



Disability Management: Best Practices and Legal Considerations

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Meet Your Presenters

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Presentation Roadmap

- Introduction
- Legal Framework
- Human rights
- Duty to accommodate - Obligations
- Duty to accommodate - Limits
- WSIB and Benefits

Introduction



Introduction

- Navigating illness and disability in the workplace is legally complex.
- Employers must balance business needs with employee rights under multiple laws.
- Most employers are regulated provincially, but some are subject to federal regulation.

Legal framework



Legal framework

- Key areas of law include:
 - Ontario Human Rights Code
 - Employment Standards Act, 2000
 - Common law obligations
 - WSIB regulations.
- Each requires specific compliance.

Common Law

- Employers are allowed to terminate at any time without cause.
- Termination must be for valid, non-discriminatory reasons.
- Reasonable notice or pay in lieu is required unless frustration of contract applies.
- Courts consider disability when determining notice periods.
- Employers must exhaust the duty to accommodate before terminating.

Human rights



Defining Disability

Disability includes:

- Physical, mental, and episodic conditions (Ontario Human Rights Code).
- Visible and invisible impairments.

Proving a Disability

Employees must:

- Provide sufficient medical information to support their need for accommodation.
- Demonstrate how their condition impacts their ability to perform job duties.

The Duty to Inquire

Employers must:

- Inquire about potential disabilities if there are observable signs of impairment.
- Avoid relying solely on the employee to initiate discussions about accommodation.

Duty to accommodate - obligations



Duty to Accommodate – SCC Guidance

- 27 In short, the duty to accommodate requires that the service provider demonstrate that it could not have done anything else reasonable or practical to avoid the negative impact on the individual. This duty applies to all aspects of the relationship with the employee, and it must be done with the goal of ensuring equitable access.
- Moore v. British Columbia (Education), 2012 SCC 61, [2012] 3 S.C.R. 360.
- The Duty to Accommodate imposes a high burden.

Duty to Accommodate (Ontario)

- Procedural and Substantive Duty to Accommodate. Employers have two key responsibilities:
- Procedural Duty: Conduct a thorough, individualized assessment of the employee's needs.
- Substantive Duty: Implement meaningful accommodations to the point of undue hardship. These duties are interdependent; failure in either can constitute a breach of the Ontario Human Rights Code.

Duty to Accommodate (Collaborate Process)

- A key part of the procedural duty under the Ontario Human Rights Code.
- Requires active, good-faith participation from:
- Employer: Assess needs and explore options.
- Employee: Provide relevant information and engage in discussions.
- Open communication ensures: Needs are understood. Effective, reasonable solutions are identified. Failure to collaborate may breach the procedural duty.

Duty to accommodate – limits



Duty to Accommodate – Substantive Limits

- Employee Preferences vs. Reasonable Accommodation
- Employers are not obligated to provide the specific accommodation requested by the employee.
- Accommodation must be reasonable, not perfect.
- A simpler, equally effective accommodation is sufficient if it meets the employee's needs.
- The process must remain collaborative and in good faith.

Duty to Accommodate – Substantive Limits

- The duty to accommodate is not unlimited. The OHRC limits undue hardship analysis to:
- Cost: Must be significant enough to threaten business viability.
- Health and Safety: Risks must be real, substantial, and supported by evidence.
- External Funding: Availability of subsidies or supports to offset accommodation costs.

Mental Health and Accommodation

- Employers must address mental health conditions under the duty to accommodate:
- Examples of accommodations: Flexible scheduling, workload adjustments, and mental health support.
- Proactive steps: Promote workplace awareness and reduce stigma.
- Legal risks: Dismissals linked to mental health require careful review to avoid discrimination claims.

Duty to Accommodate – Summary

- Procedural Duty: Investigate employee needs in good faith.
- Substantive Duty: Provide reasonable accommodation to the point of undue hardship.
- Limits to accommodation include: Cost, health and safety risks, and availability of external funding.
- Simplified accommodations are sufficient if effective. Collaboration is key to compliance and fairness.

WSIB and Benefits



WSIB

Compliance with WSIB Rules:

- Cooperate in return-to-work efforts.
- Avoid premature termination tied to the injury.
- Document Accommodation Efforts.
- Carefully Consider Termination.

Disability Benefits

Managing Disability Benefits

Employers must carefully manage disability benefits to avoid liability.

Key considerations:

- Ensure coverage during statutory leaves.
- Review insurance policies for exclusions and limitations.
- Coordinate between short-term and long-term disability plans.

