



## DUTY TO ACCOMMODATE

The duty to accommodate is a human rights matter. Our members are assured of protection from discrimination under the *Canadian Human Rights Act (CHRA)*. Our collective agreements contain No Discrimination clauses which allow our members full access to the grievance process up to and including adjudication to challenge the employer's failure to fulfill its duty to accommodate. The Canadian Human Rights Commission (CHRC) provides for a complaint process our members should also access.

The essence of the duty to accommodate is very straight-forward: 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.

The *Employment Equity Act (EEA)* also plays a key role. The *EEA* requires the employer to identify and eliminate barriers to employment and to institute positive policies and practices to ensure reasonable accommodations for people in the four designated groups (women, visible minorities, persons with disabilities and Aboriginal Peoples). This is done in consultation and collaboration with the Union, as per Section 15 of the *EEA*. The specific provisions of the *EEA* relating to reasonable accommodation are Sections 5 and 10.

Accommodation on the basis of physical or mental disability is by far the most common ground requiring accommodation. However, union representatives should be aware that accommodation cases can also involve other human rights grounds such as religion and family status.

The accommodation process for all prohibited grounds is essentially the same except that accommodation on the basis of disability involves medical information which raises issues with respect to the employer's right to know and the employee's right to privacy.

**This “*KeyInfo*” document is intended to assist Local Representatives who represent members requiring accommodation on the basis of physical or mental disability.**

## Responsibilities of the parties - Individual Accommodation Request

### ► Responsibilities of the Employer during an accommodation process

- to ensure all managers and supervisors are trained and to fulfill the employer's legal obligation to accommodate employees up to the point of undue hardship.
- to actively engage in discussions with both the employee and the union to arrive at a solution which accommodates the employee in a timely manner.
- to involve the Workplace Occupational Health and Safety Committee where risk evaluation is required.
- to advise the employee if medical information is required to support the request for accommodation. Where medical information is required, a job demands analysis (JDA) based on a job hazard analysis (JHA) approved by the Workplace Occupational Health and Safety (OHS) committee, or the JHA itself, must be provided to the employee for their physician's consideration in their medical assessment.
- **to respect the employee's right to consult a physician of their own choice.** An employee can be required to undergo an Independent Medical Examination (IME) only in exceptional and clear circumstances and the basis for requesting an IME must be fully disclosed to the employee concerned. The subject of IMEs and Fitness to Work examinations is addressed in further detail under separate fact sheet within the "KeyInfo" information kit.
- to review, follow-up and assess accommodation of workers on an on-going basis.

### ► Responsibilities of the employee being accommodated

- to identify and communicate the need for accommodation, as soon as possible.
- where the employer requests medical information, the employee should ensure their physician's medical note includes the following information:
  - A clear and unequivocal opinion as to the employee's fitness to return to work – A diagnosis is not to be included.
  - If the employee is not fit for work, what is the prognosis for recovery with an estimated time for return to work?
  - If fit for work, is the employee able to perform the full duties and responsibilities of their substantive position? If not, can they partially perform the duties of their substantive position?

- The employee's functional limitations and/or restrictions, if any, should be clearly identified in detail.
  - Are the limitations and/or restrictions temporary or permanent? If temporary, an estimation of the duration should be indicated.
  - Recommended parameters for a gradual return to work where applicable.
  - Any and all other information relevant to the fitness to work and/or accommodation required.
- to work with the employer and the union to find an appropriate/reasonable accommodation. It is important the accommodation measures proposed by the Employer respect the employee's limitations and/or restrictions.

If the proposed accommodation is considered unsuitable, the employee must provide good and sufficient reasons to the Employer for declining the proposed accommodation. Jurisprudence has held that employees are not entitled to insist on their ideal or perfect accommodation. If the employer's proposal is a reasonable accommodation it must be very seriously considered by both the employee and the union. A failure to seriously consider a reasonable accommodation would likely be to the detriment of the employee.

- to inform the employer and the union of any changes to their accommodation needs.

Employees with health and safety related concerns, can contact their union representative who is a member of the workplace OSH Committee or their workplace health and safety representative for assistance.

### ► **Responsibilities of the Union Representative**

- to represent employees who require accommodation and when required seek assistance, advice and guidance from other local, regional or national Union Representatives.
- to collaborate with the employee and the employer in accommodating the employee which includes proposing options for resolution and finding innovative solutions.
- carefully consider and respond to employer accommodation proposals and to advise the employee during the process.
- to follow-up after the accommodation is implemented to assess whether it is working and to help address any associated issues that may arise.

► **Responsibilities of the Workplace Occupational Health and Safety Committee**

- The committee participates in any risk assessment (i.e. job description analysis and accommodation protocol analysis) – for not only the employee accommodated but also for the co-workers in the case of re-bundling of duties (i.e. redistribution of certain tasks).
- The committee monitors the effectiveness of the accommodation regarding health, safety and risks.
- The committee makes accommodation recommendations as they relate to occupational health and safety.

