

**Advanced Duty to Accommodate  
Accommodating Members with Disabilities  
A Course for Union Representatives**

**Participant Package**



*Updated by the Education Program  
and the Membership Services Program  
of the Public Service Alliance of Canada  
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## THANK YOU!

As PSAC union representatives, you play a key role in protecting and enhancing our members' rights. More and more, members have become aware of their right to workplace accommodation and requests for union support are also increasing. We believe that your commitment in accepting the responsibility of representing members who require accommodation will greatly improve the working life of PSAC members and make our workplaces better for all.

This Package of Participant Materials contains important documents for the Advanced Duty to Accommodate; Accommodating Members with Disabilities; A Course for Union Representatives, as well as some resources for future reference.

In addition, you will be referring to your respective **Collective Agreement**, and the **2019 PSAC Duty to Accommodate Guide**, which can be found online here: <https://psacunion.ca/duty-accommodate-psac-guide-local-representatives>

For further information and/or resources on the duty to accommodate, check-out the PSAC website <https://psacunion.ca/accommodate>.

Thank you for the work you do on behalf of our members.

In Solidarity,  
JOSÉE-ANNE SPIRITO  
PSAC North Regional Executive Vice President

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## Course Goal, Objectives and Agenda

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### Goal

To develop the general capacity of Union representatives tasked with advocating for members with disabilities that require accommodation.

### Objectives

By the end of this session, participants will be able to:

- apply the legal definition of discrimination and accommodation in the workplace and understand when the duty to accommodate becomes applicable
- draw on trauma-informed, human-centric, intersectional analyses to ensure a more empowering and effective representation of members requiring accommodation
- identify proactive accommodation measures for the workplace
- navigate the different processes involving workplace accommodation for members with disabilities (Disability benefits, return to work (RTW), *Workers' Compensation and injury on duty (IOD)*, *health and safety provisions*) and medical assessment

- effectively deal with some of the challenges and key issues related to duty to accommodate members with disabilities (i.e.; mental health disabilities, multiple disabilities and other oppressions and harassment)
- identify various recourse mechanisms for members requiring accommodation
- have the tools and information needed to effectively represent members requiring accommodation in the workplace.

## Agenda

### Day One

Session Opening
Course Overview and Administration
Reviewing Some Basics About Accommodation
Roles and Responsibilities of the Parties
Accommodation Recourse Routes and Benefit Entitlements
Wrap-up

### Day Two

Welcome & Check-in
Proactive Measures
Accommodation Jeopardy
Working Through Accommodation Scenarios
Mental Health Disabilities
Neurodiversity and DTA
Wrap-up

### Day Three

Welcome & Check-in
Challenging Ourselves
Harassment and Accommodation
Accommodation Role Plays
Wrap-up

## **PSAC Statement on Harassment**

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*This statement is to be read out and distributed at all PSAC events.*

Our union is made strong by working together to improve our working lives and to preserve the rights that we have struggled to achieve. Mutual respect is the cornerstone of this cooperation. The PSAC Constitution states that every member is entitled to be free from discrimination and harassment, both in the union and at the workplace, on the basis of age, sex, colour, national or ethnic origin, race, religion, marital status, criminal record, disability, sexual orientation, gender identity or expression, language, class or political belief. Members are also entitled to be free from personal harassment.

If you experience harassment at this event, contact the identified Anti-Harassment Resource Person to discuss the situation and possible responses. Our initial approach is to encourage early and informal resolution and to facilitate our members speaking directly with one another to resolve the matter. If this is not successful or possible, the Constitutional and policy mandates on the issue of harassment will be fully and quickly enforced.

Harassment in all its forms detracts from our common purpose and weakens our union. Let each one of us, as we work together on the important task at hand, treat each other with dignity and respect.

## **PSAC Policy on Disability Rights**

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*As required under the Accessibility Standard for Customer Service, Ontario Regulation 429/07 under the Accessibility for Ontarians with Disabilities Act 2005 (AODA) and the Ontario Human Rights Code.*

### **PURPOSE**

The Public Service Alliance of Canada believes in the right of persons with disabilities to live and work in society with dignity, autonomy and equality.

PSAC recognizes that persons with disabilities are one of the most marginalized and employment-disadvantaged groups in society. This is due in large measure to the many attitudinal, structural or architectural, technology, information or communication, and systemic barriers present in today's workplaces and society. This discrimination comes from a lack of understanding, negative stereotypes about disabilities and from employment systems that are designed with only able-bodied workers in mind.

A disability is only one aspect of a person and should not be used to define the person or limit his/her full participation in employment, society and the union. PSAC is therefore committed to eliminating barriers for people with disabilities in their participation in the union.

PSAC acknowledges that workers with disabilities represent an important source of information on how to eradicate disability-based discrimination from the workplace, society and the union. The union will strive to ensure that members with disabilities are represented throughout the union structures and that union activities and events are inclusive and accessible for persons with disabilities.

The purpose of this policy is to establish a framework for the union to respond to and address barriers for members with disabilities in order to enable them to fully participate in their union.

## DEFINITION OF DISABILITY

The definition of disability under the Accessibility for Ontarians with Disabilities Act, 2005 (AODA) and the Customer Service Standard is the same as the definition of disability under the Ontario Human Rights Code.<sup>1</sup> Disability means:

- (a) any degree of physical disability, infirmity, malformation or disfigurement that is caused by bodily injury, birth defect or illness and, without limiting the generality of the foregoing, includes diabetes mellitus, epilepsy, a brain injury, any degree of paralysis, amputation, lack of physical coordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment, or physical reliance on a guide dog or other animal or on a wheelchair or other remedial appliance or device;
- (b) a condition of mental impairment or developmental disability;
- (c) a learning disability, or dysfunction in one or more of the processes involved in understanding or using symbols or spoken language;
- (d) a mental disorder; or
- (e) an injury or disability for which benefits were claimed or received under the insurance plan established under the *Workplace Safety and Insurance Act*, 1997.<sup>2</sup>

Under the Accessible Canada Act, a federal law that aims to create a barrier-free Canada, disability means “any impairment, including a physical, mental, intellectual, cognitive, learning, communication or sensory impairment — or a functional limitation — whether permanent, temporary or episodic in nature, or evident or not, that, in interaction with a barrier, hinders a person’s full and equal participation in society”.<sup>3</sup>

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<sup>1</sup> Note that every province has its own human rights code. While PSAC is a national organization, its headquarters are based in Ottawa, Ontario; for this reason, this course refers to the AODA and Ontario human rights code.

<sup>2</sup> Ontario Human Rights Code, Sect. 10 (1)

<sup>3</sup> Accessible Canada Act, art. 2 par. 5

Understanding disability requires acknowledging its legal, sociological, psychological, physical, biological, and neurological ramifications.

## **APPLICATION**

This policy applies to situations involving members with disabilities participating in union events and activities.

This policy adheres to the Accessibility Standard for Customer Service, Ontario Regulation 429/07 under the Accessibility for Ontarians with Disabilities Act 2005 (AODA) and the Ontario Human Rights Code.

## **ESTABLISHING POLICIES, PRACTICES AND PROCEDURES**

The union is committed to developing policies that respect and promote the dignity and independence of people with disabilities. The union is committed to providing quality services, goods and opportunities to our members and will make reasonable efforts to ensure PSAC policies, practices and procedures pertaining to providing goods or services to members with disabilities are consistent with the principles of dignity, independence, integration and equality of opportunity, as set out in the Standard. Any policy that does not respect or promote the dignity and independence of people with disabilities will be modified.

## **ASSISTIVE DEVICES**

The union is committed to ensure that members with disabilities who use assistive devices can obtain, use or benefit from the services of the union. Persons with disabilities may use their own personal assistive devices if necessary for them to fully participate. Assistive devices include such things as walkers, white canes, note-taking devices, etc.

## **SERVICE ANIMALS AND SUPPORT PERSONS**

The union is committed to welcoming members with disabilities who are accompanied by service animals on union premises that members have access to or at union events, except where excluded by law. If guide dogs or other service animals are not permitted, then alternative ways will be provided for persons with disabilities.

