

BROKEN PROCESSES: HUMAN RIGHTS TRIBUNAL REMINDS EMPLOYERS OF THE IMPORTANCE OF THE PROCEDURAL DUTY TO ACCOMMODATE

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The duty to accommodate under Ontario's *Human Rights Code* (the "**Code**") is a collaborative process that imposes obligations on both employees and employers. An employee seeking accommodation is required to provide sufficient information to allow their employer to understand the basis and parameters of their request. For the employer, there are two distinct components once an employee has requested accommodation: i) a procedural duty, which requires an assessment of the accommodation requested, and ii) a substantive duty, which requires the employer to provide accommodation.

Two recent decisions of the Ontario Human Rights Tribunal (the "**Tribunal**") elaborate on employers' procedural duty to accommodate. The decisions serve as a good reminder to ensure a timely and good faith effort in assessing the accommodation request.

Employers Fail Procedural Duty

In [Giang v. DBG Canada Limited](#), an employee alleged that his employer had discriminated against him by failing to accommodate his disability. The employee had a defibrillator installed in his chest and was cautioned by his doctor about exposure to high voltage machinery that could cause the defibrillator to deliver an inappropriate shock. The employee believed that certain equipment in his workplace posed such a risk. Although the employer initially accommodated the employee by allowing him to work in an area separate from the suspect equipment, the employer later revoked the accommodation.

Over the next two years, the employee met with management on several occasions in an attempt to validate his accommodation request. He provided doctors' notes and further explained his concerns. The employer, however, neglected to investigate the actual risks posed by the machinery. The employee was ultimately terminated for refusing to work near the equipment.

Approximately a year after the employee was terminated, the employer commissioned a worksite assessment to determine whether the workplace posed any risk to an individual with an implantable cardiac device. The

report concluded that there was little or no risk. At the hearing, the employer argued that there was no duty to accommodate since there never existed an actual threat to the employee's health.

Finding that the employer failed to meet its obligations under the procedural duty to accommodate, the Tribunal rejected the argument that after-the-fact evidence could justify a decision not to accommodate an employee. The duty to accommodate arises at the time of the request. The employee had raised a legitimate concern that exposure to certain equipment could pose a health risk. The employer did not, at that time or at any time leading up to his termination, have the information necessary to support its position that this was not the case. The employer's procedural duty to accommodate required it, at a minimum, to seek out further information to confirm that its worksite was safe for the employee.

The employer's failure to accommodate and its subsequent termination of the employee constituted discrimination under the Code. The Tribunal awarded the employee compensation for lost wages as well as \$20,000 for injury to dignity, feelings and self-respect.

The Tribunal similarly found that the employer in *Kovintharajah v. Paragon Linen and Laundry Services Inc.* had failed to meet its procedural duty to accommodate after it inappropriately revoked an employee's family-status accommodation. The employee initially worked the 8:00am to 4:00pm shift; however, after his spouse began a new job requiring her to start at 3:00pm, the employee requested that he be able to leave at 2:30pm in order to meet his childcare responsibilities. The employer agreed, but later revoked the accommodation on minimal notice to the employee. The employer claimed that it was having financial difficulties that no longer allowed it to provide scheduling accommodations as they interfered with the overall efficiency of the business.

Upon receiving notice, the employee informed management that he had no choice but to leave at 2:30pm in order to care for his children and proceeded to do so. The following day, the manager suspended the employee for 5-days without pay for leaving work early. The employee called the owner of the business to discuss his accommodation issues, who advised him that upon his return after suspension, leaving at 2:30pm should no longer be an issue. However, the employee was terminated a week after his return for leaving before the end of his shift.

The Tribunal held that the employee's termination was discriminatory. The Tribunal found that the employee had met his duty under the Code by opening a dialogue and making reasonable efforts to explore alternatives. The employer, however, neglected to engage in the process. Although the employer had a legitimate basis for its policy change, which was not, in and of itself, discriminatory, it still had a procedural duty to accommodate. When the employer chose to immediately discipline the employee rather than engage in a process of determining possible accommodation options, it was in breach of its procedural duty to accommodate the employee's family status.

The Tribunal ordered that the employer compensate the employee for lost wages, which encompassed both the 5-day suspension and the 13-months it took for the employee to secure new full-time employment. The Tribunal also awarded the employee \$20,000 in compensation for injury to dignity, feelings and self-respect.

Key Takeaways for Employers

Both decisions affirm that employers have a procedural duty to accommodate. Although employees requesting accommodation must provide their employers with the information needed to understand the nature of their request, employers must actively engage in the process.

If an employer feels as though the accommodation is without merit or unnecessary, it cannot simply deny the request. As was seen in *Giang*, the employer should conduct its own good-faith investigation in order to determine whether accommodation is required and, if so, to what extent.

Further, the procedural duty requires employers to engage in the accommodation process without undue delay. When a request is made, employers must promptly take steps to gather the information needed to determine the amount and type of accommodation that is required. This may involve making further inquiries with the employee or, in some cases, conducting its own internal assessment of the workplace.

If a judicial body finds an employer to have terminated or constructively dismissed an employee on a discriminatory basis, such as by failing to meet its duty to accommodate, the employer may be liable for the employee's lost wages. Recent trends also suggest that the employer may further be liable to compensate an employee for injury to their dignity, feeling or self-respect, as was seen in both Tribunal decisions.

If you have any questions relating to the above, please do not hesitate to contact a member of the Employment & Labour Relations Group.

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A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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