Article

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Reasonable Accommodation Requirements under Workers' Compensation in Ontario

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A relatively new and potentially important administrative forum for interpreting the concept of reasonable accommodation has been created by the Ontario Workers' Compensation Act as amended in 1989. The revised act contained provisions requiring employers to reemploy, and where necessary make reasonable accommodations for, workers following an injury. Though representing an important reformation for the workers' compensation system, accommodation requirements are present in other labour market policy initiatives. This paper discusses the accommodation requirements in other legislation and jurisprudence in Canada, describes the recent reforms to the Ontario Workers' Compensation Act in which accommodation represents an integral component, and outlines the new and emerging jurisprudence under the revised act.

Since the 1960s, Western societies have moved to legalize the concept of equal opportunity for persons with disabilities. The first approach — prohibiting discrimination on the basis of handicap — followed the logic that

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if people could be required to be blind to irrelevant disabilities, then they would make decisions on the merits. In this way, equality would be achieved by treating "like people alike".

The problem, however, is that being blind to the irrelevant disability does not guarantee that the disability will not still pose a barrier to employment or access. Being unable to walk might not prohibit people from doing the *bona fide* requirements of a job, but it might keep them out of the building. Thus, tribunals and regulators began to recognize that being blind to irrelevant disabilities was not enough – it was also necessary to recognize the barriers to access, and treat unlike persons differently.

The instrument of such differential treatment is accommodation – "positive action to accommodate the unique needs of the disabled at the workplace" (Tarnopolsky and Pentney 1991: 9.27). The growing international importance of the issue is evidenced by the fact that the decade 1983-1992 had been declared the Decade of Disabled Persons by the United Nations. In the United States, the issue of accommodation will take on increased importance as the parties interpret their rights and obligations under the new Americans with Disabilities Act, passed in 1990 and implemented in 1992.

In North America, the legislative and other initiatives that involve accommodation requirements can be found in a variety of sources: general human rights and anti-discrimination statutes; specific legislation for persons with disabilities; workers' compensation legislation; regulations or guidelines that are sometimes issued to clarify the statutes; arbitrations over the interpretations of collective agreements; and the jurisprudence and case law that invariably interpret the legislation.

Given the array of legal sources for the accommodation requirements, it is important for the stakeholders – employers, employees and unions – to have information on how these requirements are being interpreted by various bodies involved in their application. These bodies have included: the courts, at all levels, which interpret the statutes in application to specific cases; administrators who establish regulations and guidelines for affected parties to follow; and arbitrators who interpret collective agreements in light of relevant legislation.

A relatively new and potentially important administrative forum for interpreting the concept of reasonable accommodation has been created by the Ontario Workers' Compensation Act. A component of a major overhaul of the act, which came into effect in 1990, was the establishment of reemployment rights for injured workers and reasonable accommodation responsibilities for employers. Disputes arising over these provisions are resolved through an administrative process instituted by the board. The

evolving jurisprudence from the workers' compensation system, and the more familiar legal bodies, together establish the rights and responsibilities of the stakeholders in this area of growing importance.

This paper seeks to illuminate the accommodation issue by examining the approach taken under the Ontario workers' compensation system. The applications under that system are important for two main reasons, outlined in more detail later. First, the interpretations from this source are likely to be more extensive than from any other body, given the importance of this issue under the recent reforms of workers' compensation in Ontario. Second, the Ontario Human Rights Commission (1989) guidelines have been adopted as policy under the Ontario workers' compensation system, and these guidelines are generally regarded as one of the most extensive and aggressive in this area. With three years of experience in the accommodation area behind it, the application in Ontario may illuminate the utility and limitations of positive intervention in overcoming employment barriers. To our knowledge this is the first analysis of the evolving interpretation of reasonable accommodation emanating from the Ontario workers' compensation system in spite of the fact that many hundred thousand workers have been injured since the act came into effect, and were therefore subject to these provisions.

The paper begins with a discussion of the accommodation requirements in other legislation and jurisprudence in Canada. The recent reforms of the Ontario workers' compensation system are then outlined, along with the accommodation requirements that are an integral component of those reforms. The new and emerging jurisprudence of the Ontario Workers' Compensation Board and their independent Appeals Tribunal is then outlined. The paper concludes with some general observations.