The union is committed to welcoming members with disabilities who are accompanied by a support person. Any person with a disability who is accompanied by a support person will be allowed to enter the union's premises or events with his or her support person. At no time will a person with a disability who is accompanied by a support person be prevented from having access to his or her support person while on union premise or events.

Advanced notice will be given if fees are applicable for a support person's admission to union events or in relation to their presence on union premises.

## **COMMUNICATIONS**

When communicating with a person with a disability, the union elected or appointed officials, employees, agents or other representatives will do so in a manner that takes into account the person's disability. Interactions dealing with accommodating members with disabilities will be done with sensitivity and discretion.

## **NOTICE OF TEMPORARY DISRUPTIONS IN SERVICES AND FACILITIES**

The union will provide notice to the public of temporary disruptions in facilities or services that are usually used by members with disabilities to access services.

## **TRAINING**

Training will be provided to PSAC staff that interacts with members with disabilities and develop policies, procedures and practices dealing with the provisions of goods and services to members.

The content of training will include:

- the purpose of the Accessibility for Ontarians with Disabilities Act;
- the requirements of the Accessibility Standards for Customer Service;
- how to interact and communicate with members with various types of disabilities;

- how to interact with members with disabilities who use assistive devices or who require the assistance of a service animal or support person;
- information about the assistive devices made available by the union that may help members with disabilities access its goods and services;
- what to do if a member with a disability is having difficulty accessing goods and services; and,
- instruction on union procedures and practices pertaining to the provision of goods and services to members with disabilities.

Training will be provided as soon as practicable after elected or appointed officials, employees, volunteers and other persons are assigned the applicable duties. Training will also occur on an ongoing basis as changes are made to the compliance statements, procedures and practices dealing with the provision of goods and services to individuals with disabilities.

## **FEEDBACK PROCESS**

Comments on the union's services are welcome and appreciated. Feedback regarding the way the union provides services to members with disabilities or questions about this policy can be made by email to [programs@psac-afpc.com](mailto:programs@psac-afpc.com) or by letter PSAC Human Rights Program, 233 Gilmour Street, Ottawa, Ontario, K2P 0P2 or verbally at 613-560-4200. Members can expect to hear back within two days.

Complaints will be addressed according to the PSAC policies and applicable regulations.

## **NOTICE OF THE AVAILABILITY OF THE REQUIRED DOCUMENTS**

The union will provide notice that the documents required by the Accessibility Standards for Customer Service are available to the public upon request.

## **DOCUMENT FORMAT**

When providing the documents to the public, the documents or the information contained in them will be provided in a format that takes the person's disability into account.

N.B. PSAC has also developed an Accessibility Plan that outlines the steps to ensure that the union is inclusiveness and accessible to persons with disabilities.

### **Accessibility Plan**

PSAC is committed to being inclusive and accessible to all members with disabilities in the following manner:

1. **Policies:** PSAC will make reasonable efforts to draft new or review existing policies, procedures and practices with a disability lens, including member policies and those internal to PSAC as an employer such as staffing, purchasing new equipment or technology, etc. Policies will be reviewed for gaps and barriers in the union's ability to provide services to members with disabilities. The union will make reasonable efforts to eliminate gaps and barriers that are identified.
2. **Assistive Measures:** Assistive measures include assistive devices, services, and alternate service methods. Members may use their own assistive measures at PSAC events and activities. If a member with a disability makes a request to PSAC to provide assistive measures, the union will make reasonable efforts to assist based on applicable reasonable accommodation principles in order to enable members with disabilities to participate at union events or activities. A member with a disability must identify the need for assistive measures in advance of PSAC event or activity. The union may require a medical certificate in order to outline the functional limitations if accommodation by the union is required.
3. **Service Animal:** All of PSAC premises are open to service animals. Service animals are also allowed at PSAC events. If a situation arises where another member has an allergy to animals, including service animals, then the union will discuss this situation with both members and make every effort to meet the needs of both members.
4. **Support Person:** A member may bring his/her own support person onto union premises or to union events. If a member with a disability makes a request to PSAC to provide a support person, the union will make reasonable efforts to assist based on applicable reasonable

accommodation principles in order to enable members with disabilities to participate in union events or activities. A member with a disability must identify the need for a support person in advance of PSAC event or activity. The union may require a medical certificate in order to outline the functional limitations if accommodation by the union is required. Members will be notified of any additional costs, if applicable, associated with a support person in advance of attending a union Event.

5. **Communications:** PSAC will make every reasonable effort to make communications more accessible. Plain language will be used in all communications. The union will offer to communicate with members by email, or by TTY or other alternate media.

**Training:** Staff persons who are in contact with members will be trained on how to interact and communicate with members with disabilities with various types of disabilities. Training will include the following: Purpose of the Accessibility for Ontarians with Disabilities Act, 2005 and the requirements of the customer service standard; how to interact and communicate with people with various types of disabilities; how to interact with people with disabilities who use an assistive device or require the assistance of a service animal or a support person; how to use the devices (e.g. TTY, wheelchair lifts, etc.) available on union premises or otherwise, that may help with the provisions of goods or services to people with disabilities; what to do if a person with a disability is having difficulty accessing the union's services and policies, practices and procedures relating to the customer service standard.

## **PSAC Policy on Scent-Free Environments**

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The Public Service Alliance of Canada is committed to ensuring that all members with disabilities are able to effectively participate in order to contribute to the organization's mandate.

In this regard, the PSAC recognizes that accessibility is an essential requirement for the participation of members with environmental disabilities.

In consideration for the health of our members who may suffer from environmental disabilities, and with the goal of eliminating a contaminant from the air, **the PSAC requests that all participants attending any union function refrain from using scented products. These include scented perfumes, colognes, lotions, hairsprays, deodorants and other products promoted by the fragrance industry.**

A participant who notices a problem is encouraged to address the person in a cordial and respectful manner. Any unresolved issues may be brought to the attention of the organizers who may investigate and attempt to find a reasonable accommodation.

By working together, we can create healthier environments for ALL, and accommodate the needs of persons who have environmental disabilities.

## Accommodation Glossary

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### **Ableism**

Ableism is a pervasive system of discrimination and exclusion that oppresses people who are defined as “disabled” in relation to a concept of “ability” or “able-bodied” as the norm, and who are therefore excluded from participation in society because of systems, physical infrastructure, prejudices, and barriers that are based on this “norm”. People with disabilities experience discrimination, segregation and isolation as a result of other people’s prejudices and institutional barriers, and not because of the disability itself. It is also a set of beliefs or practices at the individual, community, or systemic level that devalue people with physical, intellectual, or psychiatric disabilities and often rests on the assumption that disabled people need to be ‘fixed’ in one form or the other.

### **Accessibility**

Accessibility refers to the design of products, devices, services, or environments for people who experience disabilities. More generally, it’s the access to premises, services and facilities.

### **Accommodation Protocol**

A detailed process protocol which outlines the steps, consultation, evaluation and documentation required to respond to individual accommodation situations.

### **Adverse Effect/Impact discrimination**

It occurs when a seemingly neutral law, practice, procedure, policy, or rule has a disproportionate impact on members of groups protected on the basis of an enumerated ground in human rights legislation.

### **Barrier**

A barrier is a circumstance or obstacle that keeps people apart. It also means anything — including anything physical, architectural, technological or attitudinal, anything that is based on information or communications or anything that is the result of a policy or a practice — that hinders the full and equal participation in society of persons with an impairment, including a physical, mental, intellectual, cognitive, learning, communication or sensory impairment or a functional limitation.

### **Barrier-Free**

An environment which is free of disadvantage for groups protected by human rights legislation, including a facility, place or environment with design features which allow for maximum use of the environment by persons with disabilities.

### **Bona Fide Occupational Requirement (BFOR)**

A requirement that every individual performing a specific job must meet because the requirement is essential to the effective and safe performance of the job. When there is a bona fide occupational requirement, accommodating the needs of an individual with respect to that requirement would impose undue hardship. Undue hardship is based on health, safety and cost.

### **Dignity of Risk**

The right of an individual to assume a higher risk to themselves than might normally be considered acceptable in a workplace. This concept extends only as far as it does not increase the risk to co-workers or the general public.

