grievances through "last chance" reinstatements and the willingness of boards of arbitrators to tip the scale a bit by reinstating an employee for one last chance, depends entirely on subsequent boards of arbitration, charged with reviewing a subsequent termination, being able to strictly enforce the conditions set either by the parties themselves or by the reinstating board of arbitration. If the parties and/or a board of arbitration cannot be confident that its last chance reinstatement terms will be upheld, there will be a dampening effect on the willingness of parties or boards to utilize this form of reinstatement.²⁰²

¹⁹⁸ *Ibid*, at p. 101.

¹⁹⁹ *Ibid*.

²⁰⁰ Also see *Slocan Group v. P.P.W.C., Local 18* (2001), 97 L.A.C. (4th) 387 (Taylor), where the arbitrator held that a dismissal based upon a single relapse during an alcohol rehabilitation program was contrary to human rights legislation.

²⁰¹ (1999), 86 L.A.C. (4th) 423.

²⁰² *Ibid*, at p. 434.

Thus, where an arbitrator has found that the employer has accommodated the grievor up to the point of undue hardship, the terms of the last-chance agreement will be applied.²⁰³ In *Re Toronto District School Board*,²⁰⁴ the arbitrator found that the terms of the last chance agreement involving an employee suffering from alcoholism were not unreasonable, the employer had repeatedly extended disability leaves with sick pay to the employee for enrolment in rehabilitation programs, the employee had continued to drink, and the prognosis, while positive, was equivocal. In these circumstances, the employer had met its accommodation duty.²⁰⁵

As well, a last-chance agreement may itself be viewed as a form of accommodation.²⁰⁶ In *Re DeHavilland Inc.*,²⁰⁷ Arbitrator Rayner stated that, if these agreements could be easily undone by a grievor's claim that her or his treatable disability caused the ongoing lapses in workplace attendance or performance, then employers would have little incentive to enter into these agreements in the future, leaving other employees without the benefit of such an opportunity.

Three key points emerge from these cases. First, neither employers nor unions can contract out of human rights legislation. A last-chance agreement that requires the abandonment of a right conferred by a human rights statute or is tainted by an inequitable term will be unenforceable. Second, an employer has to establish that it had exhausted all reasonable efforts to accommodate. And third, an employee with both a disability and an absenteeism problem may still be released from work, if (a) the absenteeism causes undue hardship to the employer, (b) there is no reasonable prospect for reliable attendance at work in the

²⁰³ *Re Quintette Operating Corp.* (1996), 57 L.A.C. (4th) 356 (Taylor); *Re Alcan Rolled Products Company (Kingston Works)* (1996), 56 L.A.C. (4th) 187 (Gray); *Labatts Alberta Brewery* (1996), 96 C.L.L.C. 141, 312 (Alta. C.A.).

²⁰⁴ (1999), 79 L.A.C. (4th) 365 (Knopf).

²⁰⁵ Also see *Re Uniroyal Goodrich Canada Inc.* (1999), 79 L.A.C. (4th) 129 (Knopf).

²⁰⁶ *United Food and Commercial Workers Union, Local 832 v. Maple Leaf Meats* (2000), 145 Man. R. (2^d) 114 (C.A.); *Re Canadian Regional Airlines Ltd. (Dionne)*, [1999] C.L.A.D. No. 384 (QL); *Re Town of Espanola* (1997), 61 L.A.C. (4th) 149 (Marcotte); *Wellesley Hospital* (1997), 6 Lancaster's Equity and Accommodation Reporter 3 (March/April) (Davie); *Re Mitchell Island Forest Products Ltd.* (1996), 60 L.A.C. (4th) 73 (Blasina);

²⁰⁷ (1998), 74 L.A.C. (4th) 125 (Rayner).

future, and (c) the employer has exhausted all reasonable accommodation options. These issues have been well-expressed in *Re Norbord Industries Inc.*²⁰⁸, where Arbitrator Carrier, after reviewing a last chance agreement, stated that:

While it may, in certain circumstances, be reasonable to conclude the employee is destined to failure and that it would be undue hardship to require further or more extensive accommodation [by] the employer, such a conclusion may be improper in other circumstances. Although the employee's failure may constitute *prima facie* evidence of his inability or unwillingness to participate in his own accommodation, it is not necessarily conclusive evidence either as to that issue or as to whether further accommodation would constitute undue hardship. While the parties may themselves have agreed that termination would follow, upon the employee's failure, that agreement cannot supersede the requirements of [the *Human Rights Code*].²⁰⁹

These considerations apply whenever a human rights consideration – such as a disability – is apparent. When a LCA is breached by an employee, and no human rights consideration is present, then arbitrators will generally uphold the validity of the LCA conditions, including discharge, unless some compelling circumstance (generally an event beyond the control of the grievor) is present.²¹⁰

(ix) Mental and Psychological Disabilities

Mental disabilities present some of the greatest accommodation challenges to both employers and unions. These disabilities come in many varieties, are often difficult to detect and assess, and employees are usually reluctant to reveal them because of the enormous attendant social stigma. The breadth of this stigma has been expressed by the Supreme Court of Canada in *R v. Swain*.²¹¹

The mentally ill have historically been the subjects of abuse, neglect and discrimination in our society. The stigma of mental illness can be very damaging. The intervener, C.D.R.C., describes the historical treatment of the mentally ill as follows:

²⁰⁸ (1997), 67 L.A.C. (4th) 205 (Carrier).

²⁰⁹ *Ibid*, at p.p. 218-9.

²¹⁰ *Re Extencicare (Canada) Inc* (1998), 77 L.A.C. (4th) 74 (Herman).

²¹¹ [1991] 1 S.C.R. 933.

For centuries, persons with a mental disability have been systemically isolated, segregated from the mainstream of society, devalued, ridiculed and excluded from participation in ordinary social and political processes.

The above description is, in my view, unfortunately accurate and appears to stem from an irrational fear of the mentally ill in our society.²¹²

Where an employee's capacity for rational judgement is impaired by a mental disability, human rights tribunals and labour arbitrators have placed a higher onus on both employers and unions to accommodate the employee. The fact that the employee did not disclose the mental disability when she was hired,²¹³ did not provide the employer with a medical diagnosis while in the throes of the illness,²¹⁴ did not disclose the mental illness until two years after being terminated²¹⁵ or violated a last chance agreement while in the throes of a mental disorder²¹⁶ does not necessarily disentitle him or her to accommodation. Nor can an employer rely upon the unsympathetic attitudes of other employees,²¹⁷ parents²¹⁸ or clients to justify terminating an employee with a mental illness.

As well, where the illness causes erratic behaviour at work, recent rulings have said that the employer in some cases ought to have been aware of a link between the work problems and the employee's condition.²¹⁹ In *Allbright Cleaners Ltd.*,²²⁰ the employee had been hospitalized for depression, and a distinct change in her behaviour had been observed by the employer. The human rights tribunal found that it was already apparent to the employer, when it dismissed her, that she was suffering from a mental

²¹² *Ibid.*, at p. 973-4, as per Lamer C.J.

²¹³ *Willems-Wilson v. Allbright Drycleaners Ltd.* (1997), 98 C.L.L.C. 230-007 (B.C.H.R.T.).

²¹⁴ *Mager v. Louisiana-Pacific Canada Ltd.* (1998), 98 C.L.L.C. 230-032 (B.C.H.R.T.) ("Mr. Higgins knew, or ought to have known, that the Complainant was in extreme emotional distress and, as a result, disabled from doing her job... The fact that she did not present him with a medical diagnosis does not disentitle the complainant to the protection of the Code"). Also see *AFG Industries Ltd.* (1997), 68 L.A.C. (4th) 129 (Beck). But see *Companion et al v. Jones* (1999), 35 C.H.R.R. D/164, where the Newfoundland Supreme Court, Trial Division ruled that because the employer had not been informed about the nature of the employee's illness, it could not be required to accommodate an unknown condition.