ACCOMMODATION REQUIREMENTS IN OTHER LAWS AND JURISPRUDENCE

All Canadian jurisdictions have human rights or anti-discrimination legislation and all specify disabled persons as one of the enumerated groups that are protected by such legislation (Adell 1991; Malloy 1992). All Canadian human rights statutes also provide exemptions in the case of a legitimate defence based on a *bona fide* occupational qualification (BFOQ). However, not all statutes have the same degree of specificity with respect to the duty to accommodate the needs of disabled persons. That degree of specificity can be ranked in the following fashion: (1) jurisdictions which specifically state an accommodation requirement in their statute (Ontario, the Yukon and Manitoba); (2) jurisdictions which do not specify an accommodation requirement in their statute but which have specific

guidelines on accommodation (British Columbia and Alberta); and (3) jurisdictions which do not specifically state an accommodation requirement in their statute nor in any guidelines, but which have general anti-discrimination legislation pertaining to disabled persons, subject to a BFOQ defence (all other jurisdictions). These three degrees of specificity are indicated in the three columns of Table 1. The date in each cell entry is the date when the legislation was passed or the guideline promulgated. Within each grouping, the different jurisdictions are listed in descending order according to the date at which the legislation was passed. As indicated in the second column, Ontario and Manitoba both have an accommodation requirement specified in their human rights statute and guidelines on accommodation.

TABLE 1

Accommodation Requirements in Canadian Human Rights Statutes (Year of Passage)

Jurisdiction	*Accommodation Requirements Specified in Statute*	*Accommodation Requirements in Guidelines*	*No Specified Accommodation Requirements; General Human Rights & BFOQ*
Ontario	1986	1989	
Yukon	1986		
Manitoba	1987	1988	
British Columbia		1990	
Alberta		1991	
New Brunswick			1973
Quebec			1977
Saskatchewan			1979
Federal			1985
Prince Edward Is.			1988
N. W. Territories			1988
Nova Scotia			1989
Newfoundland			1990

Source: Extracted from information provided in Winkler and Thorup (1992).

Despite this variation in the degree of specificity in the accommodation requirements in the various human rights statutes and guidelines, the fact remains that all Canadian jurisdictions have human rights legislation that prohibits discrimination against disabled persons (as well as other enumerated groups). The duty to accommodate emerged first as an inference from

the general prohibition on discrimination, although that ran into literalist readings from the courts in both Canada and the United States.[1] Next came the specific duty to accommodate subject to BFOQs, and most recently in Ontario emerged the requirement to assess BFOQs in light of the duty to accommodate.[2]

The statutory requirements have been given some interpretation through Supreme Court decisions,[3] albeit those decisions are recent, few in number, and they have dealt with religious accommodation and not specifically accommodation for disabled persons. The *Bhinder* decision in 1985 essentially indicated that the employer did not have to accommodate the religious needs of an employee (in this case, to wear a turban instead of a hard hat), once the employer established a BFOQ (in this case that a hard hat was required of all employees for safety reasons). The *O'Malley* decision of 1985 established that the employer was required to accommodate the religious holiday of an employee, if the employer could not first establish a BFOQ, and the onus was on the employer to establish a BFOQ once the complaint was made. The *Alberta Dairy Pool Case* of 1990 also required the employer to accommodate the religious holiday of an employee, with the accommodation requirement being made prior to the consideration of a BFOQ defence (Taras 1992).

Jurisprudence on accommodation requirements has also been generated by the human rights tribunals as they have interpreted their statutory requirements. After assessing the recent Canadian jurisprudence in this area, Winkler and Thorup (1992: 226) conclude that "reasonable accommodation" is generally interpreted to involve a standard of up to the point of "undue hardship". This is higher than the standard that would normally be thought of as implied by the phrase "reasonable accommodation" (Lepofsky 1992). It is also higher than the *de minimus* standard of "business inconvenience" that generally has been applied in the United States, although the new Americans with Disabilities Act (ADA) requirements use the standard of "undue hardship". Winkler and Thorup also conclude that the human rights tribunal jurisprudence suggests that the following factors are relevant in determining what is undue hardship:

- cost impact and availability of external funding;
- impact on efficiency and productivity;

1. *Re Ontario Human Rights Commission and Simpson-Sears,* (1982) 133 D.L.R. (3d) 611, and *Transworld Airlines Inc.* v. *Hordisen,* 432 v.s. 63 (1977).

2. *Ontario Human Rights Code,* R.S.O. 1990, c. H.19, s. 17 (2).

3. The implications of the Supreme Court cases for the accommodation of disabled persons are discussed in Winkler and Thorup (1992) and in Taras (1992).

- economic conditions facing the employer;
- the direct impact on other employees (although not if hostile or uninformed);
- the cumulative impact of a series of accommodations;
- availability of other positions to offer the employee;
- unreasonable and uncooperative action by the employee and an unwillingness to provide reciprocal accommodation;
- risk of serious injury that is objectively assessed (although some trade-off is allowed if the risk is minor and especially if it falls on an informed employee who is seeking accommodation and willing to make the trade-off);
- the duty to accommodate can override collective agreement provisions.