## Disability

The 2006 UN Convention on the Rights of Persons with Disabilities states that “Persons with disabilities include those who have long-term physical, mental, intellectual or sensory "impairments" which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.”

In Canada, because of its complexity, there is no single, harmonized “operational” definition of disability across federal programs, departments and laws.

The *Canadian Human Rights Act's* definition of disability as “any previous or existing mental or physical disability and includes disfigurement and previous or existing dependence on alcohol or a drug” seems to lack depth and reuses the word instead of defining it.

The *Accessible Act* defines disability as : any impairment, including a physical, mental, intellectual, cognitive, learning, communication or sensory impairment — or a functional limitation — whether permanent, temporary or episodic in nature, or evident or not, that, in interaction with a barrier, hinders a person’s full and equal participation in society.

Disability as defined in Canadian human rights law (i.e. that triggers the legal duty to accommodate) refers to physical or mental health conditions that are ongoing, significant, or episodic and which impact the persons participation at work, including examples such as mobility, visual or hearing, learning or cognitive disabilities, addiction, psychological conditions such as depression and anxiety, and others.

*Disabilities* is an umbrella term, covering impairments, activity limitations, and participation restrictions. An *impairment* is a problem in body function or structure; an *activity limitation* is a difficulty encountered by an individual in executing a task or action; while a *participation restriction* is a problem experienced by an individual in involvement in life situations. In employment equity, persons with disabilities are those who self-identify as such and may or may not require accommodation in the workplace.

Individuals who self-identify as a person with a disability may however consider their medically-defined disability as a positive aspect of their identity, a different ability or a different way of being in the world.

### **Discrimination based on a prohibited ground**

Discrimination is a distinction, exclusion or preference based on one or more of the prohibited grounds enumerated in human rights legislation which has the effect of nullifying or impairing the right to full and equal recognition and exercise of a human right or freedom guaranteed by the law, the policy, the collective agreement or any other set of rule.<sup>4</sup>

Intent is not a factor that is to be taken into account when deciding whether or not discrimination occurred; only the denial of rights, equality and human dignity of people issued from social groups that have been historically disadvantaged.

Discrimination on prohibited grounds can be discrimination based on race, national or ethnic origin, colour, religion, age, sex, sexual orientation, gender identity or expression, marital status, family status, genetic characteristics, mental or physical disability and conviction for an offence for which a pardon has been granted or in respect of which a record suspension has been ordered. Some people might experience discrimination on more than one ground when they find themselves at the intersection of more than one ground of discrimination.

Discrimination may be direct or indirect. It can also be systemic (institutional).

### **Duty to Accommodate**

In the workplace, the duty to accommodate is the legal requirement for employers to proactively remove barriers and eliminate employment standards, practices, policies, requirements, procedures, or rules that discriminate against individuals or groups on the basis of a prohibited ground, such as race, sex, disability, age, family status, religion, sexual orientation, gender identity and so on. The Employer must take all steps, short of undue hardship to eliminate discrimination related to human rights grounds and to accommodate employees who fall under human rights protections.

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<sup>4</sup> *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center)*, 2015 SCC 39, par. 20

There is also a duty to accommodate for unions in two contexts. In the workplace, they must cooperate in the employer's obligation to accommodate and not be a "barrier" in the accommodation measures. In the union context, unions have a similar obligation as the employer with respect to union activities and functions.

### **Employment Equity**

A program of proactive, positive measures designed to: 1) increase the representation of people from the four "designated groups" in the workplace to a level that reflects their availability in the labour market; and 2) to identify and eliminate artificial barriers in the workplace (including systemic and attitudinal barriers) that prevent designated group members from accessing jobs, promotions, training, etc. The designated groups are: women, Indigenous peoples, racialized people, and people with disabilities<sup>5</sup>.

These are groups that have historically faced disadvantage, and who continue to face disproportionate levels of unemployment, underemployment, and barriers in the workplace.

### **Employment Systems, Practices or Rules**

Policies, practices, or rules (formal and informal), by which an organization attracts, selects, trains, promotes and compensates employees, establishes and defines jobs and determines the conditions of employment in the workplace.

### **Essential Job Duties**

The duties and requirements essential for the performance of the job.

### **Functional Limitations**

A worker's functional limitation results from their disability. It describes how daily functioning is affected, as well as how the worker's disability affects their ability to perform their duties and tasks. A worker's functional limitations should be described in their documentation.

**Functional Analysis** It's an analysis of what the functional job demands to help determine staff's fitness requirements or activities that may place them at a higher risk of injury.

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<sup>5</sup> [Black people and 2SLGBTQIA+ people will soon be added to the equity-deserving groups.](#)

## Harassment

Any behaviour that demeans, humiliates, or embarrasses a person, and that a reasonable person should have known would be unwelcome. It includes actions (e.g., touching, pushing), comments (e.g., jokes, name-calling), or displays (e.g., posters, cartoons). The *Canadian Human Rights Act* prohibits harassment on the basis of prohibited grounds. Other human rights legislation may include different prohibitive grounds. According to the Canadian human rights commission, harassment is generally a behaviour that persists over time, but serious one-time incidents can also sometimes be considered harassment.

Sexual harassment includes offensive or humiliating behaviour that is related to a person's sex, as well as behaviour of a sexual nature that creates an intimidating, unwelcome, hostile, or offensive work environment, or that could reasonably be thought to put sexual conditions on a person's job or employment opportunities.

"Personal" harassment is not covered by human rights legislation but it is included in health and safety violence protection provisions found in all jurisdictions. While it also involves disrespectful and unwelcome behaviour that demeans or embarrasses an employee, the behaviour is not based on one of the prohibited grounds named above. Complaints for personal harassment should be made under violence protection provisions in respective jurisdictions. As such, Employers include personal harassment in their workplace violence prevention policies.

While not technically harassment, **abuse of authority** occurs when a person uses authority unreasonably to interfere with an employee or the employee's job. It includes humiliation, intimidation, threats, and coercion. It does not include normal managerial activities, such as counseling, performance appraisals, and discipline, as long as these are not done in a discriminatory manner.

Abuse of authority unrelated to a prohibited ground is not covered by human rights legislation but can be dealt with under health and workplace violence policies and/or provisions in law.

### **Intersectional Discrimination**

Intersectionality is a theory coined in 1989 by American Professor, lawyer and activist Kimberle Crenshaw that recognizes that people have many overlapping identities and may simultaneously face multiple forms of discrimination. Intersectionality is a lens through which we can see where power comes and collides, where it interlocks and intersects to allow multiple forms of inequality or disadvantage to compound themselves and create obstacles and a unique form of oppression that is not understood or taken into account when talking about discrimination. Intersectionality is also concerned with how different systems, institutions, structures, socioeconomic, political, cultural and legal practices (historical and current) work together to create and reinforce inequities and disadvantages for certain people finding themselves at the crossroads of discrimination. For example, a racialized woman with a disability will experience oppression differently than a non-racialized woman with a disability.

### **Job Hazard Analysis**

An examination of work, broken into logical steps, to identify, and then eliminate or reduce, risks to the health and safety of workers.

### **Job-Rebundling**

When duties of more than one position, which can be completed by the individual being accommodated, are re-grouped in a single position.

### **Modified Duties**

Any meaningful job, task, function and/or workload arranged to accommodate an individual's functional limitations. This includes accommodation of someone with a long-term or short-term disability, be it alterations to the work area or the equipment used by the worker, as well as other prohibited grounds of discrimination.

### **Prejudice**

Prejudice are prejudgment cultivated by stereotyped ideas or attitudes about an equity-deserving group of which the person is a member. Prejudice are negative feelings or beliefs that are not frequently recognized as unsoundly based assumptions because of the frequency with which they are repeated.

For example, feelings of prejudice grow from the belief that certain people are inferior and should be treated accordingly.

They become common sense notions which are widely accepted as the norm, as the reality and they can be used to justify acts of discrimination.

### **Stigma**

When someone appears to be different than what is accepted in society, then that person may be viewed negatively. Stigma takes the form of stereotyping, distrust, fear, avoidance and other beliefs and behaviours that can negatively impact employment, income, mental and physical health and other social services, self worth, and families, especially if they lead to discrimination.

