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THE DUTY TO ACCOMMODATE IN EMPLOYMENT

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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 the legal memos with a new article added to Chapters 6 (Prohibited Grounds of Discrimination under Human Rights Legislation), 9 (Workers' Compensation Legislation), 12 (The Undue Hardship Standard), 13 (Assessing Undue Hardship), 14 (The Accommodation Process), 17 (Modified Tasks), 18 (Modified Hours, Shifts and Schedules), 19 (Absenteeism and Leaves of Absence), 22 (Modified Workplace and Environment), 27 (Remuneration and Accommodation), Appendix RA (Related Articles).

Highlights:

In *Barton and Nordia Inc., Re*, 2024 CarswellNB 556 (N.B.L.E.B.) a 17-month delay in accommodating an employee's increased back and neck pain caused by the chair used at his workstation was found to be too long. In *Giuseppe Clemente v. Air Canada*, 2024 CHRT 102 (Can.H.R.T.) a tribunal found that the employer ought to have considered accommodation possibilities outside of the employee's branch, and across the company nationally. In *Rodrigues v. Treasury Board (Canada Border Services Agency)*, 2024 FPSLREB 75 (Can. F.P.S.L.R.E.B.) a grievor's claim that he could not work Sundays due to a knee injury was found to be a "sham" that was not supported by the medical evidence and simply reflected the grievor's personal preference as to work schedule. *Canadian Pacific Kansas City Railway and Teamsters Canada Rail Conference (Danchilla), Re*, 2024 CarswellNat 3234 (Can. R.O.A. — Bartel) noted the difference between preferred accommodations and true medical needs with the adjudicator writing, "Just because a statement flows from a doctor's pen as a request, does not clothe it with a distinction of being a "medical" requirement that must be accommodated". *Canadian Pacific Kansas City Railway and Teamsters Canada Rail Conference (JB), Re*, 2024 CarswellNat 2331 (Can. R.O.A. — Cameron) found that a grievor was held off work unreasonably until a return to work agreement had been signed. The grievor had a disability, namely a drug addiction; however, the employer led no evidence about any attempt to offer the grievor other work, including non safety-sensitive work, prior to the signing of the return to work agreement. In *Air Canada v. Marcovecchio*, 2024 FC 1639 (F.C.) the Federal Court found that the Canadian Human Rights Tribunal did not usurp the

CNESST's role when it decided that the employer's decision to rescind a job offer was discriminatory, notably when it took the employee's disability and the CNESST's process in that regard at face value. The Federal Court of Appeal held that it is not necessary for a tribunal to proceed to an undue hardship analysis when the employer's duty to accommodate is discharged by the employee's lack of cooperation. See: *Casper v. Canada (Attorney General)*, 2024 FCA 159 (F.C.A.) In *Sturgess v. Canada (Elections)*, 2024 FC 1360 (F.C.) Federal Court upheld a decision of the Canadian Human Rights Commission decision that there was insufficient evidence to prove a disability holding that there was no documentation connecting the claimant's anxiety disorder, ADHD, and depressive tendencies to a requested mask exemption. In one case involving an alleged failure to accommodate an alleged vocal disability it was noted that the medical information that had been provided to the employer was to the effect that the employee suffered from "a minor issue" and that would resolve with time. The Federal Court of Appeal noted that the employer had provided reduced hours and modified duties for months, and there was no medical evidence before it at the relevant time to substantiate on ongoing need for accommodation. See: *Jagadeesh v. Canadian Imperial Bank of Commerce*, 2024 FCA 172 (F.C.A.), leave to appeal refused *Aaren Jagadeesh v. Canadian Imperial Bank of Commerce*, 2025 CarswellNat 1786 (S.C.C.) In *Baildon (Rural Municipality) v. Gronvold*, 2024 SKCA 73 (Sask. C.A.) the Court of Appeal for Saskatchewan held that the hiring of another person to fulfil the functions of a disabled employee on medical leave is not itself discriminatory, even when the employee is not forewarned of that eventuality or the employer has not yet accommodated the disabled worker to the point of undue hardship. When an employee made an on-the-spot request for accommodation in the form of an earlier lunch, due to his diabetes, the employer rigidly denied the request, despite being able to accommodate it. The arbitration board chair took notice that some employees suffer from medical conditions that they do not disclose to their employer because they do not impact their ability to do the job and found that the employer overreacted to the accommodation request. See: *Canadian Union of Public Employees, Local 3077 v Lakeland Library Region*, 2024 CanLII 100203 (SK LA) In *Disbrow v. University of Victoria Properties Investments Inc. and others*, 2024 BCHRT 235 (B.C.H.R.T.) the employee was a security attendant whose job function included patrolling property and walking up and down over twenty flights of stairs per shift. The employee was