► **Co-workers may also be involved in workplace accommodation**

Co-workers need not know about specifics related to any accommodation due to confidentiality and privacy issues. However, co-workers need to be involved to the point that they understand what the duty to accommodate is and why it is valuable for the whole workplace. It is not helpful if some employees feel that a co-worker is receiving “special treatment”. Education and awareness are key. Both the employer and Union should strive to inform and educate on the benefits of a good accommodation policy and process.

## **Undue hardship**

Employers are obligated to reasonably accommodate workers up to the point of undue hardship which is a very high threshold. Employers are expected to exhaust all reasonable possibilities for accommodation before they can claim undue hardship which refers to an excessive/substantial disruption or interference with the employer’s operation; i.e., financial costs or health and safety.

Departments in the Federal Public Service would have great difficulty relying on this argument because Treasury Board is the employer, and as such, has broad resources to draw upon in accommodation situations. The same reasoning applies for CFIA.

## **Bona Fide Occupational Requirement (BFOR)**

A bona fide occupational requirement (*BFOR*) is a *standard or rule that is integral to carrying out the functions of a specific position*. For a standard to be considered a *BFOR*, an employer has to establish that any accommodation or changes to the standard would create an undue hardship.

When a standard is a *BFOR*, an employer is not expected to change it to accommodate an employee. However, to be as inclusive as possible, an employer should still explore whether some form of accommodation is possible.

For more information on *BFORs*, please review the CHRC website and the PSAC's Guide for Local Representatives on the Duty to Accommodate.

### **Ideal process for an optimal individual accommodation**

- When the employee requires an individual accommodation, they advise their supervisor as well as their union representative if assistance is needed.
- The supervisor will provide the employee with a job demands analysis prepared and approved by the workplace OHS Committee. The supervisor can develop a job demands analysis (JDA) but in order for it to be valid, it must be based on approved JHA(s).
- The employee provides up-to-date and relevant medical documentation in support of their accommodation request.
- The employer, employee and union have open dialogue with respect to possible accommodation measures. Everyone needs to be open and receptive to all proposals as well as creative and pro-active in finding solutions. The workplace OHS Committee will also be involved in the assessment of risks and may recommend applicable preventative measures.

This is a multi-step process and here are some ideas and principles to keep in mind.

- The objective is to have no or minimal adverse impact on the employee; i.e., pay, classification, relocation, financial, etc. Health and safety is also a key factor requiring no or minimal adverse effect on the employee as well as co-workers.
- First determine if the employee can perform their existing duties and responsibilities. It may just be that they require accommodation to perform the duties and responsibilities but in a different manner or time frame.
- If the employee cannot perform their existing duties and responsibilities, then determine if they can perform their existing job in a modified or re-bundled form.
- If the employee cannot perform their existing duties and responsibilities in a modified or re-bundled form, then determine if they can perform another job in its existing form.

- If the employee cannot perform their existing duties and responsibilities or another job in its existing form, then determine if they can perform another job in a modified or re-bundled form.
- Once suitable accommodation is identified, accommodation is implemented and should be evaluated on a regular basis with appropriate adjustments as needed.

## Recourse mechanisms

We encourage early resolution to accommodation issues wherever possible. There are great benefits to the employee if accommodations issues are resolved at the lowest level. If unsuccessful, our members have access to the following formal recourse mechanisms:

1. The employer's failure to fulfill its duty to accommodate can be the subject of a grievance based on the "No Discrimination" article in the collective agreement. *The Public Service Labour Relations Act (PSLRA)* provides adjudicators with full jurisdiction to deal with human rights matters including the award of damages.
2. A complaint to the CHRC on the basis of discrimination on a prohibited ground. Please be aware that the CHRC will generally direct the employee to exhaust the grievance process since the PSLRB has jurisdiction to address human rights grievances. It is highly recommended the employee contact the CHRC and get a file number. This will protect the prescribed one year timeline and keep the complaint in abeyance should the matter need to go back to the CHRC after the grievance process has been exhausted.

## Some Useful Links:

- Duty to Accommodate A PSAC Guide for Local Representatives [http://www.psac-afpc.org/documents/what/duty\\_to\\_accommodate-e.pdf](http://www.psac-afpc.org/documents/what/duty_to_accommodate-e.pdf)
- Canada Labour Code, Part II : <http://laws.justice.gc.ca/en/L-2/>
- Canadian Human Rights Commission [www.chrc-ccdp.ca](http://www.chrc-ccdp.ca)
- Employment Equity Act <http://laws-lois.justice.gc.ca/PDF/Statute/E/E-5.401.pdf>
- TBS Policy on the Duty to Accommodate Persons with Disabilities in the Federal Public Service <http://www.tbs-sct.gc.ca/pol/doc-eng.aspx?id=12541>
- TBS Employment Equity Policy <http://www.tbs-sct.gc.ca/pol/doc-eng.aspx?id=12543&section=text#cha1>
- Public Service Staff Relations Board [http://www.pslrb-crtfp.gc.ca/intro\\_e.asp](http://www.pslrb-crtfp.gc.ca/intro_e.asp)
- Employers' policies are available on their web sites.

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