### **Technical Aids**

Equipment or work-related devices that enable a person with disabilities to perform their duties.

### **Undue hardship**

Signals the point beyond which Employers are not required to extend their obligation to accommodate. The threshold for employer to meet “undue hardship” in order to not accommodate someone is very high. When accommodating the needs of an individual or a protected group (such as people with disabilities) would alter the essential nature of the enterprise, substantially affect the economic viability of the enterprise, or produce a substantial health and safety risk that outweighs the benefit of accommodating that group or individual worker, the Employer may be deemed to have met their accommodation obligations. The Employer will have to provide sufficient evidence.

## 10 Key Principles of Disability Justice

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### Intersectionality

All forms violence and oppression are interconnected and therefore, our strategies to fight oppression need to be inclusive and cannot treat one struggle for liberation as more important than any other.

### Leadership of those most impacted

“We are led by those who most know these systems.” – Aurora Levins Morales

### Anti-capitalist politic

In an economy that sees land and humans as components of profit, we are anti-capitalist by the nature of having non-conforming body/minds.

### Commitment to cross-movement organizing

Disability justice lends itself to politics of alliance, working across differences.

### Recognizing wholeness

People have inherent worth outside of capitalist notions of productivity. Each person is full of history and life experience.

### Sustainability

We pace ourselves, individually and collectively, to be sustained long term.

### Commitment to cross-disability solidarity

We honor the insights and participation of all of our community members, knowing that isolation undermines collective liberation.

### Interdependence

We meet each other's needs as we build toward liberation, knowing that state solutions inevitably extend into further control over lives.

### Collective Access

As Brown, Black and queer-bodied disabled people we bring flexibility and creative nuance that go beyond able-bodied/minded normativity, to be in community with each other.

### Collective Liberation

No body or mind can be left behind – only moving together can we accomplish the revolution we require.

## Trauma Awareness

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### Types of Trauma

1. **Acute trauma** results from a single incident.
2. **Chronic trauma** is repeated and prolonged such as intimate partner violence or abuse.
3. **Complex trauma** is exposure to varied and multiple traumatic events over a long period of time. Complex trauma can negatively impact your sense of self, your ability to manage emotions, and your relationships with others.

### Types of Traumatic Experiences

- **Community Violence:** Robberies, shootings, assault, gang-related violence, hate crimes, violent encounters with law enforcement, group trauma affecting a particular community
- **Disasters:** Hurricanes, floods, accidents, wars, terrorism, pandemics

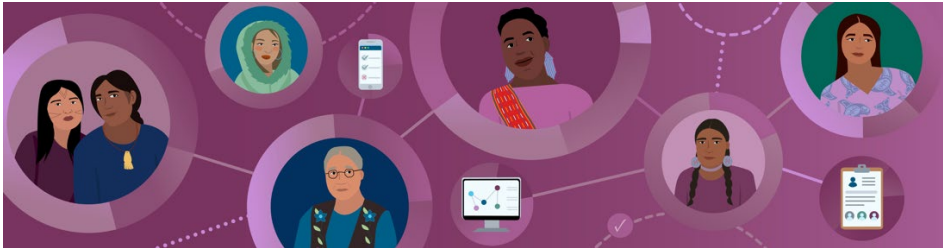
- **Family Trauma:** Abuse, neglect, experiencing or witnessing domestic violence, death, incarceration, substance abuse, mental health or other critical health challenges, divorce/separation
- **Grief and Loss:** The death of a loved one, friend or community member
- **Historical Trauma:** The collective and cumulative trauma experienced by a group across generations that are still suffering the effects. This includes discrimination, violence, and the oppression and marginalization of particular groups.
- **Intergenerational Trauma:** trauma that is passed from a trauma survivor to their descendants. It can also be referred to as transgenerational or multigenerational trauma.
- **Medical Trauma:** Pain, injury and serious illness, invasive medical procedures, or treatments, acute or chronic illness
- **Poverty:** Lack of resources, support networks, or socioeconomic mobility, financial stressors, homelessness
- **Racial Trauma:** Injury caused by encounters with racism, racist abuse, racial bias, ethnic discrimination, microaggressions, hate crimes and violence
- **Refugee and/or Immigration Trauma:** Exposure to war, political violence, torture, forced displacement, migration and living in a new culture, fears of deportation
- **School Violence:** Threats, fights, school shootings, bullying, violent loss of a student or staff member
- **Sexual Trauma:** Exposure to and/or experiencing of sexual violence
- **Workplace Trauma:** Threats, harassment, discrimination, bullying, assaults from co-workers, clients, managers, or the public

### Strategies for Trauma Awareness

1. Understand what trauma is and how to recognize it.
2. Understand that trauma is prevalent in our society and people and communities respond to it in many different ways.
3. Understand that trauma can be personal (related to traumatic experiences in a person's life), complex (based on factors such as family history, race, gender, or class) or collective (a traumatic event or experience that is shared by a group of people).

## A Human-Centric, Trauma-Informed Approach to Advocacy

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When Stewards represent someone who requires accommodation, there is an **elevated obligation**, by law, to ensure measures are in place to remove all barriers for them to access that representation. Using a human-centric, trauma-informed approach to advocacy helps to ensure that ALL members are afforded considerations that will support them and avoid triggers that could make them worse off than when they first come to you. It also means recognizing and considering the ways that colonialism, systems of violence, and systems of oppression interact with one another and how this impacts our members.

### Refresher – What is Trauma-Informed Advocacy?

- ✓ Being aware of the impact of trauma on the brain and body and implementing strategies to avoid exacerbating, creating or reproducing trauma-related problems.
- ✓ Being sensitive to members needs and instilling a climate of trust and collaboration.
- ✓ Recognizing and working with the experience and skills the member brings to the table.
- ✓ Does not ask members “what is wrong with you?” but instead “what happened to you?”
- ✓ A Human-Centric approach to advocacy is also a trauma-informed approach.

### Human-Centric Approach to Advocacy

Places the needs and expectations of the complainant at the center of your advocacy process. We see the complainant as a member and/or co-worker, first and foremost, not the problem.

## Safety

- A safe environment – meeting in spaces that work for the complainant, respecting boundaries and privacy, developing trust through collaboration.
- Be transparent – let the complainant know what to expect, don't give false hope, keep the member informed at all time, ask permission before acting on their behalf.
- Be consistent – follow-through and be honest about it when you can't, explain everything along the way, have regular check-ins. The member needs to know what to expect from you, their union, and the process.
- Be open – create space and time for questions and to listen to and act on the members concerns, ideas and feelings.

## Empowerment

- Value the member's identity, ability and knowledge.
- Foster supportive relationships with and amongst, members.
- Give members a choice in decisions that affect them, in a way that is purposeful and goes beyond what is required.
- Be open about what you are doing and ask permission before doing things on the member's behalf (i.e. taking notes, when meeting with management).
- Clarify and summarize often.
- Validate the member's feelings.
- Take lots of breaks.
- Check-in with the member regularly.

## Reflective Practice



- Reflect on your experiences from the context of individual interactions and broader organizational interactions.
- Allow members to give honest feedback about their experiences.
- Document learning from your reflection and use them to help create positive change in your advocacy work and in influencing organizational processes to better support a trauma-informed, human-centric approach to advocacy.

## ***Meiorin Decision Summary***

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### ***British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees' Union (BCGSEU) (Supreme Court of Canada) (1999) (a.k.a. Meiorin)***

#### **Facts:**

Tawney Meiorin was hired as a forest fire fighter in British Columbia and worked as a fire fighter for three years during which her supervisors found her work satisfactory. At some point, the government adopted a new series of fitness tests for fire fighters. Ms. Meiorin passed three of the four tests but failed the fourth, a 2.5 km run. She completed her run in 11 minutes, 49.4 seconds rather than the 11 minutes designated as the standard. As a result, she was dismissed.

Meiorin filed a grievance alleging discrimination on the basis of gender. The grievance arbitrator found that the aerobic capacity the 2.5 km run was supposed to measure was adverse effect discrimination against women. Furthermore, there was no evidence that the aerobic capacity aspect was necessary for either men or women to perform the work of a forest firefighter safely and efficiently.