²¹⁵ *Re Canada Safeway Ltd.* (1992), 26 L.A.C. (4th) 409 (Wakeling), aff'd 10 Alta. L.R. (3d) 51 (S.C.).

²¹⁶ *Re World's Biggest Bookstore* (1999), 83 L.A.C. (4th) 1 (Brunner); *Re Slater Steels* (1998), 76 L.A.C. (4th) 241 (M. Picher).

²¹⁷ *Re World's Biggest Bookstore* (1999), 83 L.A.C. (4th) 1 (Brunner).

²¹⁸ *Bernard v. Waycobah Board of Education* (1999), 36 C.H.R.R. D/51 (C.H.R.T.).

²¹⁹ *Zaryski v. Loftsgard* (1995), 22 C.H.R.R. D/256 (Sask. Bd. Inq.).

²²⁰ (1997), 98 C.L.L.C. 230-007 (B.C.H.R.T.).

disability. Instead of firing her, the tribunal ruled, the employer should have sought to accommodate her. It upheld the employee's complaint.

An employee who is recovering from depression is entitled to be reasonably accommodated by her or his employer when attempting to return to work. In *Québec (Comm. des droits de la personne et des droits de la jeunesse) c. Assurance Générales des Caisses Desjardins Inc.*,²²¹ an employee who had taken a leave from work to recover from depression requested the opportunity to return to work on a part-time basis for two months to regain her strength. The employer agreed to allow her to return to work part-time, but only for two weeks. Not able to work full-time at the end of the two weeks, the employee resigned, and subsequently complained to the Québec commission des droits de la personne. A Québec human rights tribunal found that the employer failed to establish a defence of undue hardship, since the employee's requested accommodation would have required very little effort from it. And in *Metsala v. Falconbridge Ltd.*,²²² the employer had required a clerical employee suffering from reactive depression to compete for a position that was suitable for accommodation. An Ontario board of inquiry faulted the employer for this, and for not actively searching for an accommodation position, while instead forcing her to wait for 18 months for a suitable vacancy to open up.

Likewise, in *McConnell v. Yukon (Public Service Commission)*,²²³ a Yukon Territory board of adjudication held that the employer's efforts to accommodate an employee seeking to return to work after recovering from depression were inadequate. The employer had offered the employee her former position, or an opportunity to apply for a position in another department. However, she had sought a transfer to

²²¹ (1997), 33 C.H.R.R. D/168 (Trib. Qué.). But see *Gordy v. Oak Bay Marine Management Ltd.* (2000), 37 C.H.R.R. D/184 (B.C.H.R.T.), rev'd [2000] B.C.J. No. 2504, where the British Columbia Supreme Court has ruled that a human rights tribunal made an error when it had found that an employer had not adequately investigated methods of accommodating an employer with bi-polar disorder when he sought to return to work as a fishing guide. The Court ruled that the high risk nature of the job required constant awareness and good judgement, and the employer properly took this into consideration when it refused to rehire the complainant.

²²² (2001), 8 C.C.E.L. (3^d) 120 (Ont. Bd. Inq.).

²²³ (1998), 34 C.H.R.R. D/26 (Y.T.Bd. Adj.).

another department, which the employer had not seriously considered. The board of adjudication found that the employer, by limiting its search to a few alternatives when other options short of undue hardship were available, expended no more than minimal efforts to find an accommodation.²²⁴ However, in a somewhat similar situation – *Weitmann v. City of Calgary*²²⁵ – an employee suffering from bi-polar disorder accepted an early retirement package from his employer while in the midst of a serious depression. Four months later, after recovering his health, the employee asked the employer to rescind his retirement, but he was refused. An Alberta Human Rights Panel, while noting that the employer was not aware of the seriousness of the illness when the employee accepted the retirement package, ruled that the employer failed to inquire further or to accommodate the disability when the employee subsequently sought to return to work. On review, the Alberta Court of Queen’s Bench reversed the panel ruling, stating that the employer did not exercise control or exert any compulsion over the employee’s choice.²²⁶

A significant decision which examines the interplay between mental illness accommodation and the safety undue hardship factor is *Shuswap Lake General Hospital v. B.C.N.U.*²²⁷ A registered nurse with a bi-polar mood disorder had made several medical errors involving patient treatment while suffering from mood swings. She took time off work, and followed the medical recovery program set out by her physician. The hospital remained concerned about her stability, and eventually decided that she had to consistently meet the standards of nursing practice to remain employed. It subsequently terminated her. Arbitrator Gordon ruled in favour of the union’s grievance. She found that the hospital did not satisfy the safety standard for undue hardship, holding that the employer must identify each potential safety hazard and provide persuasive evidence that the safety concerns outweigh the obligations owed to the employee with a disability. Applying a zero-tolerance rule inflexibly may well overlook the requirement that there are moderate levels of risk which must, in the aftermath of *Meiorin* and *Grismer*, be tolerated.

²²⁴ Also see *Grenier c. Société de Portefeuille du Groupe Desjardins* (1997), 33 C.H.R.R. D/168 (Que. H.R.T.); and *Keeping v. Royal City Jewellers & Loans Ltd.* (1997), 97 C.L.L.C. 230-020 (B.C.C.H.R.).

²²⁵ (2001), 29 Admin.L.R. (3^d) 269 (Q.B.), rev’g (2000), 38 C.H.R.R. D/71 (Alta. H.R.P.).

²²⁶ Also see *Gordy v. Oak Bay Marine Management Ltd.*, *supra*, note 255.

²²⁷ [2002] B.C.C.A.A.A. No. 21 (Gordon).

However, one arbitration board has recently ruled that an employee suffering from a mental illness must accept some responsibility for his own culpable behaviour. In *Re York Region Board of Education*,²²⁸ a high school teacher with a bi-polar affective disorder (otherwise known as manic depression) had stopped taking his anti-depressive medication, contrary to his physician's direction. The teacher subsequently engaged in a series of highly inappropriate behaviour with his students and with teaching colleagues as his illness peaked. The school board attempted to assist him, and, when he refused help, it terminated him. The arbitration board found that, while the domination of his illness mitigated some of his behaviour, he displayed recklessness by having gone off his medication, knowing that going off the drug would likely adversely affect his work performance. The arbitration board decided not to reinstate him, and instead ordered that the employer pay him six months compensation.

(x) Temporary and Probationary Employees

The duty is not limited to accommodating full-time or permanent employees. Employees who are temporary, probationary or part-time are also owed the duty, although the burden on the employer to establish undue hardship may not be as great, depending on the specific circumstances. In *Re Canada Post*,²²⁹ the employer discharged a temporary letter carrier for incapacity after she suffered a workplace injury. The employee's manager acknowledged that, had the employee been on regular status, a greater effort would have been made to accommodate her. Arbitrator Ponak reinstated her, ruling that temporary employees have a general right to be accommodated. Although temporary employees may have a lower undue hardship threshold in accommodation matters, the employer failed to meet even this lower threshold.

²²⁸ (2000), 84 L.A.C. (4th) 90 (Shime). Also see *Turanich v. Saskatchewan (Dep't. of Municipal Government)* (2000), 37 C.H.R.R. D/209 (Sask. Bd. Inq.).

²²⁹ (1998), 73 L.A.C. (4th) 15 (Ponak). Also see *Clark v. Country Garden Florists* (1996), 96 C.L.L.C. 145,185 (Nfld. Bd. Inq.).