Pre employment considerations and steps



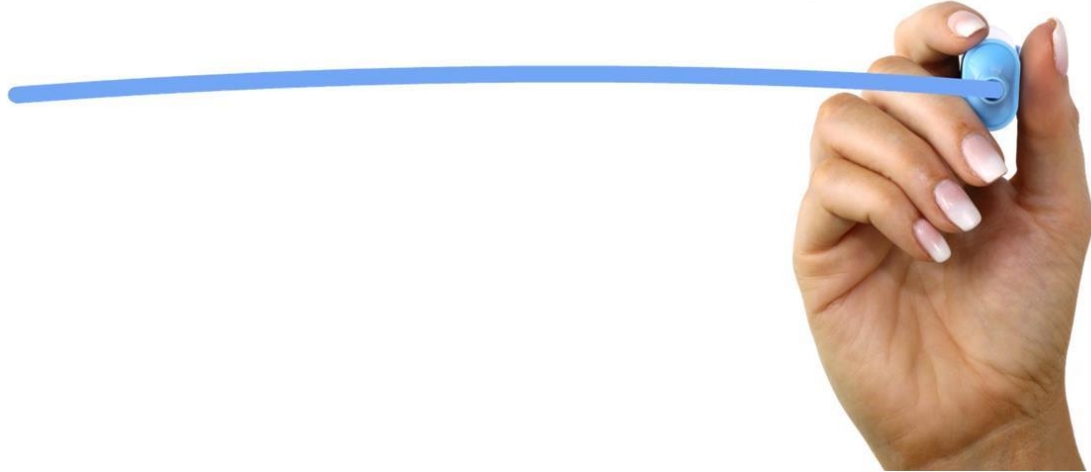
Pre-Employment Considerations

- Focus on job-related criteria.
- Avoid discriminatory questions. Questions like “Do you have a disability?” or “Do you plan to have children soon?” can lead to discrimination claims.
- The Ontario Human Rights Code prohibits questions about personal characteristics, such as age, disability, or family status, unless directly related to a Bona Fide Occupational Requirement (BFOR).

Steps for Employers

- Align policies with human rights obligations to foster equitable workplaces and minimize legal risks
- Assess situation holistically.
- Document accommodation efforts.
- Seek legal advice for complex scenarios.

QUESTIONS



Thank you!

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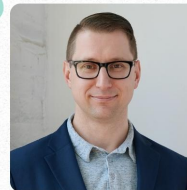
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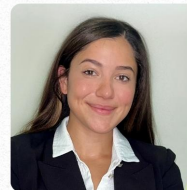
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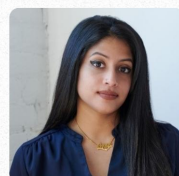
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Case Law

Honda Canada Inc. v. Keays, 2008 SCC 39:

- Employers may request independent medical evaluations to substantiate an employee's accommodation needs if the request is reasonable and made in good faith.
- The duty of good faith requires employers to act honestly and fairly when dismissing an employee, avoiding actions that unduly harm the employee's dignity or reputation.
- Punitive damages can be awarded in employment cases only where the employer's conduct during dismissal is harsh, vindictive, reprehensible, and a marked departure from ordinary standards of decency.

British Columbia (Public Service Employee Relations Commission) v. BCGSEU, 1999 CanLII 652 (SCC), [1999] 3 SCR 3:

- Employers must ensure that employment standards are rationally connected to job performance and cannot rely on discriminatory policies unless undue hardship is proven.

Hydro-Québec v. Syndicat des employé-e-s de techniques professionnelles et de bureau d'Hydro-Québec, 2008 SCC 43 (CanLII), [2008] 2 SCR 561:

Employers are not required to accommodate employees indefinitely when their disability prevents them from fulfilling the essential duties of their position, even with reasonable accommodations.

British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights), 1999 CanLII 646 (SCC), [1999] 3 SCR 868:

- Employers and service providers must consider individual assessments and reasonable accommodations before enforcing blanket standards that may discriminate.

Metro Ontario Inc. v. Unifor, Local 414, 2021 CanLII 138054 (ON LA):

- Employers may terminate employees for chronic absenteeism if they have made reasonable accommodation efforts and the employee's attendance shows no prospect of improvement.

Imperial Oil Limited v. Haseeb, 2023 ONCA 364 (CanLII):

- Hiring policies that discriminate based on citizenship or other protected grounds under the Human Rights Code are prohibited, even if unintended.

Central Okanagan School District No. 23 v. Renaud, 1992 CanLII 81 (SCC), [1992] 2 SCR 970:

- The duty to accommodate is a shared responsibility between employers and employees, requiring both parties to engage in good faith and reasonable efforts.

Thompson v. 1552754 Ontario Inc., 2013 HRTO 716 (CanLII):

- Employers cannot demand medical documentation or assurances unrelated to an employee's fitness to work or specific accommodation needs, as doing so may constitute discrimination.

Duty of Good Faith

Scenario: Kevin Keays, an employee diagnosed with chronic fatigue syndrome, participated in Honda's disability program, which required medical notes for absences. When Keays refused to meet with a company-appointed medical specialist to verify his condition and accommodation needs, Honda terminated his employment, citing insubordination.

