*LW1210 - Labour and Employment Law*

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*UNIT 2 – Employment Law - CHAPTER 5 – Human Rights Issues through the employment relationship*

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| *See NL Human Rights Act:* [*http://www.justice.gov.nl.ca/hrc/act/index.html*](http://www.justice.gov.nl.ca/hrc/act/index.html) |

*The issue of Discrimination in the workplace*

This chapter on human rights deals with the application of the applicable human rights laws during the employment relationship. No matter the jurisdiction the applicable human rights codes specifies the employer obligations to ensure that their workplace is free from discrimination and harassment.

*Types of discrimination*

**Direct discrimination** – this is blatant discrimination that seeks to exclude a certain group based on some form of discrimination that is forbidden by legislation.

**Adverse Impact Discrimination (Constructive Discrimination) –** This is a form of hidden and often unintentional discrimination that effectively discriminates against an identifiable group.

For an employer to successfully defend a discriminatory standard or rule the employer’s decision must pass a three part test:

1. There is *a* ***rational connection between the purpose for which the standard was introduced and the objective requirements of the job***
2. The standard was adopted because it was ***honestly considered to be a requirement of the job*** that is necessary for its performance
3. The standard was reasonable necessary to accomplish the legitimate work-related purpose. The employer must show it was ***Impossible*** to accommodate without undue hardship on itself.

**Recommended course of action for employers:**

The following non-exhaustive factors should be considered in the course of the analysis:]

1. whether the person responsible for accommodation investigated alternative approaches that do not have a discriminatory effect
2. reasons why viable alternatives were not implemented
3. ability to have differing standards that reflect group or individual differences and capabilities
4. whether persons responsible for accommodation can meet their legitimate objectives in a less discriminatory manner
5. whether the standard is properly designed to ensure the desired qualification is met without placing undue burden on those to whom it applies
6. whether other parties who are obliged to assist in the search for accommodation have fulfilled their roles.

*Duty to Accommodate*

The Duty to Accommodate requires that the most appropriate accommodation be determined and then be undertaken, short of undue hardship. The most appropriate accommodation respects the individual, meets the individual’s needs, promotes integration and full participation, and ensures confidentiality.

**Individualization** - The essence of accommodating people with disabilities is individualization. Each person with a disability must be considered, assessed and accommodated individually.

**Dignity**- Dignity includes consideration of how accommodation is provided and the individual’s own participation in the process. Human dignity encompasses individual self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment.

**Inclusion/Integration** - Integration requires up-front barrier-free design and inclusion-by-design to fully integrate persons with disabilities into all aspects of society as much as possible.

*Undue Hardship*

The Code prescribes three considerations in assessing whether an accommodation would cause undue hardship. These are:

1. **cost**
2. **outside sources of funding, if any**
3. **health and safety requirements, if any.**

*Fulfilling the duty to accommodate*

Accommodation is a process that can be seen as a continuum. At one end of this continuum would be full accommodation that most respects the person's dignity. Next is phased-in accommodation over time, followed by the most appropriate accommodation only being implemented once sufficient reserve funds have been set aside. Alternative accommodation (that which would be less than “ideal”) might be next on the continuum when the most appropriate accommodation is not feasible. Alternative accommodation might also be accomplished at a later date if immediate implementation would result in undue hardship.

Accommodation will be considered appropriate if it will result in equal opportunity to attain the same level of performance, or to enjoy the same level of benefits and privileges experienced by others or if it is proposed or adopted for the purpose of achieving equal opportunity, and meets the individual’s disability-related needs. If the accommodation meets the individual’s needs and does so in a way that most respects dignity, then a determination can be made as to whether or not this “most appropriate” accommodation would result in undue hardship.

*Employer’s duties to Employees with disabilities*

* accept the employee’s request for accommodation in good faith, unless there are legitimate reasons for acting otherwise
* obtain expert opinion or advice where needed
* take an active role in ensuring that alternative approaches and possible accommodation solutions are investigated, and canvass various forms of possible accommodation and alternative solutions, as part of the duty to accommodate
* keep a record of the accommodation request and action taken
* maintain confidentiality
* limit requests for information to those reasonably related to the nature of the limitation or restriction so as to be able to respond to the accommodation request
* grant accommodation requests in a timely manner, to the point of undue hardship, even when the request for accommodation does not use any specific formal language
* bear the cost of any required medical information or documentation. For example, doctors’ notes and letters setting out accommodation needs, should be paid for by the employer.