He ruled that the government had not met its duty to accommodate Ms. Meiorin and ordered that she be reinstated and compensated for lost wages and benefits.

Ultimately, the case was appealed to the Supreme Court of Canada.

The Women's Legal Education and Action Fund, in coalition with the Canadian Labour Congress and the Disabled Women's Network, intervened.

## ***Supreme Court of Canada Decision***

### **Findings:**

The Supreme Court of Canada eliminated the distinction between direct and adverse effect discrimination and replaced it with a “unified” approach.

### **Three-Step Test**

A three-step test was adopted for determining whether the Employer established, on a balance of probabilities, that a *prima facie* discriminatory standard is a *bona fide* occupational requirement (BFOR):

- 1) The Employer must show that it adopted the standards for a purpose rationally connected to the performance of the job. The focus should be on the validity of the general purpose and not the validity of the particular standard;
- 2) The Employer must establish that it adopted the standard in an honest and good faith belief that it was necessary to fulfil that legitimate work-related purpose; and,
- 3) The Employer must establish that the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, it must demonstrate that it is impossible to accommodate individual Employees sharing the characteristics of the individual without imposing undue hardship upon the Employer.

This approach is premised on the need to develop standards that accommodate the potential contribution of all Employees in so far as this can be done without undue hardship to the Employer. Standards may adversely affect members of a particular group and thus, it follows that a rule or standard must accommodate individual differences to the point of undue hardship if it is to be found reasonably necessary. Unless no further accommodation is possible without imposing undue hardship, the standard is not a BFOR in its existing form and the *prima facie* case of discrimination stands.

### **Application of test to the facts**

The B.C. government was able to meet the first two steps of the test but failed the last step. In examining the third step, the Court held that the Employer could not show that the particular standard was reasonably necessary in order to identify those persons who are able to perform the tasks of a forest fire fighter safely and efficiently.

The procedures adopted by the researchers who developed the standard were flawed because they simply described the average aerobic capacity of the people already doing the job without determining whether this was the minimum level required in order to perform the job safely. The standard was also flawed because the researchers did not determine whether the aerobic capacity of male and female test subjects varied or related to their ability to perform the job. The Court further held that the government did not show that changing the standard would constitute undue hardship.

The Court listed some important questions that may be asked in the course of the analysis. In sum, if individual differences can be accommodated without imposing undue hardship on the Employer then the standard is not a BFOR. Furthermore, Employers designing workplace standards have an obligation to be aware of differences between individuals, and differences that characterize groups of individuals. They must build conceptions of equality into workplace standards. The standard itself is required to provide for individual accommodation, if reasonably possible.

## ***Grismer Decision Summary***

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### ***Terry Grismer v. British Columbia (Superintendent of Motor Vehicles, British Columbia (Council of Human Rights) (Supreme Court of Canada) (1999)***

#### **Facts:**

Terry Grismer suffered from a condition called homonymous hemianopia which eliminated most of his left-side peripheral vision in both eyes. Grismer's driver's licence was cancelled on the ground that his vision no longer met the standard of minimum field of vision of 120 degrees. People with Grismer's condition were not allowed to hold a driver's licence in B.C., although there were exceptions in other cases. Grismer filed a human rights complaint with the B.C. Council of Human Rights. The Council found that there was *prima facie* discrimination, and that the Superintendent had failed to show that applying the visual field standards inflexibly, without individual assessment, was reasonably necessary.

Ultimately, the case was heard by the Supreme Court of Canada.

#### ***Supreme Court of Canada Decision***

#### **Findings:**

The Supreme Court of Canada applied the test set out in *Meiorin*. Once a claimant establishes that the standard is *prima facie* discriminatory, the onus shifts on the defendant to prove on a balance of probabilities that the discriminatory standard is a *bona fide* occupational requirement (BFOR) or has a *bona fide* and reasonable justification, using the three-part test of *Meiorin*.

The Court held that accommodation ensures that each person is assessed according to his or her own personal abilities rather than presumed group characteristics. Accommodation refers to what is required in the circumstances to avoid discrimination.

Standards must be as inclusive as possible. There is more than one way to establish the necessary level of accommodation.

Failure to accommodate may be shown by evidence that the standard was set arbitrarily, or that individual assessment was unreasonably refused or in some other way. If the policy or practice is reasonably necessary to an appropriate purpose or goal, and accommodation short of undue hardship is incorporated into a standard, the fact that the standard excludes some people does not amount to discrimination. The ultimate issue is whether the Employer or service provider has shown that it provides accommodation to the point of undue hardship.

The Court held that in the assessment of the cost as a justification to refuse to accommodate those with disabilities, one must be wary of putting too low a value on accommodating the disabled. Impressionistic evidence of increased expense will not generally suffice.

In Grismer's case, the Court found that the discrimination did not lie in the refusal to issue a licence but in the refusal to give the claimant a chance to prove through an individual assessment that he could be licensed without jeopardizing the goal of reasonable road safety. Terry Grismer passed all the requisite tests except for the field of vision test. He was able to compensate for his limited field of vision with a mirror system he had developed yet was not permitted to pass the test with his equipment. The absolute standard of 120-degree vision was not supported by evidence and was struck down.

The Court concluded that those providing services subject to human rights legislation must adopt standards that accommodate people with disabilities where this can be done without sacrificing their legitimate objectives and without incurring undue hardship.

## ***Meiorin and Grismer Discussion Sheet***

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*MEIORIN* (1999 workplace gender discrimination case) and  
*GRISMER* (1999 services disability discrimination case)

The following summarizes the impact of these Supreme Court of Canada (SCC) decisions on the duty to accommodate.

Prior to *Meiorin* and *Grismer*, the duty to accommodate a worker only arose when a problem had been identified. For example, in the situation of a worker who is no longer able to perform the job in the traditional manner, the worker had an obligation to advise the Employer of the need to be accommodated and the Employer had an obligation to ensure that difficulties arising out of discrimination based on a prohibited ground were accommodated.

**The most significant change to the duty to accommodate (DTA) concept, flowing from these two decisions is that:**

- *Meiorin* and *Grismer* have placed a positive obligation on the Employer to design the workplace so that equality and accommodation are built into all policies rules and practices. “Accommodation” now means, first, that all workplace standards, rules, policies and practices must be proactively designed to be “inclusive”, i.e., designed to reflect and meet the needs of all segments of society, so far as is reasonably possible, short of undue hardship. The key requirement is for Employers to ensure they do not institute barriers against those segments of society that are not present in the workplace, due to historic systemic discrimination. The new concept creates considerable overlap with the purpose of the *Employment Equity Act (EEA)*.



**NOTE:**

In addition, individuals whose needs have not been addressed by the initial pro-active process are entitled to seek further individual accommodation measures, up to the point of undue hardship. As an example, if a selection test is deemed to be barrier free and inclusive, but an applicant requires an individual assessment to have her/his accommodation needs met, this individualized assessment must be afforded, up to the point of undue hardship.

**Other important principles established by *Meiorin* and *Grismer* include:**

- a) The Duty to Accommodate (DTA) applies to both direct and indirect (adverse effect) discrimination.
- b) Bona Fide Occupational Requirements (BFOR) and duty to accommodate concepts are united. A BFOR cannot be valid without exhaustion of the duty to accommodate built into the standard, policy, rule etc.
- c) If a standard, policy, practice, etc., is found to be discriminatory, it must be struck down and replaced.
- d) The undue hardship standard is set high. You have to look at the applicable human rights legislation to determine the undue hardship factors. Under section 15(2) the *Canadian Human Rights Act*, the factors that may be considered as contributing to undue hardship are limited to **health, safety and cost**. Undue hardship does not mean merely inconvenience. Two major issues have been identified as important in defining undue hardship, namely:
  - If the **financial costs** associated with the accommodation would be prohibitive to the point that it would alter the essential nature or substantially affect the viability of the enterprise. Note, however, that outside sources of funding will be considered in this determination.
  - If **health and safety** considerations are not met, in particular, where the degree of risk which remains after accommodation has been made is so significant, that it outweighs the benefits of the accommodation. Public safety and the health and safety of co-workers are considerations in this regard.



