

Publisher’s Note

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<p>THE DUTY TO ACCOMMODATE IN EMPLOYMENT Kevin D. MacNeill Release No. 2023-4, December 2023</p>

Comprehensive, understandable and relevant across Canada, this work helps legal practitioners and human resources professionals grapple with a complicated array of accommodation issues in this rapidly developing area of law. This work pinpoints areas of concern and provides a thorough examination of all the information on accommodation you need in human rights and workers’ compensation law including: the concept of “undue hardship”; the responsibilities of employers, employees and trade unions in the process of fashioning accommodations; and the impact of the duty to accommodate on historical workplace rules. As well, this work includes extensive reference to case law from both the unionized and non-unionized sectors.

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What's New in this Update:

This release features updates to Chapter 4 (Employment under Human Rights Legislation), Chapter 6 (Prohibited Grounds of Discrimination under Human Rights Legislation), Chapter 7 (Defences to Discrimination Claims under Human Rights Legislation), Chapter 13 (Assessing Undue Hardship), Chapter 14 (The Accommodation Process), Chapter 16 (Hiring, Promotion and Probation), Chapter 17 (Modified Tasks), Chapter 18 (Modified Hours, Shifts and Schedules), Chapter 19 (Absenteeism and Leaves of Absence), and Chapter 20 (Transfers)

Highlights:

- In *Senger v. Tolko Industries Ltd.*, 2023 BCHRT 64, the British Columbia Human Rights Tribunal declined to dismiss a complaint where there was no evidence that anything other than vacant, already defined, positions were explored and that there was no evidence that the parties discussed any alternative approaches to accommodation.
- An Ontario arbitrator found that an employee was medically unable to wear a mask in response to the COVID-19 pandemic, thereby triggering the employer's duty to accommodate the employee in relation to masking. However, the workplace was such that physical distancing could not be consistently maintained, and the arbitrator found that allowing the employee to attend at the workplace would create an unacceptable level of safety risk that amounted to undue hardship. See: *UFCW, Local 175 and Highbury Canco Corp. (Failure to Accommodate), Re*, 2023 CarswellOnt 9680 (Ont. Arb. - Kugler)
- In *Victorian Order of Nurses for Canada (VON) v. Labourers' International Union of North America, Local 3000* (May 23, 2023), Carrier (Ont. Arb.), an arbitrator found that an employer had not failed to accommodate an employee when it reduced her employment status from full-time to part-time after receiving medical information indicating that the employee had permanent medical restrictions preventing her from working full-time hours.
- In *Toronto District School Board v. CUPE, Local 4400*, 2023 CanLII 69411 (Ont. Arb.), an arbitrator found that the employer justifiably could not accommodate a grievor's restriction that required her to only help students in need to use the washroom with the door open. The arbitrator held that the option of toileting a student with the bathroom door

open would be a gross infringement of the student's privacy, completely unacceptable for reasons too long to list, and an undue hardship. However, the arbitrator also found that the employer failed in its duty to accommodate the grievor after it was clear that she could return to work, but the employer ceased looking for alternative positions for her to occupy, including in other schools.

- The Quebec Human Rights Tribunal found that an employer's decision to reject the application of a municipal firefighter based on his colour-blindness was discriminatory and that the employer failed to demonstrate undue hardship. In this case, the employer failed to properly assess the applicant's real abilities by not considering his previous experience as a firefighter for another municipal fire service and the techniques he uses to compensate for his condition in a fire situation. Moreover, the employer should have evaluated the feasibility of conducting a practical exercise to assess the applicant's ability to work despite his visual impairment. See: *Commission des droits de la personne et des droits de la jeunesse (Samson-Thibault) c. Ville de Québec*, 2023 CarswellQue 2337, 2023 QCTDP 2 (T.D.P.Q.)

ProView Developments

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