*Employees’ duties*

* advise the accommodation provider of the disability (although the accommodation provider does not generally have the right to know what the disability is)
* make her or his needs known to the best of his or her ability, preferably in writing, so that the person responsible for accommodation may make the requested accommodation
* answer questions or provide information regarding relevant restrictions or limitations, including information from health care professionals, where appropriate and as needed
* participate in discussions regarding possible accommodation solutions
* co-operate with any experts whose assistance is required to manage the accommodation process or when information is required that is unavailable to the person with a disability
* meet agreed-upon performance and job standards once accommodation is provided[46]
* work with the accommodation provider on an ongoing basis to manage the accommodation process
* discuss his or her disability only with persons who need to know. This may include the supervisor, a union representative or human rights staff.

*Employees with drug and alcohol issues*

Courts and human rights tribunals have acknowledged that drug and alcohol dependencies are medically recognized disabilities under human rights law. Therefore, drug and alcohol dependencies are protected under the grounds of mental and physical disability under the Human Rights Acts.

*Employee’s Religious beliefs and practices*

Employers are required to accommodate employees on the ground of their religious belief to the point of undue hardship. Accommodation may mean modifying a rule or making an exception to all or part of it for the employee concerned. You can read more about accommodation and undue hardship.

At times, an employee's religious beliefs may conflict with an on-the-job requirement, standard or practice. The employer may be required to accommodate the employee's religious needs when workplace rules or practices have an adverse impact or create conditions that the employee cannot comply with.

# *Employees Pregnancy and Breast feeding needs*

Pregnancy-related discrimination is any action, decision or policy that negatively affects an employee or group of employees, because of pregnancy or pregnancy-related conditions or circumstances.

The following actions could be considered pregnancy-related discrimination:

* Refusing to hire or promote a person because she is pregnant, plans to become pregnant, or recently gave birth.
* Adverse differential treatment in employment because of pregnancy-related circumstances or conditions.
* Terminating a person’s employment due to pregnancy-related conditions or circumstances.
* Creating or following polices or practices that negatively affect an employee, because of pregnancy-related conditions or circumstances.
* Failing to provide reasonable accommodation for an employee who Is pregnant, trying to become pregnant or recently gave birth.
* Harassing employees because of pregnancy or related conditions or circumstances is also considered discrimination. Harassment includes joking, teasing and unwelcome comments, or touching.

*Employees Family needs*

In terms of family status, accommodation is usually associated with caregiving needs.

Generally, the duty to accommodate will only become an issue in cases where rules, policies, practices, or institutional structures, assumptions or culture are adding to, or leading to, the disadvantage of persons identified by a particular family status.

To determine whether a duty to accommodate has arisen, consider the following:

* the nature of the caregiving responsibility, and the conflict between that responsibility and the organization’s rules, requirements, standards, processes or other factors
* the more major the caregiving obligation at stake and the more serious the interference of that rule, requirement or factor, the more likely it is that a duty to accommodate will arise
* the systemic barriers faced by caregivers, including effects based on overlapping grounds like disability, age, gender, sexual orientation, race and race-related grounds, and marital status
* consider what systemic barriers exist in the workplace, including the representation of persons with significant caregiving responsibilities, the organizational culture, and the inclusiveness of its policies, procedures and decision-making practices
* the availability and adequacy of social supports for caregiving needs
* caregivers should not have to place their loved ones into situations of significant risk of physical,
* emotional or psychological harm to meet the needs of their employer.

An employer does not need to provide more than the person needs to meet the actual needs related to family status.

*On the Job Drug & Alcohol Testing*

These policies focuses on the proper and improper use of employment related drug and alcohol testing.

The inappropriate use of alcohol or drugs can have serious adverse effects on a person’s health, job performance and workplace safety. Safety must be ensured in ways that do not discriminate against employees on the basis of a prohibited ground of discrimination.

*Workplace Harassment*

Everyone should be able to work in a safe and healthy workplace.

