

# 2014 Legal Update



## The Duty to Accommodate and Returning to Work – An Overview

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# Introduction

- The nature of the Duty to Accommodate and legal requirements to satisfy it continue to develop
- The Duty to Accommodate can arise in a variety of situations
- Issues can be complex & solutions are not always obvious
- Effective accommodations can reduce productive time lost and avoid litigation

# Outline

1. Statistics
2. Relevant Legislation
3. Review of the Duty to Accommodate
4. Returning to Work
5. Fact patterns

# Statistics

- In 2013
  - 2,761,604 days were lost from work owing to occupational injury and disease
  - 17,743 serious injury claims made in 2013
    - 63% male / 37% female
    - 9% of serious injury claims were aged 15-24
    - 21% of serious injury claims were aged 55+

# Relevant Legislation

- *Workers Compensation Act (“WCA”) & Regulations*
  - Employer duty to ensure the health & safety of all workers (*WCA* s. 115)
  - Worker duty to protect the worker’s health and safety and that of colleagues (*WCA* s. 116)
  - Supervisor duty to ensure health & safety of all workers supervised by the supervisor (*WCA* s. 117)

# Relevant Legislation

- Human Rights Legislation
  - BC: *Human Rights Code*, RSBC 1996, c 210\*\*
  - Federal: *Canadian Human Rights Act*, R.S.C. 1985, c. H-6
  - *Canadian Charter of Rights and Freedoms*

# BC Human Rights Code

## Discrimination in employment

13 (1) A person must not

- (a) refuse to employ or refuse to continue to employ a person, or
- (b) discriminate against a person regarding employment or any term or condition of employment

because of the race, colour, ancestry, place of origin, political belief, religion, marital status, family status, physical or mental disability, sex, sexual orientation or age of that person or because that person has been convicted of a criminal or summary conviction offence that is unrelated to the employment or intended employment of that person.

# BC *Human Rights Code*

- Exemptions:
  - the operation of a bona fide retirement, superannuation or pension plan or to a bona fide group or employee insurance plan, whether or not the plan is the subject of a contract of insurance between an insurer and an employer.
  - a refusal, limitation, specification or preference based on a bona fide occupational requirement (BFOR).



# The Duty to Accommodate

- Step #1: What is the nature of the accommodation sought?
- Step #2: Is there a duty to accommodate and what is the scope of the duty?
- Step #3: Would a refusal to accommodate be discriminatory and contrary to human rights legislation?
- Step #4: Is there a basis for an agreement on reasonable accommodation?

# The Duty to Accommodate

- Accommodation issues tend to arise with respect to:
  - Physical or mental disability (most common);
  - Religion;
  - Family Status; and
  - Age

# The Duty to Accommodate

## Definition of Disability

- *Boisbriand* decision of the Supreme Court of Canada (2000) defined “handicap” (aka disability) broadly as follows:

“may be the result of a physical limitation, an ailment, social constraint, a perceived limitation or a combination of all of these factors...”

# The Duty to Accommodate

## Would a refusal be discriminatory?

- Prima facie discrimination in employment can generally be established where:
  - 1) an employee has a characteristic linked to one of the prohibited grounds under the Code;
  - 2) the employee is experiencing adverse treatment; and
  - 3) there is a nexus between the adverse treatment and the prohibited ground.
- If satisfied, the Employer must then prove it met its duty to accommodate

# The Duty to Accommodate

## What is the Scope?

“The duty...is to take reasonable steps to accommodate the complainant, short of undue hardship: in other words, to take such steps as may be reasonable to accommodate without undue interference in the operation of the employer's business and without undue expense to the employer.”

Ont. Human Rights Comm. v. Simpsons-Sears, [1985] 2 SCR 536

# The Duty to Accommodate

- The Employer does not have a duty to accommodate where:
  - it can demonstrate **undue hardship**; or
  - An objectively justifiable **bona fide occupational requirement (“BFOR”)** exists.

# The Duty to Accommodate

- When has the Employer reached “**undue hardship**”?
  - Accommodation efforts must be assessed globally
  - All accommodation during the employment relationship is relevant
  - The undue hardship test does not require the employer to show that it is “impossible to accommodate” the employee
  - The duty to accommodate ends where the employee is unable to fulfill the basic obligations of employment for the foreseeable future

*Hydro-Quebec*, Supreme Court of Canada (2008)

# The Duty to Accommodate

- Factors to Consider for Undue Hardship:
  1. Size of the employer
  2. Interchangeability of the workforce & facilities;
  3. Whether the employee's job exacerbates the disability;
  4. The extent of the disruption of a collective agreement;
  5. The effect on the rights of other employees;
  6. The effect on the morale of other employees;
  7. Costs to accommodate, including impacts on efficiency, wage increases, and other direct \$ costs to be incurred
  8. The impact on the safety of the individual, other employees, or the general public.