Similarly, in *Re Dominion Castings*,²³⁰ the arbitrator held that the accommodation duty does not only apply to employees with seniority status. It also extends to probationary employees:

To construe the collective agreement consistently and in harmony with the [*Ontario Human Rights Code*], the parties must have intended to incorporate the well-known meaning of discrimination that the *Code* has established to provide the protection [to probationary employees].²³¹

(xi) Maternity Leave, Disability and Access to Sick Leave Benefits

The denial of sick leave benefits to a female employee during the period of normal childbirth and recovery has been recently found by two Ontario court decisions to be discriminatory. The effect of these decisions, as well as several new arbitration awards in Ontario and Alberta, has been to restate the thrust of the landmark 1989 decision in *Brooks v. Canada Safeway Ltd.*²³² In *Brooks*, the Supreme Court of Canada stated that a distinction based on pregnancy is not merely a distinction between those who are and are not pregnant, but also between the gender that has the capacity for pregnancy and the gender which does not. The legal question before the Ontario courts shifted the ground of discrimination from gender to disability: can a sick leave plan exclude a women whose physical disability is the result of her pregnancy, even if employees on unpaid leaves are not entitled to sick leave benefits for any illness that arises during the course of their leave?

In *Ontario Cancer Treatment and Research Foundation*,²³³ the Ontario Court, General Division upheld a human rights board of inquiry ruling that denying an employee sick leave benefits because she was on vacation when she delivered her child constituted discrimination on the basis of pregnancy. The employer had considered the employee to be on maternity leave, and its policy did not provide sick leave benefits to anyone on an unpaid leave of absence. The employee, because she was unable to return to work after that vacation because of illness (a post-partum depression), alleged discrimination on the basis of gender.

²³⁰ (1998), 73 L.A.C. (4th) 347 (Levinson).

²³¹ *Ibid*, at p. 355.

²³² [1989] 1 S.C.R. 1219.

²³³ (1998), 38 O.R. (3d) 72 (Gen. Div.).

Both the board of inquiry and the Ontario Court took a broad view of the comparator group: they found that the employee had been discriminated against because she was treated differently from others absent for health-related reasons because of her pregnancy:

The employer argued that there is no discrimination in these circumstances, because a woman on maternity leave, or deemed by the employer to be on such leave, is in the same position as any other person on an unpaid leave of absence...[A]ll in that group are denied access to sick leave benefits...[T]his comparison is not a proper one, for it ignores the fact that women who have just given birth or, like those in [the complainant's] situation who do not take maternity leave and are ill in a period following the birth, are in the same situation as others unable to work because of sickness; that is, they are absent from work for a health-related reason.²³⁴

More recently, the Ontario Court of Appeal in *O.S.S.T.F., District 34 v. Essex County Board of Education*²³⁵ has adopted the same approach. A teacher who was about to go on pregnancy and parental leave asked to use her accumulated sick leave benefits under the collective agreement for the period of time when she would be off work. The advantage for her was that the sick leave provisions were more generous than the maternity benefits under the *Employment Insurance Act*.²³⁶ The employer refused, maintaining that an entitlement to sick leave benefits after a delivery was inconsistent with the maternity leave provisions offered by the federal and provincial governments. The teacher and the union lost at arbitration, where the board held that sick leave and maternity leave were two different types of leave, and sick leave did not extend to employees absent on a maternity leave. The decision was quashed by the Ontario Divisional Court,²³⁷ where Adams J. ruled that the school board had discriminated on the basis of pregnancy in refusing the employee access to the sick leave benefits for that period after childbirth which was related to recovery of her health. The employer then appealed to the Court of Appeal.

Like the Divisional Court, the Court of Appeal held that the denial of sick leave benefits to employees during the period when they are disabled due to childbirth amounts to discrimination on the basis of

²³⁴ *Ibid.*, at p. 80.

²³⁵ (1998), 164 D.L.R. (4th) 455 (Ont. C.A.).

²³⁶ S.C. 1996, c. 23.

²³⁷ (1996), 136 D.L.R. (4th) 34 (Ont. Div. Ct.).

pregnancy and sex. It stated that, while having sick leave and parental leave benefits listed separately made the collective agreement easier to administer, it nevertheless violated the human rights legislation:

The problem is that all ‘disabled’ persons are not treated the same by the agreement. Women giving birth normally, and who, it is acknowledged, would nonetheless be ‘physically disabled’, in the ordinary sense of those words, for some undetermined length of time, would not receive leave with pay for that period. In my view, that is all that is being argued about in this case. In that sense, I agree with Adams J. that the [Arbitration] Board’s reading of the Agreement results in discrimination against pregnant women.

However, the Court of Appeal went on to uphold the arbitrator’s decision, on the grounds that the employee had not proven that she was disabled for the period of time that she was claiming sick leave benefits.

The Ontario Court of Appeal’s decision in *Essex County* went a step beyond the ruling in *Ontario Cancer Foundation*, in that the Court held that a woman who has just given birth is considered disabled for the period following a normal pregnancy and delivery. The reasoning in *Essex County* has since been applied by arbitrators in Ontario²³⁸ and Alberta,²³⁹ and in a recent Ontario human rights ruling.²⁴⁰ These decisions have held that a pregnant employee cannot be excluded from sick leave benefits if the disability arises from the pregnancy, even if other employees on unpaid leaves are not entitled to sick leave benefits for illnesses that occur during the leave.

(xii) Drug and Alcohol Testing

The rules respecting how employers can test their employees for their use of drugs and alcohol – past and present – are also subject to human rights considerations. A number of questions that require balancing

²³⁸ *Re Peel Board of Education* (2000), 92 L.A.C. (4th) 289 (Kaplan); *Re Hamilton-Wentworth District School Board* (2000), 89 L.A.C. (4th) 194 (Springate); *O.E.C.T.A. v. Dufferin-Peel Roman Catholic Separate School Board* (1998), 80 L.A.C. (4th) 149 (Samuels); supp. award (1999), 85 L.A.C. (4th) 21.

²³⁹ *Calgary Regional Health Authority and Health Sciences Association of Alberta*, [1998] A.G.A.A. No. 96.

²⁴⁰ *Wight v. Ontario (Office of the Legislative Assembly)* (1998), 33 C.H.R.R. D/191 (Ont. Bd. Inq.).

management rights and human rights arise: Can employers ask job applicants about their past or present use of addictive substances? Can employers require random testing of their employees? Are the rules any different when safety-sensitive positions are involved? While the current state of the law has not yet definitively answered all these questions, several recent court decisions have pointed out its probable future direction.

The law on drug and alcohol testing is probably the clearest at the pre-employment stage. An employer requirement that a job applicant reveal his and her disabilities – including dependence upon drugs or alcohol – is considered discriminatory if it is used to screen out candidates. Indeed, current human rights law states that the only information that employers can seek on disabilities at the hiring stage is limited to a potential employee's ability to perform the essential components of the advertised position. Section 23(2) of the *Ontario Human Rights Code* provides that:

The right under section 5 [of the *Code*] to equal treatment with respect to employment is infringed where a form of application for employment is used or a written or oral inquiry is made of an applicant that directly or indirectly classifies or indicates qualifications by a prohibited ground of discrimination.

What about an employer policy that requires its employees to submit to mandatory drug or alcohol testing? The current state of the law appears to be that, unless the employer can establish that such testing was rationally connected to the safe and efficient performance of the employees' work, such a policy will be struck down for discriminatorily targeting drug dependent employees. In *Canadian Civil Liberties Association v. Toronto Dominion Bank*,²⁴¹ the Federal Court of Appeal struck down a mandatory drug testing policy initiated by the Toronto Dominion Bank, holding that it was discriminatory. However, the two majority judges gave different reasons for their finding, which makes it more difficult to accurately determine the legal status of such policies.

²⁴¹ (1998), 163 D.L.R. (4th) 193 (F.C.A.), upholding (1996), 25 C.H.R.R. D/373 (F.C., T.D.), quashing (1994), 22 C.H.R.R. D/301 (C.H.R.T.).