Arbitral jurisprudence can also be an important source of information on how arbitrators interpret accommodation requirements under collective agreements. After reviewing arbitral jurisprudence in the area of accommodations for disabled persons, Winker and Thorup (1992) conclude that arbitrators follow similar criteria as those utilized by human rights tribunals. Adell (1991) further indicates that the following factors relevant to the interpretation of reasonable accommodation emerge from the arbitral jurisprudence:

- any BFOQ must be reasonable in relation to the actual work done and the significant requirements of the job, not to occasional requirements;
- the actual work done currently in the specific job is what is relevant, and not possible work to be done in future jobs if the worker were to be subsequently promoted;
- arbitrators are unlikely to require the alteration of seniority provisions as part of any accommodation.

Jurisprudence from workers' compensation boards and appeals tribunals other than those in Ontario do not appear to be a significant part of the emerging jurisprudence in this area. This likely reflects the particular emphasis in Ontario on the reemployment of injured workers under the new workers' compensation reforms, as well as the practice of following the Ontario Human Rights guidelines, with its stringent accommodation requirements. Similarly, there is limited jurisprudence from the United States, given their earlier *de minimus* requirements and the fact that the more recent requirements up to the point of "undue hardship" are only recently being applied under the ADA beginning in 1992 (Fasman 1992).

ONTARIO'S WORKERS' COMPENSATION REFORMS

Before outlining the emerging jurisprudence under Ontario's workers' compensation system, it is important to highlight the essential features of

that system, especially as they relate to the accommodation requirements. This is so because the recent reforms make the reemployment of injured workers an integral part of the new system, with the duty to accommodate in turn being a key ingredient of the reemployment strategy (Allingham and Sangster 1990; Hyatt 1992a, 1992b).

The recent reforms occurred as a result of Bill 162, effective January 1990. The previous system involved replacing 90 percent of the lost income of workers with a temporary disability. Once their medical condition had stabilized (maximum medical improvement) and if they had still not returned to work, then they were given a disability rating between 0 and 100 percent based on the so-called "meat-chart". This was then multiplied by their pre-accident earnings to yield a permanent disability payment. This payment was made for life, irrespective of the recipients' subsequent work behaviour or earnings. Problems occurred because the so-called "temporary" payments often dragged on for long periods, with the workers not returning to work. As well, the compensation payment did not always reflect lost income, and hence departed from the insurance principle of workers' compensation.

The new procedure is a wage loss system, designed to compensate for lost earnings.[4] During the first year (potentially up to 18 months) the injured worker is given "temporary" compensation of 90 percent of the actual income loss. After that first year, they are assessed for permanent disability payments. Such payments are equal to 90 per cent of their expected "future economic loss" defined as the difference between their "earnings capacity" and their pre-injury earnings. Their earnings capacity could be their actual earnings (including zero), or it could be a level of earnings that they are deemed to be able to earn in suitable and available employment, if their actual earnings are regarded as an inappropriate indication of their earnings capacity. This wage loss calculation is made one year after the injury, with subsequent reviews three years and six years after the injury. After the final review, the compensation will be 90 percent of their lost earnings capacity, irrespective of their subsequent work behaviour and earnings.

While this wage loss system is fairer in that it adheres more to the insurance principle of compensating for lost earnings capacity, the high income replacement rate of 90 percent reduces the monetary incentive to return to work, at least until the final six year review. In order to offset this disincentive, as well as to avoid the problems of the old system where the

4. In addition to this economic loss component, there is a non-economic loss award made to compensate for physical and functional loss. It is based on a disability rating, with younger workers receiving a larger payment since they will experience the physical and functional loss for a longer period of time.

90 percent replacement rate of "temporary" disability often dragged on indefinitely, the new system emphasized a number of features to encourage the return to work. These included: early and extensive vocational rehabilitation efforts as well as rewards for such efforts and penalties for not cooperating in these efforts; strong reemployment requirements placed on the employer where the injury occurred; and reasonable accommodation requirements to facilitate the return to work. Such accommodation requirements are therefore an integral feature of Ontario's workers' compensation reforms.

Although the expansion of accommodation requirements into the realm of workers' compensation represents a shift in workers' compensation policy and law, from a larger perspective these reforms are entirely consistent with a variety of other emerging policies.[5] These include: (1) employment equity that emphasizes the need to compensate for the cumulative legacy of a history of unequal opportunities and discrimination that is often unintended and systemic; (2) human rights legislation that focuses on the accommodation of diversity and individual differences; (3) vocational rehabilitation strategies that emphasize the integration of disabled persons into "real world" work situations, partly through adapting the environment as well as the individual; (4) social assistance programs that stress the importance of enabling people to "earn" their income rather than receive it as a transfer payment; (5) public education programs that emphasize breaking down stereotypes and attitudes that may be more disabling than physical or mental disabilities; (6) "employee well-being" programs that focus on the importance of social interactions and self-esteem through meaningful work relations and (7) reinstatement requirements placed on the time-of-accident employer on the grounds that such requirements have properties of efficiency (since the costs may induce them to reduce the likelihood of such injuries) and fairness (since those costs fall on the employer where the injury occurred, and such employers are less likely to be able to shift the costs to the injured worker through the payment of lower wages in return for the accommodations[6]).