# The Duty to Accommodate

- Is the standard a **BFOR**? (*Meiorin* test)
  - Employer must:
    - show that it adopted the standard for a purpose *rationally connected* to the performance of the job;
    - establish that it adopted the particular standard in an *honest and good faith* belief that it was necessary to the fulfillment of that legitimate work-related purpose; and
    - establish that the standard is *reasonably necessary* to the accomplishment of that legitimate work-related purpose.

# The Duty to Accommodate

## Agreement on Reasonable Accommodation

- Preferable to come to an agreement
- Negotiation process may take place prior to an employee's time off, while the employee is off work, when the employee is planning to return, and when the employee is back and working

# Returning to Work

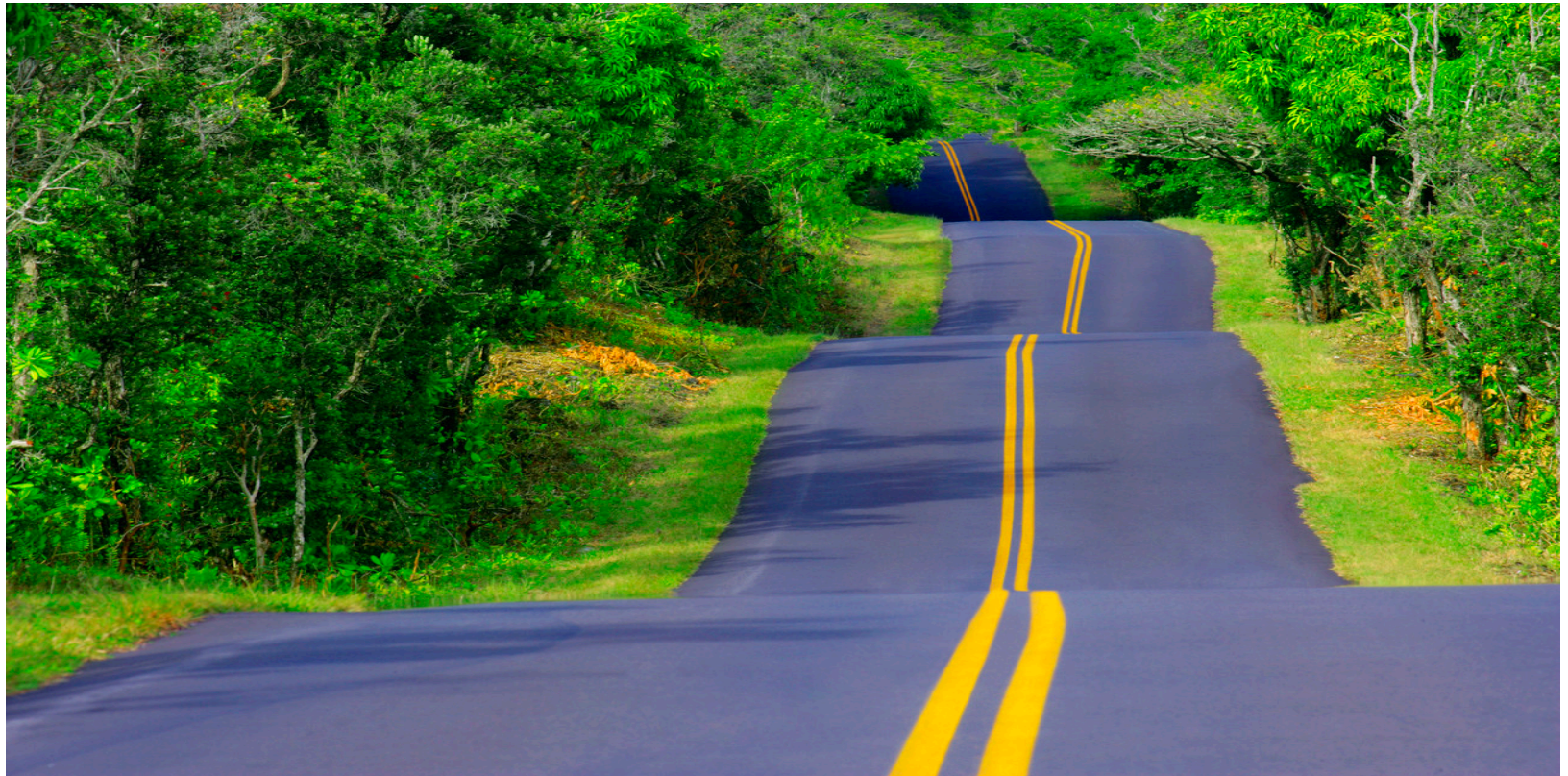
- Issues upon returning to work:
  - What are the requirements of the position?
  - Is accommodation needed?
  - Privacy concerns
  - Medical information
  - Modified job duties
  - Permanent vs. Temporary restrictions
  - Seniority Rights