One majority judge in *Toronto Dominion Bank* ruled that the mandatory drug testing policy was a case of *direct* discrimination (i.e., the policy *directly* targeted drug dependent employees). Therefore, the Bank was required to show that the policy was reasonably necessary for the efficient and safe performance of the employees' work. The second majority judge held that the drug testing policy was an example of *indirect* discrimination (i.e., the policy was a neutral rule that applied to all, but *indirectly* impacted in an adverse manner upon drug dependent employees). Thus, the Bank had to demonstrate that the policy was not rationally connected to the objective of ensuring that employees were performing their jobs safely, efficiently and productively.

Since the decision, the Supreme Court of Canada has ruled that the legal categories of *direct* and *indirect* discrimination are no longer useful tools for human rights and accommodation analysis, and has collapsed them into a new test (the "Meiorin test").²⁴² Applying this new test (which contains many elements of the old accommodation approach, but in a more organized fashion), it would appear that the general approach from *Toronto Dominion Bank* would still be applicable. That is, the courts would ask (i) whether the mandatory drug testing policy was *rationally connected* to the performance of the work?; (ii) was it adopted *honestly* and in *good faith*?; and (iii) were the employees with a disability who were affected by the policy *accommodated up to the point of undue hardship*? Applying the *Meiorin* test to the Federal Court of Appeal's analysis, it would appear that the answer to the validity of the Bank's mandatory drug testing policy would still be that it would fail to pass human rights muster.

What about random drug or alcohol testing policies? This issue was the subject of an important decision of the Ontario Court of Appeal in July 2000. In *Entrop v. Imperial Oil Ltd.*,²⁴³ the employer had instituted a new drug and alcohol policy in 1991, which required all employees in safety-sensitive positions to disclose any past or present substance abuse problems. Mr. Entrop, a recovered alcoholic who had not drunk for

²⁴² *British Columbia (Public Service Employee Relations Commission) v. B.C.G.S.E.U.*, *supra*, note 48.

²⁴³ (2000), 00 CLLC 230-037 (Ont. C.A.), upholding in part (1998), 98 C.L.L.C. 230-012 (Ont. Div. Ct.), upholding (1995), 23 C.H.R.R. D/196 (Ont. Bd. Inq.).

over seven years, held a safety-sensitive position overseeing the refining of oil at the employer's Sarnia operations. He informed management of his past dependency, and was immediately reassigned to a less desirable job in a non-safety-sensitive position. Shortly afterwards, he filed a complaint under the *Ontario Human Rights Code*.

Before a Human Rights Board of Inquiry, Mr. Entrop was successful in challenging the employer's drug and alcohol policies. The Board decision found that the challenged provisions of the policy were *prima facie* discriminatory for being too broad and for containing sanctions that were too stringent. It also ruled that the employer's alcohol and drug policy did not properly accommodate those employees with disabilities. In its decision, the Board of Inquiry stated that the policy relating to random drug testing allowed the employer to terminate an employee for a single positive finding, while a positive test was not a reliable indicia of actual impairment of the individual's capacity to perform the job. On appeal, the Divisional Court upheld the Board's findings and the employer appealed further to the Court of Appeal.

The Ontario Court of Appeal partly reversed the Board's decision. It applied the new "unified approach" towards assessing discrimination and accommodation cases developed by the Supreme Court of Canada in its *Meiorin* test. As we noted above, this decision erased the old distinction between 'direct' and 'indirect' (or 'adverse effect') discrimination, and the different legal analyses and remedies that accompanied each. Now, each discrimination case would be assessed on a three-step analysis: (i) was the policy rationally connected to the performance of the job? (ii) was the policy adopted honestly and in good faith? and (iii) was the policy "reasonably necessary", which is determined by assessing whether the employee could be accommodated short of undue hardship by the employer and/or union?

Turning next to human rights definitions, the Court of Appeal in *Entrop* endorsed the prevailing caselaw which said that addiction to drugs and alcohol constituted a "handicap" within the meaning of the *Human Rights Code*.

The Court applied the *Meiorin* test first to the employer's policy on pre-employment screening and the random drug-testing. It found that this part of the policy satisfied the first two steps of the new test, but failed the third. The pre-employment screening and random drug testing were rationally connected to the performance of safety-sensitive jobs (i.e. "to minimize the risk of impaired performance due to substance abuse" in order to "ensure a safe, healthy and productive workplace"), and had been adopted in an honest and good faith belief that the policy was necessary to accomplish this goal. However, the Ontario Court of Appeal found that a positive finding on a drug test was not a sufficiently reliable indication of impairment, and the sanction provided for a positive test (in safety-sensitive positions) was too stringent and broad (termination without consideration of the circumstances of the individual).

The Court's conclusions on the employer's alcohol-testing provisions, however, were different. Like the other parts of the policy, alcohol testing passed the first two steps of the *Meiorin* test. On the critical third step, the Court found that alcohol breathalysers, unlike drug tests, measured actual impairment rather than past or recent use. Therefore, it rejected the Board's finding that random alcohol testing was not reasonably necessary to deter alcohol impairment at the workplace. Random alcohol testing was permissible where (a) it reliably indicated impairment; (b) employees in safety-sensitive positions were fairly notified in advance of the possibility of testing; and (c) the policy accommodated individual differences and capabilities of employees to the point of undue hardship.

As well, the Court applied the *Meiorin* third-step analysis to several other aspects of the employer's policy on drug and alcohol use.

- (i) *Mandatory employee disclosure of past substance abuse* no matter how far in the past was too broad. Rather, it preferred a policy that was reasonably related to employment requirements. A cutoff point of substance abuse within the past five to six years would probably have been acceptable to the Court.
- (ii) *Automatic re-assignment out of a safety-sensitive position* following disclosure of a past substance abuse problem was too broad and not reasonably necessary.

- (iii) The employer's requirement of *two year's rehabilitation and five year's abstinence* was overly broad, and not sufficiently tailored to individual recovery from a substance abuse problem.
- (iv) The *controls for reinstatement* were too onerous, and must be tailored to the individual's particular circumstances.

The Court upheld the Board's award of damages for mental anguish to Mr. Entrop for "the wilful and reckless manner" of the infringement of his employment rights, relying upon the injury to the complainant's dignity and acts of reprisal directed at him.

What are the implications of the *Entrop* decision for employers? This is the latest, but not likely the final, judicial word on the legality of substance abuse testing at work. *Entrop* generally widens the employer's ability to test for substance abuse, as long as it can establish a clear and close nexus between (i) the seriousness of the impairment, (ii) the safety requirements of the job, (iii) the capability of the testing technology to measure impairment, and (iv) the flexibility of the work policy to accommodate employees with substance abuse problems. A substance abuse policy must be proportional to the actual needs of the workplace and the particular job, and must not unduly punish or disadvantage employees. *Entrop* strongly implies that, to successfully pass legal scrutiny, a drug and alcohol testing policy must finely balance the employment requirements for safe and healthy work conditions with the human rights recognition that substance abuse is a disability issue. Even where a rule is rationally connected to a legitimate aim and has been adopted in good faith, it may not pass the *Meiorin* "reasonably necessary" step if it provides for sanctions which are overly broad or which go beyond what is required to obtain that end. With regard to drug-testing policy in particular, employers may be hard-pressed to get past this obstacle, given the technical limitations of present testing methods.

And what are *Entrop's* implications for unions? The Ontario Court of Appeal ruling invites the scrutiny of substance testing policies in all workplaces, so unions will have to remain vigilant on behalf of their members. In a seminal arbitration award, issued three days before *Entrop*, Arbitrator Michel Picher ruled

that employers can require employees to undergo drug and alcohol testing, but only where reasonable grounds are established. In *CAW v. Canadian National Railway Co.*,²⁴⁴ Arbitrator Picher stated that an employer could demand testing where an employee was beginning a safety-sensitive job, where there were reasonable grounds to believe an employee was impaired while at work, or in the aftermath of a significant accident or incident. However, he accepted that drug testing cannot measure actual impairment, and the employer would have to produce additional grounds to justify the testing in any particular situation. In addition, even where a policy passes the *Meiorin* test, unions will want to review an employer's efforts to ensure that the duty to accommodate an employee with a substance abuse disability has been met.