Clearly, the duty to accommodate the needs of disabled workers is an important component of the reemployment strategy of Ontario's reformed workers' compensation system. While the reemployment and accommodation provisions may represent an apparent shift in workers' compensation policy, this shift results from the momentum of other labour market policy initiatives which is now "spilling over" into workers' compensation.

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5. These are discussed, for example, in Berkowitz (1990), Collignon (1989), Gunderson (1992), Gunderson, Hyatt and Law (1993), and Lepofsky (1992).

6. Empirical evidence presented in Hyatt (1992a) indicates that such cost shifting does occur if the injured worker returns to another employer but not to the time-of-accident employer.

THE ONTARIO WORKERS' COMPENSATION SYSTEM

As indicated, the emerging jurisprudence and policy under Ontario's workers' compensation is important because it is extensive, and it involves the interpretation of two important legislative initiatives, both of which are on the "leading edge" in this area. Those legislative initiatives are the Workers' Compensation Act itself (with its reforms of which accommodation is an integral component), and the Human Rights Code (with its detailed guidelines on accommodation).

For reemployment and accommodation issues, the jurisprudence and policy under workers' compensation in Ontario emanates from three main sources: (1) policy statements issued by the Policy Branch of the board, and integrated into its operations manual, (2) board jurisprudence established by the internal review process of the board or by the Reemployment Hearings Branch, and (3) tribunal jurisprudence established by external review through the Workers' Compensation Appeals Tribunal in its handling of appeals cases.

The following applications of the accommodation requirement focus on those that shed additional light on how the requirements have been interpreted by other bodies (as previously discussed) or that show confirmation of key principles in the area.

Once a worker applies for workers' compensation, a Claims Adjudicator first determines eligibility by establishing that the injury is causally attributable to the workers' employment and that the worker cannot return to his or her pre-injury job at this stage. Once the medical condition has stabilized, the Claims Adjudicator assesses the injured workers' functional ability to return to work, either at the pre-injury job or at some other job. If the worker is unable to return to the pre-injury job, then a Caseworker handles the case. The Caseworker establishes a Vocational Rehabilitation program if necessary, and also works on reemploying the injured worker. Assuming the worker is medically able to return to work and to meet the normal health and safety requirements of the workplace, the priorities for reemployment are:

- the pre-accident employer, at the pre-accident job;
- the pre-accident employer, at a comparable job (i.e., a high degree of similarity with the pre-accident job in such areas as demands, rewards,[7] status and opportunities);

7. Comparable wages are taken to be at least 90 percent of pre-injury earnings. Overtime wages are included in this assessment.

- the pre-accident employer, at the most suitable job (i.e., the one which best matches the worker's current skills);
- another employer, at a suitable job.

While assessing possible vocational rehabilitation objectives, a Case-worker may conclude either that the worker can do a modified version of their pre-injury job, or suitable work available with the accident employer. Either conclusion will lead the Caseworker to examine whether the reemployment provisions in section 54 of the act apply.

If an employer is reluctant to reemploy, the Reemployment Hearings Branch can stop the case. First, Mediators try to bring the employer and the worker together. This achieves some form of settlement in about 75 percent of cases. Failing that, a formal hearing is held to determine if section 54 applies. If it does, the board can offer the worker rehabilitation services and benefits in lieu of employment, charging the employer a penalty. The board has no authority to order an employer to offer work – a fact which critics have focused on in describing the section 54 penalties as little more than a licensing fee to refuse to employ.

The reemployment provisions upset some tradition notions in workers' compensation. Normally, when workers recover from their injuries, entitlements end. Now those workers have a potential entitlement to extended benefits if they are not employed on terms at least equal to the standards set out in the act. The more able the worker is to work, the more exacting are the reemployment standards imposed upon the employer. This has some interesting effects: employers must decide which cost they wish to bear – the cost of reemploying, or the cost of not doing so. Similarly, arguing that a worker is no longer entitled to disability benefits amounts to establishing the worker's entitlement under section 54. The worker, denied further benefits because the board ruled that the disability is over, would traditionally have to appeal that ruling and attempt to prove continuing disability. It is significantly simpler, now, for that worker to accept the disability ruling and on that basis claim reemployment rights under section 54.

