



Accommodating the Frequently Absent Employee

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Scenario 1

Sara's supervisor meets with her to discuss performance issues and negative workplace behaviours. The meeting does not go well. The next day, Sara presents a handwritten note from a night clinic nurse practitioner that indicates that Sara is unable to work for medical reasons for 4 weeks. No other information is provided. Sara has no history of medical absences and the employer is not aware that she has health issues.

Scenario 2

Mike has been off work on sick leave for 22 months. When he first went out on leave, he provided a medical certificate. He was approved for STD benefits, and eventually LTD benefits. Mike and the employer have not been in contact for over a year and no additional medical information was either requested or provided. The employer knows that Mike will soon reach the 2 year point of his disability benefits and wants to terminate the employment relationship.

The Duty to Accommodate

- The *Human Rights Act* prohibits an employer from discriminating against an employee on the basis of disability.
- As a result, an employer is required to accommodate a disabled employee to the point of undue hardship.



The Scope of Accommodation

- Accommodation is an adjustment or modification of the work environment or method of doing work.
- Employers must accommodate to the point of undue hardship.
- Employers must be prepared to accept some hardship.
- “Undue” hardship is more than minor inconvenience or disruption.

Factors Used to Assess Undue Hardship

- Financial cost (actual and relative to employer)
- Size of workforce
- Safety
- Interchangeability of workforce and facilities
- Disruption of collective agreement
- Employee morale
- Disruption to the workforce or work schedules



McGill University (SCC: 2007)

- ...The factors that will support a finding of undue hardship are not entrenched and must be applied with common sense and flexibility.
- ...Since the right to accommodation is not absolute, consideration of all relevant factors can lead to the conclusion that the impact of the application of a prejudicial standard is legitimate.

McGill University (SCC: 2007)

- A collective agreement clause, specifying termination after a certain period, is not determinative but gives a clear indication of the parties' intention with respect to reasonable accommodation and, as such, is a significant factor for an arbitrator to take into account in considering a grievance.
- An employer and a union can agree to an absence limit so long as the limit does not violate human rights.

Accommodation is a Multi-Party Responsibility

- Along with the employer and the union, the employee must also actively participate in finding an appropriate accommodation.
- Accommodation cannot be done in isolation by the employer. It requires as a minimum the co-operation and will participation by the employee.



Employer's Obligations

- The employer must investigate when it has reason to believe accommodation is necessary (i.e., employee's actions suggest mental illness, substance abuse, etc.).



Examples of Accommodation

- Making arrangements for an employee to enter a treatment program.
- Providing counselling or other assistance.
- Allowing an employee to claim time off as vacation time.
- Adjusting shifts and schedules so that the employee can attend treatment or meetings.

Examples of Accommodation

- Providing a leave of absence with or without pay.
- Tolerating absenteeism.
- Managing co-workers morale problems caused by the burden of the employee's absenteeism.
- If possible, reassigning the employee to a position consistent with their training, skills and experience.

Employee's Obligations

- Employees are expected to identify the need for accommodation, functional limitations and required adjustments.
- The employee - or a medical provider - cannot dictate the accommodation. It must be a collaborative, multi-party, process.
- An employee cannot insist on a preferred accommodation.
- An employee may not refuse a reasonable accommodation.



Participation in the Solution

- An employee has a duty to work in good faith with the employer to attempt accommodation and a duty not to reject proposed accommodation because it is not the preferred accommodation.
- The employee has a duty to participate in the implementation of the accommodation.
- An employee must make sincere efforts.
- The level of the employee's commitment can be scrutinized to assess whether employer has reasonably accommodated employee.

Renaud, SCC, 1992

- “While the complainant may be in a position to make suggestions, the employer is in the best position to determine how the complainant can be accommodated without undue interference in the operation of the employer’s business. When an employer has initiated a proposal that is reasonable and would, if implemented, fulfil the duty to accommodate, the complainant has a duty to facilitate the implementation of the proposal.”

Union's Obligations

- Unions have a duty to facilitate accommodation (e.g. waiver of collective agreement terms, flexibility where possible).



An Employer is NOT Required to:

- Create a new position for the employee.
- Fundamentally change working conditions.
- Hire another employee to perform an employee's duties.
- Provide non-productive duties on long-term basis.
- Tolerate excessive absenteeism that is unlikely to improve.
- Tolerate misconduct, even if related to disability.
- Holding position for absent employee indefinitely.