More recently, arbitrators have ruled that employees in safety-sensitive jobs can be subjected to random drug tests either as a condition for reinstatement following a discovery of drug possession,²⁴⁵ or where a grievor acknowledged recent drug use.²⁴⁶ Arbitrator Devine has stated that:

Once possession of marijuana on company property was established, it was reasonable for the Employer to request that the Grievor provide a urine sample to establish whether or not he was fit to work in a safety-sensitive position.²⁴⁷

Conversely, random alcohol testing, as urged by a union in an unsuccessful bid to have an employee suffering from alcoholism reinstated, was turned down by the arbitrator in *Re International Forest Products Ltd.*²⁴⁸ The union had advanced the testing as an answer to the serious safety concerns that the employer had raised arising out of past attempts to accommodate the employee. Arbitrator Munroe ruled that "it would simply be wrong to introduce into the duty to accommodate a general requirement that employers implement police-like measures to ensure the workplace sobriety of employees suffering from alcoholism."²⁴⁹

²⁴⁴ (2000), 95 L.A.C. (4th) 341.

²⁴⁵ *Re Fording Coal Ltd.* (2001), 94 L.A.C. (4th) 354 (Hope).

²⁴⁶ *Re Fording Coal Ltd.* (2001), 97 L.A.C. (4th) 289 (Devine).

²⁴⁷ *Ibid.*, at p. 302.

²⁴⁸ (2001), 101 L.A.C. (4th) 111 (Munroe).

²⁴⁹ *Ibid.*, at p. 128.

(xiii) Job Transfers

Commonly, the issue of a job transfer arises in the context of accommodation. Can an employee with a disability request or refuse a transfer, should it impact upon his or her impairment? The answer invariably goes to the facts of each case, and involves an assessment as to whether the requirement for an accommodation has been made out, and whether a persuasive undue hardship defence has been established.

In *NAV Canada v. I.B.E.W.*,²⁵⁰ an electronic systems technologist with the national air traffic control facility at the Prince George airport had been granted an accommodation by his employer based upon his fear of flying. Although electronic systems technologists were required to occasionally fly to remote locations to repair equipment, the employer recognized 'fear of flying' as a disability, and, given the relatively large number of other technologists at the Prince George airport, waived that requirement for the employee. However, when the employee requested a lateral transfer to Cranbrook, the employer refused, stating that there were only two other electronic systems technologists at that location, and it was already accommodating one of the other Cranbrook technologists who also suffered from 'fear of flying'. Arbitrator Chertkow accepted the employer's argument that the excessive costs and potential for a disruption in service as a result of the transfer amounted to an undue hardship.

In another decision on accommodation and transfer, *Stevenson v. Canada (Canadian Security Intelligence Service)*,²⁵¹ an intelligence officer working with the Canadian Security Intelligence Service was ordered to transfer from Vancouver to Ottawa against his wish. At the time, the officer was suffering from depression, and he requested that the

²⁵⁰ (2001), 101 L.A.C. (4th) 158 (Chertkow).

²⁵¹ [2001] C.H.R.D. No. 40.

transfer be either rescinded or at least delayed until he recovered from his illness. CSIS refused, and after allowing the officer a three month sick leave, terminated his employment on a medical discharge. The Canadian Human Rights Tribunal applied the three step analysis from *Meiorin* and found that CSIS's granting of the medical leave of absence and the temporary postponement of the transfer sufficiently satisfied the accommodation requirement. The employer's declaration that the officer was "unfit" for present duty, the Tribunal said, failed to consider his favourable prognosis for recovery.

III The Role of the Union

In *Central Okanogan School District No. 23 v. Renaud*,²⁵² the Supreme Court of Canada expressly stated that unions have a responsibility, together with employers, to accommodate those employees protected by human rights legislation. Like an employer, a union cannot rely upon a collective agreement provision to escape its accommodation responsibilities. However, also like an employer, a union can refuse a proposed accommodation if the consequences would result in an undue hardship to other members of the bargaining unit.

The *Renaud* decision stated that unions could breach its accommodation duty in one of two different ways. First, a union could have signed a collective agreement that contains a discriminatory provision. It might be liable even if it had opposed the provision when the employer proposed it at the bargaining table. And second, a union might be liable if it stands in the way of a reasonable accommodation proposal, even if the proposal would mean breaching a collective agreement clause.²⁵³

²⁵² [1992] 2 S.C.R. 970.

²⁵³ See *Stewart v. Samuels* (2001), 39 C.H.R.R. D/326 (B.C.H.R.T.), where a trade union was cleared of any human rights liability because the evidence did not demonstrate that it either participated in the

(i) Liability for Discriminatory Provisions

A recent labour arbitration award has stated that, if a collective agreement provision unreasonably blocks an accommodation, the agreement might have to be modified. However, a union may not share in the employer's liability if it can show that it had opposed the inclusion of the disputed provision during negotiations. In *Re Ministry of Health and OPSEU (Pazuk)*,²⁵⁴ the collective agreement expressly provided that, for the purpose of determining severance pay entitlement, an employee's continuous service was not to include any period when an employee was receiving long-term disability payments. (The grievor had been on long-term disability for almost 10 years, and sought to have this time credited as service for the purposes of severance pay).

In its decision, the Ontario Grievance Settlement Board found that this provision constituted indirect discrimination, and the employer was directed to include the grievor's LTD period for the purpose of severance pay calculation. A unique feature of this case was that, because the union had attempted in bargaining to amend the provision in order to comply with human rights legislation, the arbitration board did not find the union was jointly liable for the grievor's loss, even though the union was a signatory to the offending clause. This case suggests a move away from a strict determination in earlier decisions that a union's agreement to an offending provision will invariably result in a joint finding of liability against the union for losses suffered by the complaining employee.²⁵⁵ However, if

discriminatory conduct (abetting racist behaviour) or prevented the employer from accommodating the affected employee.

²⁵⁴ (1994), 10 Lancaster's Charter Cases/ Human Rights Reporter 1 (Sept).

²⁵⁵ *Gohm v. Domtar Inc. & OPEIU, Local 267* (1990), 12 C.H.R.R. D/161 (Ont. Bd. Inq.); aff'd (1992), 89 D.L.R. (4th) 305 (Ont. Div. Ct.).

a union has displayed an unwillingness to change the offending collective agreement provision despite the employer's urgings, it may still be found jointly liable.²⁵⁶

Other decisions have stated that a union clears itself of human rights liability where it can show that it took the initiative to propose alternative solutions to a challenging request for accommodation, and that it would be willing to waive parts of the collective agreement in ways that would not disrupt the rights of other employees. In *Drager v. I.A.M.*,²⁵⁷ a human rights tribunal ruled that, although a union had participated in the formulation of a discriminatory clause in the collective agreement, it would not find it liable because the union had shown flexibility regarding seniority and shift rights. Similarly, in *Thomson v. Fleetwood Ambulance Service*,²⁵⁸ a board of inquiry held that the union's efforts over the years to remove the discriminatory provisions concerning restrictions on vacation pay entitlement were sufficient to absolve it of any liability.

However, a recent ruling indicates that a union's representation responsibilities towards a member with a disability may well be more onerous than under the conventional application of a union's duty of fair representation. In *K.H. v. CEP, Local 1-S and Sasktel*,²⁵⁹ a union member suffering from depression was fired for his inability to follow management orders and to get along with his fellow employees. The union filed a number of grievances on his behalf, but dropped the matter before going to arbitration. K.H. claimed that the union breached its duty to fairly represent him, and the Saskatchewan Labour Relations Board upheld the complaint. While the Board found that the union may have handled the grievances diligently "from the point of view of the normal operation of the grievance

²⁵⁶ *Thorne v. Emerson Electric Canada Ltd*, (1993), 18 C.H.R.R. D/510 (Ont. Bd. Inq.).