ACCOMMODATION REQUIREMENTS UNDER ONTARIO WORKERS' COMPENSATION

Accommodation and Medical Ability

The accommodation requirements, and their interrelationship with the reinstatement provisions, are given in section 54(4-6) of the Ontario Workers Compensation Act:

> Upon receiving notice from the Board that a worker is able to perform the essential duties of the worker's pre-injury employment, the employer shall offer to reinstate the worker in the position the worker held on the date of injury or offer to provide the worker with alternative employment of a nature and at earnings comparable to the worker's employment on that date...
>
> Upon receiving notice from the Board that a worker, although unable to perform the essential duties of the worker's pre-injury employment, is medically able to perform suitable work, the employer shall offer the worker the first opportunity to accept suitable employment that may become available with the employer...
>
> In order to fulfil the employer's obligations under this section, the employer shall accommodate the work or the workplace to the needs of a worker who is impaired as a result of the injury to the extent that the accommodation does not cause the employer undue hardship.

The Ontario statute appears to be an attempt to shift rehabilitation costs directly to the accident employer. When the worker has recovered sufficient medical ability to do their pre-injury or less strenuous work, the accident employer is obliged to offer the appropriate employment, subject to certain conditions. If the employer does not offer such employment, the board provides vocational rehabilitation services and benefits in lieu of actual employment. The cost is not borne solely by the standard collective liability system, however, but is charged to the accident employer by way of penalty under section 54(13). Regardless of whether the worker is reemployed or not, the accident employer pays the cost (and more) via penalties and assessments.

In determining a worker's collective entitlement under section 54, the act seems to follow a *Bhinder*-like model: the board identifies the "essential duties", determines if the worker has the medical ability to perform those duties and notifies the employer. The employer is then obliged to reemploy or bear the cost of board-delivered rehabilitation. "In order to fulfil" the obligation, section 54(6) says "the employer shall accommodate...". Thus, it appears that accommodation is only considered after the determination of ability to do essential duties; as in *Bhinder*, the accommodation requirement does not seem to touch the "BFOQs".

The board's policy makers — the Board of Directors — have not followed the approach suggested by a literal reading of section 54 but instead have taken a page from the Ontario Human Rights Code. Section 17(2) of the latest code states that a person cannot be considered incapable of a BFOQ unless accommodating the person in the job would be an undue hardship on the employer. In effect, accommodations must be considered before ruling on the capacity to perform BFOQ's. Board policy documents 07-05-07, 07-05-08 and 07-05-10 declare that a board

decision-maker must weigh possible accommodations prior to judging a worker's "medical ability to perform" essential duties or suitable work. In effect these policies read into section 54 a provision similar to section 17(2) of the Code.

In this process, the accommodation requirements are imposed prior to the consideration of whether the injured worker can return to their pre-accident job, or to a comparable or suitable job with their pre-accident employer. In essence, the accommodation requirements become an integral part of the medical assessment as to whether and how the person can return to work, and if so, to what type of work.

In determining whether the worker can return to their previous job, consideration is given to the "essential" duties of the job necessary to produce the actual job outcome within the normal range of productivity. This implies that it is not necessary to be able to do all tasks (only the essential ones), that hypothetical or possible future job outcomes are not relevant, and that some reduced productivity can be tolerated provided it is within the normal range of productivity. Again, these requirements are considered after any accommodations with respect to those essential duties. Alternatively stated, the essential duties are considered in light of the accommodation requirements, which significantly enhances the likelihood of the worker being able to return to their pre-accident employer to the same job, a comparable job, or a suitable job.

Board jurisprudence on the issue, while limited, has followed that policy. In decision R.B. 2/90 the Reinstatement Officer held that the employer's provision of a chair (an accommodation) would enable the worker to do the essential duties of the job, and thus the employer was obliged both to accommodate and to reemploy. This decision was upheld upon appeal to the external appellate body – the Workers' Compensation Appeals Tribunal. In ruling 968/90 (February 20, 1991), the tribunal held that medical ability to perform essential duties must be decided after accommodation of the work or workplace is determined.

In board decision R.B. 76/92, the Reinstatement Officer ruled that incorporating an accommodation into the determination of medical ability did not mean the board could require the employer to remove the essential duties. Overruling a junior decision-maker who had declared a worker "fit for the pre-injury job with an accommodation", the Reinstatement Officer held that the worker had to have some degree of medical ability to perform the modified version of the essential duty. If even the modified task was beyond the worker, then this was not a modification of a pre-existing job, but the creation of a new job, which the statute did not require.

Accommodation and Undue Hardship

Even if an accommodation to the work or workplace would enable a worker to do their pre-injury or suitable employment, such accommodation would not be imposed if it causes "undue hardship" to the employer. In determining undue hardship, the board has adopted the guidelines of the Ontario Human Rights Commission (1989). The guidelines suggest a number of important principles in determining undue hardship.