**A note of caution:**

Where legislation limits the number of undue hardship factors, we should be careful to limit the Employer to those factors only. In the absence of such limiting legislation, *Meiorin* accepts the open-ended shopping list of undue hardship factors commonly accepted in the case law following the 1990 Supreme Court of Canada case of *Central Alberta Dairy* which included factors such as: the impact on the collective agreement; interference with the rights of other Employees; problems of Employee morale; size of the Employer's operation; flexibility in the workforce and in facilities.

However, we must be very cautious about Employer accommodation measures which seek to immediately call into question collective workplace rights.

**In assessing whether or not Employers are complying with accommodation/BFOR obligations, in the situation of a human rights complaint or grievance, the following must be proven by the contending parties:**

- The complainant/griever must establish that the workplace standard, policy, procedure, rules, practice, etc. being challenged is *prima facie* discrimination (i.e. the policy has a discriminatory impact on people with disability).
- Once a *prima facie* case of discrimination is established, the Employer/respondent is required to prove that, despite the discrimination, the challenged standard, policy, procedure, rules, practice etc. is a *Bona Fide Occupational Requirement* (BFOR) and is, therefore, valid (i.e. that the standard, etc. is a necessary requirement in order to meet its objective or for the position).

To establish a BFOR, the Employer **must meet a three-step legal test:**

- I. There is a rational connection of the standard, rule, policy etc. to the performance of job;
- II. The Employer has adopted the standard, rule, policy etc. in good faith;
- III. The standard must be “reasonably necessary” for the accomplishment of that legitimate work-related purpose. To demonstrate that it is “reasonably necessary”, the Employer must show that it is “impossible to accommodate [members of human rights-protected groups] without imposing undue hardship on the Employer”.



**Note:**

**This last step is the core of accommodation.** It is here that the concept of inclusion comes into play. Employers have to prove that their standards, rules, policies, practices, etc. are reasonably necessary for the safe and efficient performance of the job at issue. This includes proving that it is impossible, without undue hardship, to accommodate the human rights characteristics of a group or of an individual. In the specific case of *Meiorin*, the Employer failed to establish that their 11-minute testing standard was reasonably necessary for the safe and efficient performance of the job, given that *Meiorin* had successfully performed the job for a three-year period, yet had failed the standard which had been set based on all mostly male testing sample.

In examining Step iii), the Court, in *Meiorin*, set out the following six questions:

- 1) Have alternative approaches been investigated?
- 2) If they have and they accomplish the Employer's purpose, why have the alternative approaches not been adopted?
- 3) Is it necessary for all Employees to meet single standard?
- 4) Is there a less discriminatory way to do the job while still meeting the Employer's legitimate purpose?
- 5) Is the standard designed to meet its purpose without placing an undue burden on persons to whom it applies?
- 6) Have the other required accommodation parties fulfilled their roles?

**Legal Factors**

Provincial and territorial human rights acts vary in their accommodation provisions. However, the *Meiorin* decision creates a "unified approach" to accommodation issues which, along with the Employer's duty to be proactive and systemic in eliminating discrimination, applies to all human rights legislation in Canada.

The Supreme Court of Canada has held that all human rights legislation is quasi-constitutional (i.e., nearly constitutional) in that it expresses fundamental Canadian values and important public policies. Thus, if there is a conflict between other legislation and human rights legislation, the latter is paramount (i.e. "trumps" the ordinary legislation) unless specifically excluded by legislators.

In light of this, acts, such as workers' compensation acts or the labour acts, which purport to accommodate employees with disabilities, may not go far enough to fulfill the accommodation requirements of human rights legislation. The last word is always the human rights legislation.

**In order to comply with their accommodation obligations under the *Employment Equity Act*, Employers subject to this *Act* are to:**

- Ensure their employment equity plan includes provisions for the accommodation of the needs of applicants and Employees from the four designated groups (women, Indigenous people, racialized people and people with disabilities) and any other equity-deserving group.

## DTA – Workplace Committee Responsibilities

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Examples of some workplace committee responsibilities include:

### Health and Safety Committee

- joint employee-employer committees
- conduct workplace inspections (i.e. to determine if there are health and safety hazards in the workplace)
- investigates workplace accidents (i.e. identify root cause of injury and then make recommendations on preventative and corrective measures including making recommendations on modifying tasks, job processes or the way tasks are done, providing training, etc.)
- ensure Job Hazard Analysis are carried out by the employer
- union committee members provide support and guidance to injured workers and/or workers with disabilities (i.e. on workers' compensation and disability insurance) and/or refer members to the appropriate union representatives for assistance
- monitors workplace for health and safety hazards
- in some cases, sub-committees of the Health and safety committees are created, such as Wellness Committees. These sub-committees look at how to improve workplace performance.

### Employment Equity Committee

- joint employee-employer representatives
- ensures there is an employment-systems review that identifies barriers to full participation in the workplace of persons who belong to the 4 designated equity groups
- contributes to the development of, and monitors, employment equity plan(s) with a view to integrity and compliance in implementation
- keeps members / employees informed and educated on matters related to employment equity
- examines barriers for the designated groups and ways to remove those barriers

### **Union – Management Committee**

- deals with outstanding labour/management issues, including accommodation
- union committee members can use this venue for advocacy and problem-solving DTA issues

### **Human Rights Committee(s)**

- keep employees/members informed and educated on issues related to DTA, human rights and employment equity (etc.)
- can advocate on behalf of members
- can raise unresolved issues with the Employer
- can refer DTA issues to the applicable parties (union and/or Employer designates)

Some of these committees obtain their authority from different legislations and therefore have different mandates, resources, timelines, and outcomes.

## DTA – Recourse Routes

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### Grievance

- Per Collective Agreement

### Human Rights Complaints

- Per applicable provincial/ territorial jurisdiction
- Notify the Human Rights Commission at the same time as you file the grievance (must exhaust the grievance process first)
- Canadian Human Rights Commission

### Internal Employer Policies

- Per applicable policy including but not limited to: H&S, Accommodation, Disability, and Employment Equity.
- Use only if process meets the requirements of due process but file a grievance at the same time

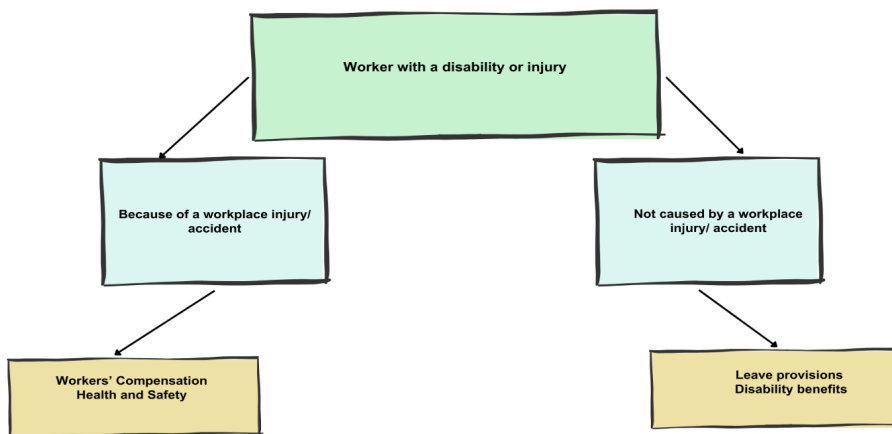
**In all three instances, you must adhere to time limits.**

## Workplace Accommodation – Group Activity Task Sheet

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### Instructions for Activity

In this exercise, we will work in groups to understand the process of accommodation.



Group 1 will look at what to do in the event of a disability/injury that is caused by workplace injury/accident.

Review the following handouts:

- *Workers' Compensation and Accommodation*
- *Workers' Compensation Board (WCB) Claim*
- *A – WCB Claim Accepted*
- *B – WCB Claim Not Accepted*

Group 2 will look at what to do in the event of a disability/injury that is not caused by workplace injury/ accident.