Harassment is defined as the improper conduct by an individual, that is directed at and offensive to another individual in the workplace, including at any event or any location related to work, and that the individual knew or ought reasonably to have known would cause offence or harm. It comprises objectionable act(s), comment(s) or display(s) that demean, belittle, or cause personal humiliation or embarrassment, and any act of intimidation or threat. It also includes harassment within the meaning of the Canadian Human Rights Act (i.e. based on race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability and pardoned conviction).

To substantiate harassment allegations, it must be demonstrated that, according to the balance of probability:

The respondent displayed an improper and offensive conduct including objectionable acts, comments or displays, or acts of intimidation or threats, or acts, comments or displays in relation to a prohibited ground of discrimination under the Canadian Human Rights Act;

* The behaviour was directed at the complainant;
* The complainant was offended or harmed, including the feeling of being demeaned, belittled, personally humiliated or embarrassed, intimated or threatened;
* The respondent knew or reasonably ought to have known that such behaviour would cause offence or harm;
* The behaviour occurred in the workplace or at any location or any event related to work, including while on travel status, at a conference where attendance is sponsored by the employer, at employer sponsored training activities/information sessions and at employer sponsored events, including social events; and
* There was a series of incidents or one severe incident which had a lasting impact on the individual. Note that in the case of sexual harassment particularly, a single incident may be viewed to be more significant in circumstances when your relationship at work is one where the respondent has influence or power over you with regard to career advancement, performance review, absenteeism, day to day management of activities, work assignments and the carrying out of progressive disciplinary measures.
* In order to make a finding of harassment, each of the above elements must be present. If even one of these elements cannot be proven, there will not likely be a finding of harassment.

*The Human Rights Complaints Process*

If you believe that you have been discriminated against and wish to file a complaint with the Human Rights Commission, you must contact the Commission within twelve months of the date that the alleged discrimination occurred.

Once a complaint is accepted, our Investigator will draft the complaint based on the information you provide. A final draft will be sent to you for review and signature. Once your signed complaint is received by our office, the investigation into the complaint will proceed.

**Step One - Investigation Phase**

The complaint will be assigned to one of the Commission’s Investigators. The Respondent (the person(s) or organization(s) against whom the complaint has been filed) will be notified that a complaint has been filed and that it is being investigated and will be given the opportunity to respond to the complaint.

Once the Respondent has provided a response the Complainant will be provided a copy and an opportunity to make comments. The Investigator may interview the individuals involved, inspect records or documents, and has certain powers to enter buildings to seek evidence.

**Step Two - Mediation**

Commission staff will attempt to help the parties involved in the complaint reach a settlement (a solution to the problem to which both parties agree). Where a settlement is reached, the Commission file on the complaint file is closed, and no further action will be taken unless one or both parties fail to comply with the terms of the settlement. If no settlement is reached, or if there is non-compliance with the terms of a settlement, the complaint will proceed to STEP THREE.

**Step Three - Report**

The Investigator’s Report is sent to the Commission’s appointed board for review. This group, which is made up of individuals appointed from various parts of Newfoundland and Labrador, decide whether to refer the complaint to the Board of Inquiry.

**Step Four - Board of Inquiry Phase**

The Board of Inquiry is made up of a number of Adjudicators. Each complaint that reaches this stage is heard before one Adjudicator in a public hearing. The Complainant and Respondent each have a chance to present their arguments.

**Step Five - Decision**

After hearing all of the evidence the Adjudicator will decide if there has been a violation of the Act and will provide his/her decision in writing. If a violation of the Act is found to have occurred, the Adjudicator will order the Respondent to stop the violation, and can also order the Respondent to provide opportunities or privileges that have been denied, to pay compensation to the Complainant, and/or order other remedies to compensate the Complainant for the discrimination he/she suffered.

The Adjudicator’s decision is legally binding on the parties, but it can be appealed to the Supreme Court Trial Division.

**Step Six - Appeal Phase**

Both a Complainant and Respondent have the right to appeal the decision of the Board of Inquiry to the Supreme Court of Newfoundland and Labrador Trial Division. An appeal must be filed within thirty days from the date on which the prospective Appellant received the order of the Board of Inquiry. The Supreme Court can confirm, reverse, or vary the decision and orders of the Board of Inquiry.