Costs will be a factor but only if they are "demonstrably attributed to the accommodation" and so large as to "alter the essential nature or substantially affect the viability of the enterprise." The costs must be "quantifiable" and not "speculative" or "hypothetical", and the magnitude must be firmly documented. They must reflect only the current situation, and not "unpredictable future possibilities", and they cannot reflect customer or third-party preferences. They must be amortized over the whole organization, not just the branch or unit doing the accommodation. The costs must be mitigated through outside sources of funding or grants, subsidies or loans. Any other benefits from the accommodation should be subtracted to arrive at net costs attributable only to the specific accommodation. The employer is expected to depreciate the cost where appropriate, so that they do not pose an undue burden in any one year. If necessary, the organization is also expected to spread the cost over time by "taking out loans, or issuing shares or bonds". Larger organizations and governments are perceived to be in a better position to absorb the costs of accommodation.

Undue hardship may exist if the accommodation poses significant health and safety risks to the accommodated worker or to co-workers. However, a cost-benefit standard must be applied. Modifying or waiving a health or safety standard will be considered as imposing undue hardship only if "the remaining degree of risk outweighs the benefit of enhancing equality for persons with disabilities." The trade-off is more likely to be allowed if the risk falls on the person for whom the accommodation is being made, and that person is willing to assume the risk. Even if the accommodation requirement conflicts with health and safety legislation, the accommodation requirements generally take precedence since they are embedded in human rights legislation which the Supreme Court regards as "virtually quasi-constitutional" (Adell 1991; Lepofsky 1992; Malloy 1992).

The guidelines indicate that the terms of a collective agreement cannot act as a bar in the provision of accommodation. If the employer and the union cannot arrive at a mutually agreeable solution, the employer must make the accommodation even if it conflicts with the collective agreement. If the union attempts to block the accommodation, it may be added as a

respondent to a complaint. As discussed later, however, seniority provisions are given special treatment under Ontario's workers' compensation accommodation requirements, a treatment that is also consistent with the limited arbitral and human rights jurisprudence that exists in this area (Adell 1991).

The guidelines also set out general procedures for accommodating the needs of persons with disabilities. Their specific needs should be considered "individually" and in a manner that "respects their dignity". The disabled person should be consulted to determine what they need and how it can best be provided. Voluntary action and "good-faith" efforts on the part of the organization will be considered in any subsequent complaints.

Again, jurisprudence on "undue hardship" is sketchy. Decision R.B. 76/92, which relieved an employer of alleged employment obligations, said that removing duties from a job did not amount to an accommodation but rather constituted the creation of a different job. The analysis stopped there, suggesting that creating a new job is not required even where such action would not impose undue hardship on the employer.

The Appeals Tribunal explicitly adopted the board's use of the Human Rights Commission guidelines in a number of cases. In decision 968/90, the tribunal held that the accommodation did not give rise to undue hardship because there was no evidence that it affected productivity. In decision 288/91, undue hardship was equated with "jeopardizing the financial viability of the employer." In ruling 335/92, however, the tribunal indicated that the extensive accommodation of a worker's "needs" did not reach into needs arising out of impairment unconnected with the employment. Section 54(6) is ambiguous as to the nature of "needs" in question, but the tribunal did not accept that section 54(6) could oblige the employer to address impairments not causally related to the workplace injury or disease.

Given the extensive nature of possible accommodations, it is difficult to assess a worker as "medically able" to perform essential duties or suitable work if those forms of work are subject to unlimited modification. Where does one begin? Is anyone "totally disabled" under such a scheme? More significantly, where does accommodation end? Is everyone medically able to perform the essential duties, but for "undue hardship"?

The board has seldom exercised accommodation policy in this fashion. Instead, Caseworkers and Adjudicators look at the pre-injury job, assess whether the worker has any relatively minor barriers to doing that job and then negotiate some modifications with the employer. When interpreting the meaning of "undue hardship" it is important to be mindful of the practical limitations imposed by the act. The board is circumscribed in requiring accommodation up to the point of undue hardship by the fact that the maximum penalty under the act is effectively one year's wages of the

employee who is not accommodated.[8] The board does not have the power to order the reinstatement of the injured worker (Baker and Sones 1990). If faced with an accommodation cost that exceeds one year's wages of the injured employee, the employer may simply decide not to reemploy the worker, and to pay the penalty.

Relationship to Collective Agreement and Seniority

The Workers' Compensation Act and its accommodation requirements take precedence over the collective agreement which means that provisions in the collective agreement cannot pose a barrier to reasonable accommodation. The notable exception is seniority provisions (section 54(15)). While this gives the appearance that seniority provisions have a blanket exemption from accommodation requirements, there are a number of considerations that can circumscribe that exemption. For example, if seniority is but one factor along with skill and ability, then bypassing seniority may be required for the accommodation if the injured worker has the skill and ability. Also, if seniority is a barrier to accommodation within the bargaining unit, the employer may have to find suitable work in jobs outside of the bargaining unit. As well, an injured worker who is reemployed cannot be laid off because of being least senior, if the work is then done by an employee outside of the bargaining unit.