Outcome: The Supreme Court of Canada ruled that employers are entitled to request independent medical evaluations (IMEs) to assess accommodation needs, provided such requests are reasonable and made in good faith. The Court also reinforced the employer's obligation to act honestly and fairly in the manner of dismissal, emphasizing that mistreatment during termination could lead to liability.

Lesson: Employers have the right to seek medical information through IMEs as part of their accommodation processes but must ensure that such requests are necessary, reasonable, and non-coercive. Dismissals must be carried out with honesty and respect to fulfill the duty of good faith owed to employees.

Duty to Accommodate: *Meiorin* Case

Scenario: A female firefighter failed an aerobic test that was a standard requirement. The test was challenged as discriminatory because it did not account for gender differences in physical capacity.

Outcome: The Supreme Court of Canada ruled the standard was not a bona fide occupational requirement (BFOR). The employer failed to demonstrate that alternative standards would result in undue hardship.

Lesson: Employers must ensure that job requirements are necessary and explore accommodations to avoid discriminatory impacts.

Accommodation Limits: BFOR

Scenario: A long-term employee with significant health issues had been absent for over 900 days in a five-year period. The employer accommodated the employee's needs repeatedly but concluded that the pattern of absenteeism could not be sustained and terminated the employment.

Outcome: The Supreme Court of Canada upheld the termination, ruling that the duty to accommodate does not require employers to accommodate employees indefinitely when there is no reasonable prospect of the employee achieving regular attendance.

Lesson: The duty to accommodate has limits. Employers are not obligated to keep an employee whose condition prevents them from fulfilling the essential duties of their job, even with accommodations. Employers must demonstrate that all reasonable accommodations were explored before termination.

Accommodation Limits: *Grismer* Case

Scenario: A visually impaired individual was denied a driver's license based on vision standards. He argued the standard was discriminatory.

Outcome: The court held the standard was not reasonably necessary because the licensing authority failed to consider reasonable accommodations.

Lesson: Employers and service providers must prove that accommodations are impossible without undue hardship.

Termination – Excessive Absenteeism

Scenario: An employee with chronic absenteeism due to depression was terminated after several years of excessive innocent absenteeism, with no signs of improvement.

Outcome: Termination upheld, the employer had accommodated the employee's absences for years and that continuing to do so would undermine the fundamental essence of the employment contract.

Lesson: Employers may terminate employment for excessive absenteeism if they have made reasonable accommodations and there is no reasonable prospect of the employee achieving regular attendance.

Discrimination – Pre-employment

Scenario: Muhammad Haseeb, applied for an engineering position at Imperial Oil. The company required candidates to be eligible to work in Canada on a permanent basis. Haseeb, misrepresented his status during the application process. Upon discovering this, Imperial Oil rescinded the job offer.

Outcome: The Ontario Court of Appeal upheld the Human Rights Tribunal of Ontario's decision, finding that Imperial Oil's hiring policy discriminated based on citizenship, a protected ground under the Human Rights Code. The court emphasized that employment decisions should not be based on citizenship status.

Lesson: Employers must ensure that hiring policies do not discriminate against applicants based on protected grounds, such as citizenship. Job requirements should be directly related to the essential duties of the position and comply with human rights legislation.

Medical Documentation

Scenario: *Central Okanagan*, a Supreme Court of Canada decision, sets the foundation for understanding the duty to accommodate and the rights and obligations of both employers and employees in that process. It clarifies that employers can require reasonable information to understand the need for accommodation and its feasibility.

Outcome: The Court emphasized that the duty to accommodate is a shared responsibility. Employers can request sufficient medical documentation to determine appropriate accommodations, as long as the requests are reasonable and not overly invasive.

Lesson: Employers are entitled to request medical information that clarifies:

- The functional limitations of the employee.
- The types of accommodations needed to support the employee's work performance.
- Confirmation of the employee's fitness to return to work if relevant.

The request must not seek unnecessary details, such as a specific diagnosis, unless it is directly relevant to the accommodation.

Medical Documentation

Scenario: Joan Thompson, employed as a counter person at a coffee shop, took a three-day leave due to stomach flu. Upon her return, her employer demanded a medical note confirming she was fit to work and would be seizure-free, given her history of epilepsy. Thompson provided a note addressing her recent illness but not her fitness to work or seizure condition. Consequently, she was not reinstated to the work schedule.

Outcome: The Human Rights Tribunal of Ontario found the employer's demands unreasonable and discriminatory. It ruled that requiring medical documentation confirming a return to "normal health" was unjustified, especially since Thompson's epilepsy had been stable for years. The tribunal awarded her damages for injury to dignity and lost wages.

Lesson: Employers must ensure that requests for medical information are reasonable, necessary, and directly related to the employee's job duties. Overreaching demands, especially without evidence of current performance issues related to a known disability, can constitute discrimination.