Hydro-Quebec (2008: SCC)

- The duty does not require that all possible means of accommodation be exhausted before it is satisfied.
- An employer is not required to completely alter the essence of the contract of employment.
- Undue hardship will be established where:
 - Proper operation of business is hampered excessively;
and
 - The employee is unable to work in reasonably foreseeable future despite efforts to accommodate.

Sun-Rype Products Ltd. (2016 BC)

- Lengthy absence for more than 2 years.
- Employer provided rehabilitation, benefits, and developed return to work programs.
- Unable to return to work through lighter duties and prognosis of return to work was uncertain.
- Dismissal upheld. Employer was able to demonstrate that the employee could not return to productive work in the foreseeable future.

Medical Certificates

- What can you ask for?
 - Sufficient medical information to establish a bona fide sickness or disability.
 - The Employer's enquiries for medical information must be:
 - Reasonable
 - In accordance with the collective agreement.



When can an Employer Require Medical Certificates?

- Hiring – to determine whether the employee is able to perform duties of the job.
- Absences – to substantiate absences from workplace.
- Accommodation – to substantiate requests for workplace accommodation.
- RTW – to determine whether employee is fit to safely return to work.

What can the Employer ask?

- An employer may ask for:
 - Prognosis, not diagnosis, (e.g. timing for RTW or when updated information will be available).
 - Whether the illness is related to workplace.
 - Whether the illness prevents performance of any duties.
 - Actions the employer could take to accommodate.

Content of Medical Information

- The content of a medical certificate must be reasonable given the nature of the benefit being sought.
- An employee who submits insufficient medical information may be asked to provide more detailed information.
- The content of information required to accommodate evolves in the attendance management process.

Requiring an Independent Medical Examination (IME)

- Generally a last resort.
- Requiring an IME to substantiate the truth of an employee's assertion tantamount to making employee take a lie detector test.
- The employer must have more than a suspicion that the employee poses health / safety risk.
- “Necessary” due to a “legitimate doubt”.
- Where there is a genuine fitness risk.
- Be mindful of the collective agreement.

Frustration

- Frustration of contract occurs when an unforeseen event or circumstances renders a contract fundamentally different in character from what the parties originally intended. When frustration arises, the contract may be terminated without liability.
- Employer attempts to terminate on the basis of frustration have frequently been overturned by courts as a result of insufficient evidence of near permanent inability to return to work.



Frustration

- Disability likely to be permanent.
- The employee is unable to perform essential duties of employment for an indeterminate period of time.
- Further performance of the employee's obligations are impossible or would be substantially different from performance initially contemplated.

Frustration

- *White v. F. W. Woolworth* (NLSC-AD: 1996)
- Court of Appeal refused to find a contract frustrated after employee off for 10 months saying “normally” between 18 months and two years absence to frustrate contract.

Roskaf v. RONA Inc., ONSC 2018

- Employee had been off work for almost 3 years.
- Employer terminated the contract for frustration.
- Employer asserted that the medical evidence confirmed that the employee was permanently and totally disabled from employment in any occupation and was unlikely to return to work within a reasonable time.
- The court determined that the employee's insurer's decision to continue LTD benefits and the representations of the plaintiff to the insurer that his medical condition had not improved and that he was totally disabled from performing the duties of any occupation allowed the employer to conclude that there was no reasonable likelihood that the plaintiff would return to work in the foreseeable future.

Essential Duties

- The goal of accommodation is to put the employee in a position to perform their essential duties.
- Employers are generally not required to exempt employees from essential duties as part of the accommodation process.

Essential Duties

- The duty to accommodate does not require an employer to reorganize the workplace or to restructure existing jobs.
- If a disabled employee is unable to perform the essential or core duties of the position or an available position, regardless of whatever attempts might be made at accommodation, that is the end of the matter.



Audience Participation

Scenario 1

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- What is the appropriate response?

Scenario 2

Mike has been off work on sick leave for 22 months. When he first went out on leave, he provided a medical certificate. He was approved for STD benefits, and eventually LTD benefits. Mike and the employer have not been in contact for over a year and no additional medical information was either requested or provided. The employer knows that Mike will soon reach the 2 year point of his disability benefits and wants to terminate the employment relationship.

- What do you do?



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