Overcoming the Reemployment and Accommodation Obligation

In an unusually sharp divergence, the board and the Appeals Tribunal differed over the circumstances which relieve an employer of its obligations under section 54. Both agreed that once the time limits under section 54(8) have passed, an employer is free to discharge the worker or refuse accommodations under the Workers' Compensation Act, although the Human Rights Code still applies. The board and Tribunal, however, held divergent views about the employer's obligation prior to the passing of the section 54 time limits.

The board held a strict line: the employer may not terminate the worker without just cause or proof that the termination is required to save the company. This latter ground fits with the "undue hardship" provisions of section 54(6), and in fact at least one worker representative has argued that

8. The board also may award the injured worker up to the amount the worker would have received for one year if the normal compensation arrangements had occurred. In effect, this is their temporary disability payment, which is typically 90 percent of their lost earnings if they do not work. This compensation amount may be added to the employer's accident cost record.

only "undue hardship" will free an employer of its duties under section 54 (R.B. 53/92).

The Appeals Tribunal, notably in decision 605/91, maintained that the employer retains all its standard liberties to discharge the worker during the obligation period, provided that the termination decision is not "tainted" with an "anti-injured worker" bias. At the heart of this approach is the belief that section 54 does not exempt an injured worker from the "normal vagaries" of employment. A literal reading of section 54, which is basically what the board relied upon, grants to the eligible injured worker a form of enhanced rights to be employed on certain terms, or to be compensated in lieu thereof. Some tribunal panels do not accept that the Legislature intended such a result, but rather conclude that section 54 must instead be read with a purpose in mind, the purpose being the protection of certain workers from employment discrimination on the basis of an injury or claim.

The board's adherence to its more literal reading of section 54(4) is based on the view that the Ontario Human Rights Code expressly protects injured workers from the discrimination in question, so why would the act address the same question? This is underscored by the fact that if the act is an "anti-discrimination" provision, it offers less protection than already afforded by the code. Thus, there appears little "purposive" to be gained by following the Workers' Compensation Appeals Tribunal interpretation, unless the purpose of all workers' compensation law is to offer injured workers special services and entitlement. Board adjudicators argue that the tribunal approach actually reads that purpose out of section 54.

The tribunal has yet to reconcile its stance that an employer must accommodate to the point of undue hardship as defined by the Human Rights Code guidelines, yet is free to lay off a worker because of a slowdown in business. As a result, the employer and worker communities attempting to manage their affairs in these matters face somewhat different tests when they take their section 54 cases from the board's hearing process to the Appeals Tribunal. Notwithstanding the differences in approach, the tribunal has upheld the board in several of their cases, albeit on distinct grounds.

CONCLUDING OBSERVATIONS

The duty to accommodate the needs of disabled persons will likely grow in the future, both in the workplace and with respect to access to goods, services and facilities. This is especially the case if accommodation requirements have their intended effect – that of integrating persons with disabilities into the mainstream of society, including the workplace. Accommodation in one sector will have an interactive effect on accommodation

requirements in other sectors. For example, accommodation in the education sector will put subsequent pressure for accommodation at the workplace so that disabled persons who receive an education can utilize it in the workplace. This in turn will put pressure for accommodation in public transit to facilitate getting to and from work or educational institutions.

Because this is a new area of legislative requirements, the jurisprudence and interpretations are only beginning to emerge. While we tend to think of the legislative requirements and jurisprudence as emerging from human rights legislation and its interpretation through the courts and human rights tribunals, another potentially important source is the policy prescriptions and the appeals decisions of workers' compensation boards and tribunals. Such decisions are important in their own right, especially in facilitating the return to work of injured workers. They are also important in contributing to the growing jurisprudence that is emerging in the area of accommodation requirements in general.

As we have suggested, the reemployment and reasonable accommodation requirements, in addition to addressing equality of opportunity concerns, can also be characterized as a reallocation of the costs of a serious injury from the injured worker, the workers' compensation board, and other insurance or funding sources, to the time-of-accident employer and, potentially, co-workers. While we have discussed some of the dimensions through which the reasonable accommodation provisions interact with collective agreements, and the way the board has addressed these interactions, these represent only some of the potential issues which could arise. In a discussion of the Americans with Disabilities Act, Knapp (1993: 6) submits that while collective agreements promote equal treatment for all employees, reasonable accommodation, "... requires disparate treatment in its insistence on the individualized treatment for protected individuals. This tension between uniformity and individualization will provide fertile ground for grievances." The concern over the effects of "individualization" is also relevant in non-union settings.

The accommodation provisions appear to open new vistas for the reorganization of work and the workplace to reintegrate injured workers into employment. Human resources professionals face the challenge of finding, perhaps, non-traditional ways of organizing the nature of work and the workplace.