²⁵⁷ (1994), 20 C.H.R.R. D/119 (B.C.H.R.C.).

²⁵⁸ (1995), 96 C.L.L.C. 203-007 (Ont. Bd. Inq.).

²⁵⁹ (1997), 98 C.L.L.C. 220-020.

procedure,” it concluded that, overall, the union had:

...failed to take sufficient account of the [mental] disability experienced by K.H., and that they therefore discriminated against him in handling his grievance.²⁶⁰

The Saskatchewan Board emphasized that, while representing members with a mental disability may present a particular challenge to a union, it also placed a higher onus upon the union to ensure that the unique features of these members’ disabilities are not disregarded through inadvertent workplace discrimination.²⁶¹

Another recent ruling by an Alberta human rights tribunal found that the union was equally liable along with the employer by agreeing to a discriminatory provision. In *Starzynski v. Canada Safeway Ltd.*,²⁶² the employer and union had negotiated a major severance package for laid-off employees. An eligibility requirement for the severance provisions stipulated that an employee had to have worked a set number of hours in the previous 52 weeks. This requirement excluded approximately 30 employees who were off work on long-term disability leave. The Alberta tribunal found this provision amounted to discrimination on the basis of disability. Although the union made some efforts to support these employees after the signing of the package (by helping them file complaints, among other measures), the Alberta tribunal found that these attempts did not overcome the original discrimination. It held the union and the employer to be equally liable for the damages owed to the complainants:

Since the duty to accommodate in this case arose from the direct participation in the formation of a discriminatory provision in the collective agreement, then the Union must take a pro-active role in finding a remedy for the problem created. The Union in these circumstances cannot sit back and force the employer to be the sole party accommodating the employees affected...the liability is to be shared equally between the Employer and the Union.

²⁶⁰ *Ibid*, at p. 143,171.

²⁶¹ See, however, *B.O. v. C.U.P.E., Local 59* (2001), 20001 C.L.L.C. 220-045 (Sask. L.R.B.), where another employee with a severe mental illness complained that his union did not fairly represent him following his attempt to undo his resignation from employment taken when suffering from a depression. The Saskatchewan Labour Relations Board agreed with the K.H. decision that a union must make special efforts when representing an employee with a mental illness. However, in this case, it ruled that there was insufficient evidence to conclude that the union had improperly decided not to advance his grievance.

²⁶² (1999), 00 C.L.L.C. 230-007 (Alta. H.R.C.C.).

On appeal, the Alberta Court of Queen’s Bench upheld the tribunal decision.²⁶³ It ruled that there had been insufficient efforts by the union to persuade the membership to accommodate the sub-group of members with disabilities.²⁶⁴

(ii) Seniority

What accommodation must a union provide when its seniority provisions are under review? The thrust of the recent caselaw states that the seniority rights in a collective agreement can only be overridden where no other accommodation option, short of undue hardship, is possible. However, where seniority acts as a wall rather than an equity enhancement – such as in cases of separate seniority lists within the same collective agreement – then it may very well be found to be a discriminatory barrier.

InRe Greater Niagara Regional Hospital,²⁶⁵ a registered practical nurse whose back disability prevented her from resuming her essential duties required a less physically demanding position that could only be found in another bargaining unit. The hospital trained her as a clerk, and assigned her to a vacancy in the clerical bargaining unit. This unit had a separate collective agreement and a separate seniority list from the practical nursing unit. While the union local representing the clerical unit did not object to her assignment, it did protest against the full transfer of her accumulated seniority from the nursing unit. The arbitration board upheld the union’s protest, ruling that the transfer of the disabled employee’s full seniority would adversely affect the seniority and job security of the other clerical employees at a time of impending lay-offs

²⁶³ (2000), 86 Alta.L.R. (3^d) 366 (Q.B.). At the time of writing, the union is seeking a further appeal before the Alberta Court of Appeal.

²⁶⁴ Also see *Oster v. I.L.W.A., Local 400*, [2000] C.H.R.D. No. 3, where the Canadian Human Rights Tribunal found that a union failed to accommodate a female member by not referring her to a posting on a ship as a cook/deckhand. The union maintained that the referral was impractical because the ship did not have separate sleeping quarters for women. The Tribunal stated that the union did not seek alternative choices, such as opposite-shift arrangements for the complainant in the sleeping quarters.

²⁶⁵ (1995), 47 L.A.C. (4th) 366 (Brent).

in the health sector. This, it stated, would amount to a “significant interference” in their rights, the standard set by the Supreme Court of Canada in *Renaud*.²⁶⁶

A second, more recent arbitration decision has endorsed this approach. In *Re Bayer Rubber Inc.*,²⁶⁷ a senior employee claimed that he was improperly removed from his machinist position, while a more junior employee who required an accommodation because of a disability was permitted to stay in his job. The union argued that, before interfering with the grievor’s seniority rights, the employer had to make all reasonable efforts to survey the workplace for positions or work which might satisfy the disabled employee’s need for accommodation. The arbitrator agreed. In his ruling, Arbitrator Watters stated that:

...an Employer, after considering the full range of options and balancing the respective interests, may reasonably determine that the “most sensible” accommodation is one which does affect the contractual rights of other employees, including seniority. In my view, however, an Employer should first strive to avoid any significant interference with seniority rights, to the extent that is possible, given the importance of seniority to the workforce.²⁶⁸

Given that other reasonable accommodations were available that did not intrude into existing seniority rights, the arbitrator found that the employer’s selected accommodation in this case amounted to a significant, rather than a slight, interference.²⁶⁹

Similarly, in *Overwaitea Food Group*,²⁷⁰ the employer had denied an employee a shift-change premium, because the shift change was necessary to accommodate the scheduling needs of an employee with a disability. The union accepted that, as a general rule, it had a duty to cooperate with the company to accommodate such an employee. However, the arbitrator found that, in this case, the company could have

²⁶⁶ *Supra*, note 47. At p. 591, Sopinka J. stated: “The 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.”

²⁶⁷ (1997), 65 L.A.C. (4th) 261 (Watters).

²⁶⁸ *Ibid*, at p. 286. Also see: *Re Canada Post (Lascelles)* (1993), 33 L.A.C. (4th) 279 (Adell); *Roosma v. Ford Motor Co.*, (1995), 24 C.H.R.R. D/89 (Ont. Bd. Inq.); *MacEachern v. St. Francis Xavier University* (1994), 24 C.H.R.R. D/226 (N.S.H.R.C.).

²⁶⁹ Also see *Re North Vancouver (District)* (2001), 101 L.A.C. (4th) 229 (Burke).

²⁷⁰ (1996), 5 Lancaster’s Equity and Accommodation Reporter 4 (Sept.) (Bird).

accommodated the disabled employee without breaching the collective agreement rights of the grievor:

It is clear on the evidence that had [the manager] adopted a different set of priorities, he could have given an effective 24 hour notice *and* complied with the duty to accommodate...In these circumstances it is clear that there was no conflict between the collective agreement and the duty to accommodate [the grievor]. The duty to accommodate is not an eraser with which an employer can rub out inconvenient provisions of a collective agreement. *The duty to accommodate only overrides a provision of the collective agreement where, as in Renaud, the provision conflicts with the duty to accommodate.*

[Emphasis added]

The arbitration board in *Re MacMillian Bloedel*²⁷¹ held that the duty on the employer to look for options for an unobtrusive accommodation is the highest when the harm to other employees is the greatest. The employer had initiated a job posting process, and then interrupted it to award the vacant position to a junior employee with a disability. The union grieved, arguing that the employer had not adequately canvassed other available positions in the workplace which would have caused less interference with collective agreement rights. The arbitrator upheld the grievance, ruling that the employer should carefully seek accommodations that do not interfere with seniority rights. “It is clear from *Renaud*,” he wrote, “that the employer ignores the union at its peril.” He continued:

While *Renaud* makes it clear that a collective agreement must bend to an accommodation, and in that sense the duty to accommodate is a general law, *Renaud* also makes it clear that neither an employer nor a union can bend the collective agreement unless and until other accommodations have been explored.²⁷²

However, the arbitrator also cautioned the union that, on these particular facts, it should accept some responsibility for the break-down in the accommodation process. He relied on *Renaud* to remind the union

²⁷¹ (1998), 75 L.A.C. (4th) 34 (MacIntyre). Also see *Re British Columbia (P.S.E.R.C.)* (2000), 94 L.A.C. (4th) 275 (Lanyon) (“The objective is to find some general principles of scheduling that accommodate gender balancing and have a minimal impact on seniority and the assignment of bargaining unit work”); and *Re Canada Post* (1993), 33 L.A.C. (4th) 279 (Adell) (“the employer is clearly obliged to raise with the union any proposed course of action which involves a departure from the provisions of the collective agreement or which otherwise affects employee rights”).

