

# EMPLOYER BREACHES PROCEDURAL BUT NOT SUBSTANTIVE COMPONENT OF DUTY TO ACCOMMODATE

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It is a foundational principle of human rights law that employers have a duty to accommodate certain protected characteristics of their employees to the point of undue hardship. It is also well established that the duty to accommodate has both a procedural and a substantive component. The procedural component requires employers to inquire into an employee's accommodation needs and undertake an individualized investigation of potential accommodation measures to address those needs. The substantive component relates to the reasonableness of the chosen accommodation or the reasons for not providing accommodation, including proof of undue hardship.

The recent decision in [Winners Merchants International and the Workers United Canada Council, Local 152](#), reaffirms the importance of fulfilling both the procedural and substantive components of the duty to accommodate.

## The Facts

In this case, the arbitrator heard a grievance filed by the union on behalf of Prakish Sandhu, a forklift driver, after the employer denied her request for a transfer from the midnight shift to the afternoon shift. When the grievor requested the transfer, she was performing modified duties, having sustained permanent injuries in a motor vehicle accident. As part of her accommodation, the grievor was removed from the employer's forklift rotation schedule, which required employees to operate four different types of forklifts. Instead, the grievor operated only one type of forklift and received assistance from other employees to move boxes.

After making the request, the grievor was simply told by the employer that she was denied the transfer because she was on modified duties.

## The Arguments

The union argued that by failing to: (a) inquire into the grievor's accommodation needs on the afternoon shift; (b) investigate potential accommodation measures; and (c) make an individual assessment about its ability to accommodate the grievor, the employer breached the procedural component of its duty to accommodate the

grievor. The union also argued that since the employer was already accommodating the grievor on the midnight shift, accommodating the grievor on the afternoon shift would not constitute undue hardship. The union requested that the grievor be awarded the transfer and be compensated for any lost wages.

The employer argued that there were significant differences between both the volume of work performed and the nature of forklift operations on the afternoon shift and the midnight shift. The employer testified that as many as 400 employees are required during the afternoon shift, while only about 80 employees work on the midnight shift. Because of the nature of the employer's operation, having more employees in the workplace made accommodation more difficult. The employer argued that creating a separate schedule for the grievor during the afternoon shift would constitute undue hardship.

### **The Findings**

The arbitrator made clear that the employer had an obligation to consider the grievor's specific request in a timely fashion and on an individual basis. As all of the employer's arguments in defence of its inability to accommodate the grievor were developed after the fact, the arbitrator found that the employer failed to conduct the assessment required to meet the procedural component of the duty to accommodate.

In many such situations, arbitrators direct the parties to consider the issue of accommodation as it should have been considered in the first place. Guided by the arbitrator's decision, the employer and the employee are usually able to determine a mutually acceptable accommodation arrangement. However, in this case, the arbitrator declined to do so, finding that the likelihood of the employer reaching another conclusion, even assuming the utmost good faith, was remote.

The arbitrator found that to accommodate the grievor on the afternoon shift, the employer would be required to provide the grievor with frequent but irregular assistance and would have to reconfigure its system of forklift driver deployment to incorporate a role for the grievor, which would impose an unwarranted alteration to working conditions at a significant cost to the employer. Accordingly, the arbitrator found that despite the breach of the procedural component of the duty to accommodate, the evidence adduced at the arbitration made clear that accommodation would reach beyond "due" hardship. Therefore, the grievance was allowed in part.

### **Lessons for Employers**

The lapse in process in this case likely occurred for two reasons: (1) the employer assumed it knew the grievor's accommodation needs as the grievor was already performing modified duties when she made the request for a transfer; and (2) the employer intuitively knew that accommodating the grievor would amount to undue hardship so it did not, at the time the request was made, keep written records of the consideration it gave to

greivor's needs or collect empirical evidence to support its intuition that it would be unable to accommodate those needs without undue hardship.

Employer's who are proactive and sensitive to their accommodation obligations and the individual needs of employees requesting accommodation, are best positioned to both avoid and defend against challenges related to accommodation requests. No matter how well an employer knows its own business or thinks it knows the accommodation needs of an employee, employers should always:

1. accept employee requests for accommodation in good faith, unless there are legitimate and substantive reasons for acting otherwise;
2. seek legal advice as to appropriate actions the employer should undertake to explore the needs of the employee and the employer's ability to accommodate those needs;
3. keep a written record of each accommodation request and all actions taken to explore the needs of the employee and the employer's ability to accommodate those needs;
4. take an active role in ensuring that alternative approaches and possible accommodation solutions are investigated by canvassing various forms of possible accommodation and alternative solutions;
5. obtain expert opinions, as needed;
6. 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; and
7. if the employer is unable to accommodate the employee's request without undue hardship, provide the employee with substantive reasons for denying the request, supported by written records and empirical evidence.

by Stefanie Di Francesco

### **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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