Review the following handouts:

- *Disability Insurance (DI) and Accommodation*
- *D.I. Elimination Period*
- *A – Disability Insurance Path for approved claims*
- *B – Disability Insurance Path for approved claims*

Group 3 will look at what we need to work on with the employer.

Review the following handouts:

- *Health and Safety Accommodation*
- *Hierarchy of Accommodation*
- *Sample reintegration and accommodation plan*

Group 4 will look at return to work.

Review the following documents:

- *What You Should Know About Return-to-Work Programs*
- *Medical Support for Accommodation*
- *Sample Release of Information Form*
- *Sample Medical Questionnaire/ Functional Analysis*

### **Worksheet for Activity**

As a group, explain how you would work through your assigned situation with a member seeking accommodation.

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Identify the specific steps and how you will apply a trauma-informed, human centric approach to working with the member.

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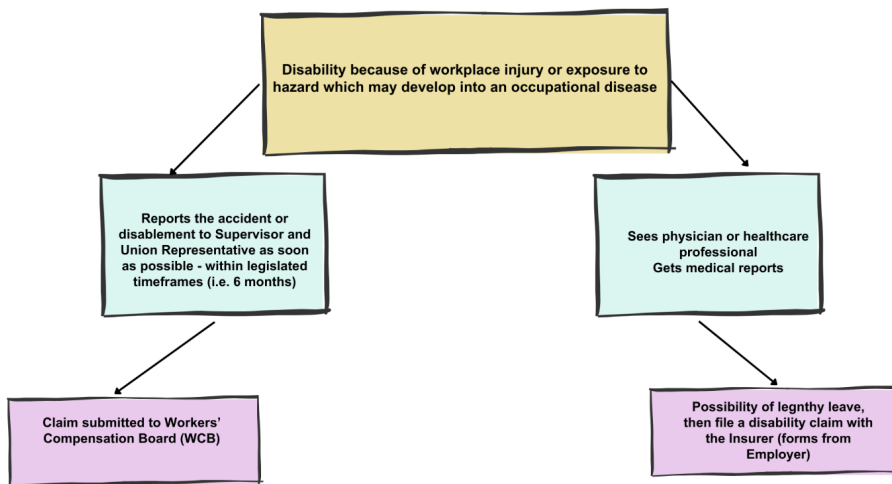
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## Workers' Compensation and Accommodation

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The **Supervisor** who receives the accident report must ensure that an employer report is submitted to the applicable provincial/territorial WCB.

The **Physician or Healthcare Professional** will fill out a report and send it to the WCB.

The **Union representative** will advocate for the member and help them navigate forms and the process.

## **Workers' Compensation Benefits for Injured Workers**

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### Provincial or territorial Workers' Compensation Board

- Each province and territory in Canada has its own exclusive Workers' Compensation Board/Commission (WCB). Northwest Territories and Nunavut have a combined Workers' Compensation Board. WCBs administer the workers' compensation legislation of the province/territory that they are in.
- All Canadian workers' compensation schemes have specific modified work as well as Return-to-Work provisions. Workers must carefully review the applicable provisions in their province or territory.

### Federal Government Workers

- The federal government also provides benefits to its Employees under the Government Employees Compensation Act (GECA). Instead of establishing its own system for compensation and treatment, the government uses the services already available through provincial/territorial workers' compensation boards. There is no cost to the Employee for these services; the government of Canada reimburses the provincial boards for the cost of compensation to federal Employees.
- While these programs are largely administered by provincial and territorial governments in Canada, Human Resources and Skills Development Canada (HRSDC) Labour Program is responsible for claims that involve federal government Employees—both inside and outside of the country—who are injured on the job or become sick from an occupational disease.
- Eligibility for compensation can only be determined by the workers' compensation authorities. Departmental officials do not have any adjudication authority and must report all workplace injuries and industrial diseases to the HRSDC-Labour Programs.
- Many PSAC collective agreements have a clause allowing for injury on duty leave (IOD). If a WCB claim is approved, sick leave would be changed to IOD leave.

## Rehabilitation Assistance

Provincial and territorial workers' compensation boards pay for rehabilitation assistance; aid to an injured worker until he or she returns to work. Such assistance can include medical aid, loss of income, job retraining, job placement and assistance with reintegration into society. Generally, there are no limitations on the amount spent on rehabilitation assistance. This assistance is left up to the individual Board and several of them have built their own hospitals and rehabilitation centres.



## Return-to-Work

- Most provincial/territorial workers' compensation legislation includes provisions on modified work and the worker's re-employment rights. In general, the provincial/territorial legislation encourages modified work initiatives in the workplace. Worker cooperation is expected and benefits can be terminated if the Board feels the worker is not providing the necessary medical information. Since this legislation varies from one province to another, you should check with your respective provincial/territorial Workers' Compensation Board for more details.
- The Employer's re-employment obligation is also included in your provincial/territorial workers' compensation legislation. These provisions will protect the worker's job for a fixed period. As a general rule and under specific conditions (size of business, period of employment before injury, etc.) the worker has the right to return to his/her job for a period of two years after he/she was injured. Again, you should check with your respective provincial/territorial Workers' Compensation Board for the legal requirements in your province.

## **Additional Requirements for Federal Government Workers**

At the federal level, additional recourses are found in the Public Service Employment Regulations, pursuant to section 22 of the Public Service Employment Act. According to section 7 of the Regulations, workers who become disabled and, as a result of the disability, are no longer able to carry out the duties of their position are entitled, if they are able to return to work within five years from the date of the injury, to be appointed without competition in priority to all persons, other than those referred to in section 39.1, 40 and subsections 41(1) and 41(4) of the Act, to a position in the Public Service for which they are qualified. In the application of the priority, there is no distinction made or preference given based on the nature of the disability, or whether it is a work-related injury or not.

*Cautionary note – the employer may try to use the priority provisions as a means of removing a worker with a disability from the workplace rather than attempting to accommodate the worker. Thus, it is important to assess when it is appropriate to use the priority provisions and when it is not.*

Additional coverage is found in the Canada Labour Code, Part III, Division XIII.1, section 239.1. It provides wage protection and return-to-work provisions for workers injured on the job. Employers are required to: provide replacement wages equal to the rate of workers' compensation in the province or territory where the worker resides; continue benefits and seniority during the period of workplace-caused disability; return workers injured on the job to work whenever reasonably practicable.

The Canada Labour Code Part II outlines the employer's overall responsibility to provide a safe and healthy workplace. It lays out both employer and employee responsibilities and that of health and safety committees. It also establishes the procedures for when an employee is injured at work, including the applicable forms and resulting investigations. Both Parts (II and III) concern a lot of federal industries, including banks, telecommunications, federal Crown corporations (e.g. Canada Post).<sup>6</sup>

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<sup>6</sup> <https://www.canada.ca/en/services/jobs/workplace/federally-regulated-industries/canada-labour-code-parts-overview.html>

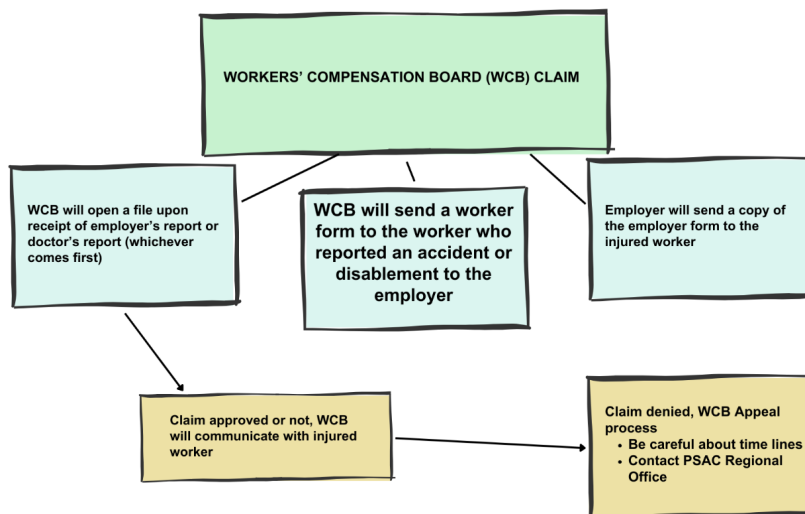


**If you need to know more about workers' compensation, where can you go for help?**

- Union representative on your Health and Safety Committee
- Union Shop Steward
- Union Local Executive
- Your nearest PSAC Regional Office
- Your Component Service Officer
- Publicly funded injured workers clinic (if there is one in your province or territory)
- Injured Workers Network (if there is one in your province or territory)
- Canadian Centre for Occupational Health and Safety
- Workers' Health and Safety Centre

## Workers' Compensation Board (WCB) Claim

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Upon receipt of the Employer's forms or the doctor's report (whichever comes first), the Workers' Compensation Board (WCB), will send a form to the injured worker to fill out – *A Worker's Report of Accident*.