²⁷² *Ibid.*, at p. 46.

that it was not absolved of its responsibility if it failed to offer alternative measures that would be less onerous from its point of view.²⁷³

What happens when multiple seniority lists within the same collective agreement adversely affect an employee who is protected by human rights legislation? The emerging trend by human rights tribunals has been to determine that these seniority lists are discriminatory because they act as barriers to achieving workplace equality. In *Goyette and Tourville v. Voyageur Colonial Ltd. and Syndicat des employé(e)s de terminus de Voyageur Colonial Limitée*,²⁷⁴ the employees of an inter-provincial bus company were organized within a single bargaining unit, but maintained two seniority units. The telephone customer agents, who were primarily women, were grouped by classification into one seniority unit, while the other agents and clerks were in a separate, male-dominated, seniority unit. The positions in the second unit, particularly those of the ticketing agents, were more desirable jobs because they offered better working conditions and a greater variety of job positions. However, because competitive seniority was not transferable between units, the telephone customer agents would rarely bid for available openings in the second seniority unit. The Canadian Human Rights Tribunal ruled in 1997 that the separate seniority units acted as an unlawful barrier. The decision was subsequently upheld by the Federal Court.

Similarly, in *Bubb-Clark v. Toronto Transit Comm. and A.T.U., Local 113*,²⁷⁵ an employee with narcolepsy had transferred from one seniority unit within the collective agreement to another unit, which resulted in the loss of his competitive seniority from the first unit. When he sought an accommodation position in the first unit, the union objected, and then eventually allowed him to re-claim part of his back seniority. An Ontario human rights board of inquiry found that the separate seniority units discriminated against employees with disabilities, because they were disadvantaged in job bidding, shift selection, vacation determination, and most importantly, the ability to seek an accommodation. On the evidence, the board

²⁷³ Also see *Re Colonial Cookies* (1999), 82 L.A.C. (4th) 101 (Rayner).

²⁷⁴ (1997), 97 C.L.L.C. 230-039 (C.H.R.T.), uph'd (1999), 185 D.L.R. (4th) 366 (F.C.-T.D.).

²⁷⁵ (2002) O.H.R.B.I. Decision No. 02-006.

of inquiry found that no other employees would be significantly affected to the point of undue hardship by the award of seniority to employees with disabilities.

(iii) Collective Agreement Rights outside the Bargaining Unit

If the only reasonable accommodation for a disabled employee is a placement in a non-bargaining unit position, is an employee entitled to request this? And if she or he is entitled to the position, do the employee's collective agreement rights and benefits follow? The present view is that an employer cannot automatically exclude a position from an accommodation consideration merely because it is not in the bargaining unit. However, the ability to export rights and benefits outside of the bargaining unit is limited. Nevertheless, the cases also recognize that loss of bargaining unit status can constitute indirect discrimination because of the loss of just cause protection, union representation, and the economic benefits that come with a collective agreement.

In several recent decisions, arbitration boards have ruled that non-unit positions should be among the list of potential accommodations, if no position within the bargaining unit would satisfy the duty. In *Re Riverdale Hospital*²⁷⁶ and *Re Municipality of Metropolitan Toronto*,²⁷⁷ the arbitration boards both held that bargaining unit boundaries may amount to a discriminatory barrier under the human rights legislation.

However, collective agreement rights and benefits have not passed so easily through the bargaining unit walls. In *Re Interlink Freight Services*,²⁷⁸ the injured employee, a truck driver, was temporary placed in a security guard position as part of a "work-hardening" program while he was recovering from a disability. The guard position was not covered by the collective agreement. Subsequently, the employer removed him from that position because of work performance concerns. The union grieved against the removal, and the

²⁷⁶ (1994), 41 L.A.C. (4th) 24 (Knopf).

²⁷⁷ (1993), 35 L.A.C. (4th) 357 (Fisher).

²⁷⁸ (1996), 55 L.A.C. (4th) 289 (M. Picher).

employer argued that the union had no right to grieve under the agreement because the employee was not a member of the bargaining unit when working as a security guard. The arbitrator agreed with the company. He stated that the employee retains his right under the collective agreement to return to his driver's position when he becomes physically fit. However, the arbitrator went on to say that:

...the duty to accommodate [does not] extend to exporting or expanding the terms and conditions of the collective agreement so as to apply them to non-bargaining unit positions...[This] would overstep the line which properly protects equal treatment and non-discrimination, and would effectively confer upon the grievor rights beyond those enjoyed by his peers in the bargaining unit, or his peers in the non-bargaining unit position of security guard.²⁷⁹

In another recent decision involving similar issues, the arbitration board in *Re West Park Hospital*²⁸⁰ was faced with a grievance from a disabled nurse who had been transferred to a position outside of the bargaining unit. The employer had determined that this was the only way to properly accommodate her back injury. The union argued that the transfer constituted indirect discrimination, since the nurse would be unable to retain her collective agreement benefits and rights. The arbitrator concluded that an employer's primary obligation is to attempt to accommodate an employee in her or his own job. However, if such accommodation within the bargaining unit is not possible, the duty requires an offer of suitable work elsewhere as a last measure, and that may not necessarily be in a bargaining unit position.

One of the most recent arbitral statements on the subject strongly suggests that a bargaining unit position – because of the collective agreement protection it offers – is an important job benefit, and is not to be lightly interfered with. In *Re Mount Sinai Hospital*,²⁸¹ the grievor was a nurse with a permanent partial injury to her back, which restricted her ability to lift and to be on her feet for an extended time. The hospital eventually found her a part-time position outside of the bargaining unit as a ward clerk. The grievor's union protested, arguing that the hospital had ignored other feasible accommodations that would have kept the nurse within the bargaining unit. The arbitration board found that the hospital's search was inadequate. It

²⁷⁹ *Ibid*, at p. 299-300.

²⁸⁰ (1996), 55 L.A.C. (4th) 78 (Emrich).

²⁸¹ (1997), 66 L.A.C. (4th) 221 (Emrich).

also pointed out that the ward clerk position entailed a substantial reduction in pay and benefits for the grievor, placed her outside the scope of any union representation, and stranded her in work outside of the nursing profession. The loss of pay, professional status, and union representation was a critical factor in the board's eyes:

The adverse effect and costs of the [employer's] proposal were largely borne by the grievor. The proposal did not respect the grievor's preference...to remain within the field of nursing and strips her of bargaining unit affiliation. Given that disabled employees face restrictions in the variety and amount of work that they can perform attributable to the nature of their handicap, they may be more vulnerable than able-bodied members of the employer's workforce to the efforts of downsizing and elimination of positions. It is a significant bulwark against such vulnerability to be able to avail oneself of the assistance of a bargaining agent to advocate accommodation proposals with the employer, to utilize seniority rights in the event of lay-off and to have just cause protection against discharge, with rights to grieve and access to arbitration.²⁸²

Thus, the test as to whether an employee can be compelled to accept an accommodation position outside the bargaining unit depends on if there are other, less drastic accommodations available within the unit. In most circumstances, an assignment outside the bargaining unit would be acceptable only after all other reasonable possibilities of accommodation within the unit have been exhausted. Arbitrator Christie confirms this approach in his recent decision in *Re Queen's Regional Authority*.²⁸³ In his concluding comments, he stated:

I will find that the duty to accommodate across bargaining unit lines overrides collective agreement rights of any significance only where, first, the need to accommodate is clear, in that the claim of the person to be accommodated obviously outweighs the claims of those whose rights are displaced, and second, where there is no other reasonable way to fulfil it. The employer must very seriously seek a less intrusive way to accommodate an employee under the *Human Rights Act*.