# Returning to Work

- Reasons for accommodations vary:
  - Restrictions imposed by childcare
  - Returning from serious workplace injuries
  - Returning from personal medical leaves
  - Returning from substance abuse treatment
  - Permanent restrictions on work capabilities
  - Graduated return to work plans

# Returning to Work

- Accommodation is a 2 Way Street
  - Employees must participate



# Returning to Work

## Employer Obligations:

1. Determine reason for request for accommodation
2. Assess nature of discrimination allegations and whether such effects may be alleviated through reasonable accommodations
  - Every situation is different; context important; look at each situation individually
3. Determine whether there is significant cost and disruption caused by accommodation required
  - “impressionistic assumptions” are not good enough

# Returning to Work

4. Consider use of legal, medical and occupational safety experts to determine accommodation options
5. Make an attempt at accommodation that is tangible and measureable
6. Communicate the position to the employee and the Union (if applicable)



# Returning to Work

## Employee Obligations:

1. Describe nature of any accommodation required
2. Explain the basis for the accommodation request
3. Provide medical support where appropriate
4. Attend at independent medical examination when reasonably requested
5. Provide ongoing medical disclosure where relevant



# Frustration of Contract / Innocent Absenteeism

- If a return to work is not possible, and will not be for the foreseeable future, the contract may be frustrated at common law
- In the context of a unionized employee, permanent disability may provide the basis for treating the employment relationship as at an end due to innocent absenteeism

# Frustration of Contract

*“It has long been a tenet of our law that a contract may be brought to an end by operation of law and the parties discharged from further performance if, without the fault of either party, the circumstances in which it was expected to be performed have changed so radically that performance would be impossible or at least something radically different than was initially contemplated. In such circumstances, the contract is said to be frustrated.”*

*Wightman Estate v. 2774046 Canada Inc., 2006 BCCA 424*

- Frustration is typically referred to as having been brought about by an “act of God”



# Frustration of Contract

- *Dartmouth Ferry Commission v. Marks* (1904)
  - Permanent disability that prevents employee from performing duties frustrates contract; distinct from temporary disabilities
- *Yeager v. R. J. Hastings Agencies Ltd.* (1984)
  - Length of the absence alone is not determinative of the issue (2 years in this case)
  - Abandonment is just cause for dismissal



# Frustration of Contract

- *Demuyne v. Agentis Information Services Inc.* (2003)
  - Absences exceeding 18-24 mths fall outside the “temporary” range and into the “permanent” category
- *Wightman* (2006)
  - Availability of LTD benefits does not mean a contract cannot be frustrated
  - Wording of the employment contract is important



# Frustration of Contract

- What steps do I consider to determine whether the contract has been frustrated?
- *Marshall v. Harland & Wolff Ltd. (1972)*
  - Ask yourself: is the employee's incapacity of such a nature, or does it appear likely to continue for such a period, that further performance of the employee's obligations in the future would be either impossible or radically different from that undertaken by the employee and agreed to be accepted under the agreed terms of employment?



# Frustration of Contract

- Consider:
  - a) The terms of the contract, including provisions as to sick pay
  - b) How long the employment is likely to last in the absence of sickness
  - c) The nature of the employment
  - d) The nature of the illness or injury and how long it has already continued and the prospects for recovery
  - e) The period of past employment

# Summary

- Expect further developments in the duty to accommodate
- Rise in mental illness rates
- Aging workforce
- Diverse family structures and parental care obligations
- Increased cultural and theological diversity

# Questions?



**Thank you for Attending!**