diagnosed and requested accommodation. A tribunal found that it would create safety risks and burdens on other employees to allow the worker to use elevators during her patrols, and there were no available open positions for her to transfer into. Further, the employer was not required to consider options like a bicycle or mobility device since this would not have addressed the employee's inability to walk up and down the number of stairs required to do her job. In *McNeil v. Telus Employer Solutions (TES) (No. 2)*, 2024 BCHRT 166 (B.C.H.R.T.) an employee's request to work from home due to her allergies was properly refused because the medical information provided consisted only in her doctor's suggesting a trial of the requested accommodation and a statement that the employee suffered from various vague and generalized symptoms. There was no clear statement of what the employee's restrictions were in fact. In *Shin v. Ministry of Public Safety and Solicitor General and another (No. 2)*, 2024 BCHRT 156 (B.C.H.R.T.), reconsideration/rehearing refused 2024 BCHRT 185 (B.C.H.R.T.) an employer's revoking a conditional hire based on an employee's failure to meet language competency standards was found not to be discrimination on the grounds of ancestry, place of origin, race, age, and mental disability. The complainant was hired as a Correctional Officer, and his employment was contingent on successfully completing certain class work, written examinations, and graded role-playing scenarios. Despite having numerous attempts, the complainant did not successfully complete the assessments. It was decided that "a requirement that an employee have a certain level of language skill is not inherently discriminatory and a complainant must demonstrate that such a requirement is connected to their protected characteristic by showing, for example: that the requirement is not necessary to do the work; the respondent's view of the language skills of the complainant is not accurate or fair; or if the complainant's accent is criticized in a derogatory way". Further, the employer established that they could not accommodate the complainant because "it would be an undue hardship to accommodate a candidate by allowing them to succeed in the program using recordings because it would provide an inaccurate view of a candidate's qualifications."

Appendix RA Related Articles—A new article was added on pronouns in the workplace. Gender identity and gender expression are protected grounds in every jurisdiction. It is well known that transgender individuals experience stigma, harassment and discrimination in many aspects of their lives, including in the workplace, despite human rights legislation. Four recent human rights decisions reflect the kind of discrimination and harassment to which transgen-

der individuals are commonly subject - the refusal of others in the workplace to use their chosen pronouns and their chosen name: *EN v. Gallagher's Bar and Lounge*, 2021 HRTO 240, 2021 CarswellOnt 4892 (Ont. H.R.T.); *Nelson v. Goodberry Restaurant Group Ltd. dba Buono Osteria and others*, 2021 BCHRT 137, 2021 CarswellBC 3045 (B.C. H.R.T.); *Bilac v. Abbey, Currie and NC Tractor Services Inc.*, 2023 CHRT 43 (Cdn. H.R.T.); and *S.R. v. DLPH Hambleton Group Inc. (aka Burger King Franchise 3566)*, 2024 HRTO 1491 (Ont. H.R.T.). These decisions are important for employers as they show the potential results of failing to ensure that transgender individuals are not discriminated against or harassed in the workplace on the basis of their gender identity or gender expression - significant damage awards for which owners and directors may be jointly and severally liable. Other results are the loss of valuable employees who feel forced to quit because of ongoing discrimination and harassment as well as an inability to attract and retain a diverse group of employees because of the discriminatory environment. The decisions show that using an individual's chosen pronouns and name is not optional - it is required to comply with human rights legislation and is an important part of the duty to accommodate.