IV The Responsibilities of the Employee Seeking the Accommodation

²⁸² *Ibid*, at p. 259.

²⁸³ (1999), 78 L.A.C. (4th) 269 (Christie).

The Supreme Court of Canada in *Renaud*²⁸⁴ wrote that the search for accommodation in the workplace is a multi-party responsibility. Along with the employer and the union, the individual employee must also actively participate in finding an appropriate accommodation. When an employer, or an employer and a union together, have come up with a reasonable proposal, the employee has a duty in law to facilitate the implementation of the proposal:

The [employee] cannot expect a perfect solution. If a proposal that would be reasonable in all the circumstances is turned down, the employer's duty is discharged.²⁸⁵

More recently, Arbitrator Michel Picher in *Re Canpar*²⁸⁶ has re-stated the principle in more explanatory detail:

...it is not the obligation of the Company under the Canadian *Human Rights Act* to necessarily offer an employee the precise accommodated assignment that he or she might demand. If the employer offers to the employee a work opportunity involving substantially similar working conditions and earning opportunities...in a manner that does not involve any significant adversity to the employee, it has fulfilled its obligation of reasonable accommodation.²⁸⁷

The requirements of an employee seeking an accommodation are well illustrated in *Re GSW Heating Products Ltd.*²⁸⁸ In this case, an employee was unable to return to his work as a stuffer operator for a chimney insulation manufacturer as a result of a variety of ailments that included a serious back injury. The employer eventually terminated him for excessive innocent absenteeism. Prior to the termination, the employer had selected several jobs which met the restrictions set out by the employee's doctor. The employer then allowed the employee to choose the one he liked best. The employee found the standing and bending painful, but made no effort to identify the problem or seek assistance in finding a solution. The arbitrator found that the grievor could have solved both problems by using his own initiative to use a chair and to ask that his raw materials be placed on a table. He apparently had never identified these problems to his supervisor. Nor had he accurately described his job to his doctors so that they could suggest

²⁸⁴ *Supra*, note 47.

²⁸⁵ *Ibid.*

²⁸⁶ (2000), 93 L.A.C. (4th) 208. Also see *Quigley v. Ocean Construction Supplies* (2002), C.H.R.R. Doc. 02-054 (C.H.R.T.).

²⁸⁷ *Ibid.*, at p. xxx.

²⁸⁸ (1996), 56 L.A.C. (4th) 249 (Barrett).

modifications. On these facts, the arbitrator ruled that, in light of the grievor's lack of co-operation, the employer had satisfied its duty to accommodate.

Other recent rulings have reinforced the dictum from *Renaud* on the scope of the employee's responsibility. The Federal Court (Trial Division) in *Guibord v. The Queen*,²⁸⁹ has found that when a disabled employee refuses an offer of alternative employment at another location, she or he must provide a reasonable explanation for the refusal. This refusal must be based upon more than a mere reluctance to accept a job that is not the same as the old position. The Federal Court also stated that the employer was entitled to reject the suggestions for accommodation offered by the employee and her doctor, where these suggestions did not meet the employer's operational requirements.

In *Re T.T.C. Bottling Ltd.*,²⁹⁰ the conditions attached by the arbitrator to the grievor's accommodation in his new position included the lower rate of pay that went with the new position, restrictions on operating motorized vehicles or handling dangerous materials, and the wearing of personal protective clothing at all times. In *Re Alcan Rolled Products Company (Kingston Works)*,²⁹¹ Arbitrator Gray reiterated the dictum in *Renaud* that the employee bears a duty to assist in securing a proper accommodation. If the employee suffers a series of relapses in her or his treatment for drug or alcohol addiction, and fails to keep the promise in a last-chance agreement to attend work regularly, then she or he may be in breach of their duty to assist in enabling the accommodation to work. In *Re Canadian Pacific Ltd.*,²⁹² the arbitrator ruled that an employee seeking an accommodation, in circumstances where there were no available permanent positions, must be prepared to accept retraining and offers of temporary work, or risk exhausting the opportunity to be accommodated. In *Turanich v. Saskatchewan (Dept. of Municipal Government)*,²⁹³ an employee with dyslexia and a learning disability was found by a Saskatchewan Board of Inquiry to have

²⁸⁹ (1996), 97 C.L.L.C. 230-019 (F.C., T.D.).

²⁹⁰ (1993), 32 L.A.C. (4th) 73 (Christie).

²⁹¹ (1996), 56 L.A.C. (4th) 187 (Gray).

²⁹² (1996), 57 L.A.C. (4th) 129 (M. Picher).

²⁹³ (2000), 37 C.H.R.R. D/209 (Sask. Bd. Inq.).

been reasonably accommodated by his employer, in part because he failed to co-operate with the ongoing accommodation efforts and exercised poor judgement in quitting instead of applying for disability benefits. And in *Re St. Paul's Hospital*,²⁹⁴ an employee with pain syndrome in his right shoulder refused an employer's proposed accommodation that met the conditions proposed by the employee's physician. In these circumstances, Arbitrator Jackson held that the employee was obliged to accept a reasonable accommodation. Once he refused, the employer had discharged its legal duty.

However, it must be remembered that the initial burden to accommodate rests with the employer. It must initiate the effort to investigate the accommodation possibilities, and then consult with the employee²⁹⁵ and, where one is present, the union. In *Marc v. Fletcher Challenge Canada Ltd.*,²⁹⁶ a British Columbia Human Rights Tribunal rejected a newsprint company's argument that the employee with a disability had to show that there were no jobs in the mill that she could perform with or without modification, and that there was a job in the pulp mill that could accommodate her needs. The Tribunal said:

There is no obligation on the complainant to originate a solution in the search for accommodation, although she may make suggestions.

But once the employer has exhausted the available accommodation possibilities, the onus would shift to the employee who is seeking the accommodation to suggest viable alternative accommodations, or to present new medical evidence. In *Re Sault Area Hospitals*,²⁹⁷ an employee had attempted, and failed, on five occasions to return to work. On each occasion, the employer, with the union's co-operation, had put together a modified work program designed to fit the limitations described by the employee's own physician. Following each failure, the employer invited further input from the union and the employee, and gave consideration to whatever suggestions were advanced. Arbitrator Whitaker found that, in the circumstances, the accommodation duty demanded no more from the employer.

²⁹⁴ (2001), 96 L.A.C. (4th) 129 (Jackson).

²⁹⁵ *Martin v. 3501736 Inc. (No. 1)* (2001), 41 C.H.R.R. D/88 (B.C.H.R.T.).

²⁹⁶ (1998), 35 C.H.R.R. D/112 (B.C.H.R.T.).

²⁹⁷ (2001), 96 L.A.C. (4th) 168 (Whitaker).

To sum up, an employee seeking an accommodation has three responsibilities: (i) to actively co-operate with the employer and/or the union in investigating accommodation possibilities; (ii) where appropriate, to offer reasonable explanations for his or her refusal to accept a proposed accommodation; and (iii) to accept a reasonable accommodation proposal that meets the employer's operational requirements and that does not cause him or her undue hardship in the circumstances.