The accommodation requirements will have additional implications for other industrial relations and human resource management practices, many of which are increasingly important in today's workplace. They may conflict with issues of job design involving multi-tasking that adds to the variety and complexity of the job. Such could be the case with job enlargement (the addition of more tasks of the same level of complexity so that more variety

is involved), job enrichment (adding more tasks of different levels of complexity), and job rotation (rotating individuals through a variety of tasks). Accommodation requirements may also conflict with the increased pressure for the flexibility and adaptability that is associated with just-in-time delivery systems. Tensions may also be created between the individual requirements of workplace accommodations and the increased emphasise on team production. These are not insurmountable obstacles. They simply illustrate the additional pressures that will be placed on the industrial relations and human resource management functions.

It is too early to tell whether Ontario's reemployment and accommodation reforms will prove to be a model for other jurisdictions. Advocates for injured workers will most certainly point to the Ontario system in efforts to push legislative reform. However, the long-run trends of increased global competition, free trade, industrial restructuring, technological change and prolonged recession will militate against widespread adoption of the reforms if they prove costly and administratively burdensome to employers.

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RÉSUMÉ

Le devoir d'accommodement lors du retour au travail d'un accidenté en Ontario

On peut trouver à plusieurs endroits des dispositions législatives et autres prévoyant des exigences d'accommodement sur les lieux de travail pour les personnes souffrant d'incapacités : charte des droits, loi anti-discrimination, lois spécifiques pour les personnes souffrant d'incapacités, lois sur les accidents du travail, règlements, sentences arbitrales et autre jurisprudence.

Dans cet article, nous examinons la jurisprudence récente découlant de l'interprétation de la loi ontarienne sur les accidents du travail de 1989 eu égard au devoir d'accommodement de l'employeur. Cette jurisprudence est importante vu qu'elle aura probablement plus de portée que toute autre, compte tenu de l'importance de ce sujet lors de la réforme récente de la loi ontarienne sur les accidents du travail. De plus, le système ontarien régissant les accidents du travail adoptait comme politique les balises récemment retenues par la Commission ontarienne des droits de la personne, balises généralement qualifiées des plus larges et agressives dans ce domaine.

Le devoir d'accommodement que l'on retrouve ailleurs au Canada, dans la législation et la jurisprudence, est analysé dans le contexte plus large d'initiatives de politiques publiques connexes. Cela inclut la législation sur l'équité en emploi qui vise à compenser pour l'héritage de discrimination, même systémique ; la législation portant sur les droits de la personne qui concerne l'accommodement lié aux diverses différences individuelles ; les stratégies de réhabilitation professionnelle qui mettent l'emphase sur l'intégration de personnes souffrant d'incapacité dans le « vrai monde » du travail ; les programmes d'assistance sociale qui montrent l'importance de permettre aux personnes visées de gagner leur revenu plutôt que de le recevoir en paiement de transfert ; les programmes publics d'éducation qui visent à briser les stéréotypes et les attitudes, les programmes de bien-être des employés qui mettent l'accent sur l'importance des interactions sociales et l'estime de soi par des relations significatives au travail et, finalement, les exigences qui imposent des obligations de réintégration aux employeurs.

Après avoir situé le devoir d'accommodement dans le contexte plus large de ces initiatives, nous insistons sur les réformes récentes du système ontarien portant sur les accidents du travail et plus particulièrement sur leurs implications sur le devoir d'accommodement. Nous analysons ensuite la jurisprudence récente de la Commission ontarienne des accidents du travail et ses tribunaux indépendants d'appel. Les questions en jeu incluent :

- la détermination de la capacité d'un employé d'accomplir les tâches principales d'un travail avant ou après qu'un accommodement soit imposé ;
- l'établissement de ce qui constitue de la résistance indue de la part de l'employeur ;
- la relation entre la convention collective et le principe de l'ancienneté ;
- les circonstances qui exemptent l'employeur du devoir d'accommodement, comme par exemple licencier l'employé.

En conclusion, nous nous interrogeons sur la mesure dans laquelle les exigences d'accommodement sont appelées à augmenter ou à décroître dans l'avenir. Nous évaluons aussi leurs implications potentielles sur les relations industrielles et sur les pratiques de gestion des ressources humaines, telles l'augmentation du nombre de griefs sur cette question d'accommodement ; les pressions sur les gestionnaires de ressources humaines pour modifier les emplois et les lieux de travail ; les modifications aux clauses de convention collective portant, entre autres, sur l'ancienneté et l'assurance salaire à long terme ; les conflits possibles avec l'enrichissement, l'élargissement et la rotation des tâches ; les tensions avec les pressions accrues pour que la flexibilité satisfasse aux demandes de livraison à temps ; et les conflits possibles avec la production en équipe.