- The Employer will provide the injured worker with a copy of the Employer Form.
- The injured worker should send a letter to the WCB and identify his/her union representative.
- The WCB will inform the injured worker whether or not the claim is approved.
- If the claim is denied, the file should be referred to the PSAC Regional Office for appeal.
- Pay close attention to the appeal timeline – it ranges from 30 days to 6 months depending on the province or territory.

## A – WCB Claim Accepted

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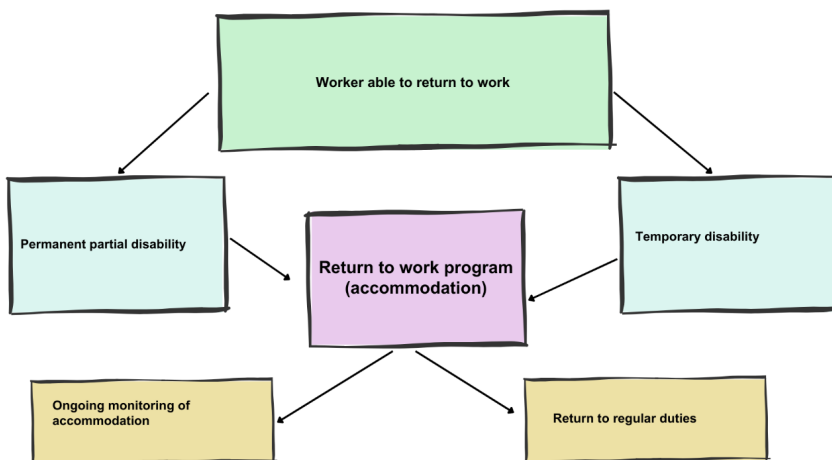
When a worker's compensation claim is accepted, it is always important to check the collective agreement and the pertinent provincial or territorial WCB legislation to be sure of the specific provisions for the injured worker filing for WCB.

### If a worker is able to return to work

If the worker is able to return to work and has a permanent partial disability, the WCB will review pertinent medical information and work with the employer and the employee to implement an accommodation plan for the injured worker.

The union representative should act as an advocate for the worker, making sure the worker obtains all that s/he is entitled to or advising re: appeals etc. They can sit in and/or be informed of the process and the outcome.

If the worker is able to return to work and has a temporary disability, the WCB will review the pertinent medical information and work with the employer and employee on a return-to-work program (which might involve things like gradual return to work and temporary accommodations). Once again, the Union representative should keep informed and act as an advocate for the injured worker.



### If the worker cannot return to work in the short-term

For those who have access to Injury on Duty Leave, it usually runs out after 130 days. For Treasury Board employees, there is not usually a cut-off until a status review has been performed. In such cases, there is a slight chance that the worker will not be cut off.

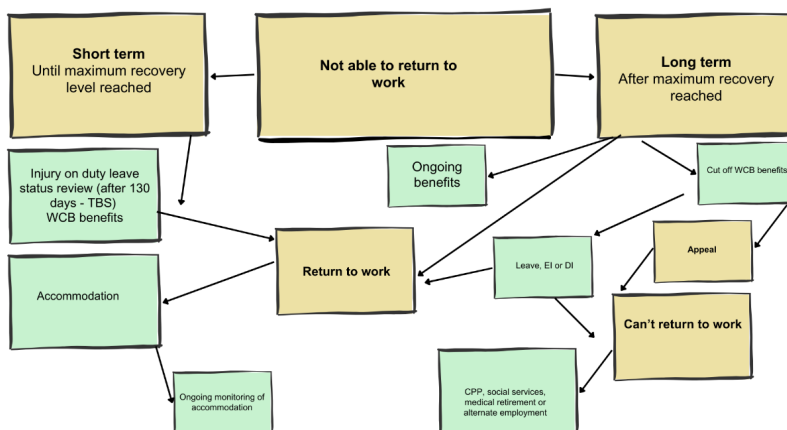
When the member returns to work, the parties will develop a return-to-work plan, including any accommodation needed. The plan/accommodation should be monitored as long as required.

If a member is off for the long term and they are cut off of benefits, they will file an appeal (contact the PSAC Regional Office for assistance).

Where workers are cut off from benefits, they can access their leave, DI, or Employment insurance to sustain their income.

If these benefits are exhausted and they still can't return to work, they will have to resort to CPP, Medical retirement, Social Services or alternate employment. If they can return to work at some point after a long absence, then return to work measures will be put in place by the parties.

The employer may grant administrative leave with pay in some circumstances. See collective agreement for details on leave with pay provisions.



## **B – WCB Claim Not Accepted**

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**If a WCB claim is denied, the file should be referred to the PSAC Regional Office for appeal.**

There are **strict time limits** to file an appeal starting the date of the decision letter or the date when the decision was given in person or over the phone. There are also strict deadlines within the appeal process.

The first step in the appeal process is to request a review of the decision at the WCB Review Division within **a specific time-period starting the date of the decision letter (or the date the decision was given in person or over the telephone as the case may be).**

The Review Division will review the decision and issue a new decision confirming, varying or cancelling the WCB decision.

If you disagree with the Review Division decision, it can be appealed to the Workers Compensation Appeal Tribunal (WCAT) which is the second and last step of the appeal process.

There is a **specific time limit to appeal a Review Division decision to the WCAT beginning the date of the Review Division decision.**

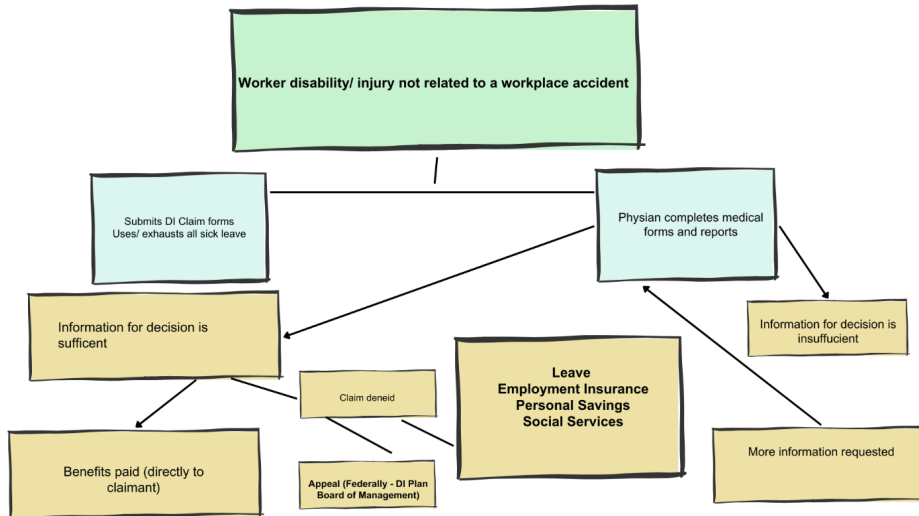
Except in very rare circumstances, a **WCAT decision is final.**

**Verify and note down timelines and process for your jurisdiction.**

**Appeals are often very complex and usually require a thorough knowledge of workers' compensation law and policy as well as the complexities and time limits of the appeal process.**

**We strongly recommend that if the Member receives any WCB decision that they disagree with, that you contact the PSAC Regional Office for support the appeal process.**

## Disability Insurance and Accommodation



A worker filing for Disability Insurance can obtain forms from the employer to submit to the insurance company. At the same time, the worker's physician should complete the applicable medical forms and reports to support the worker's claim.

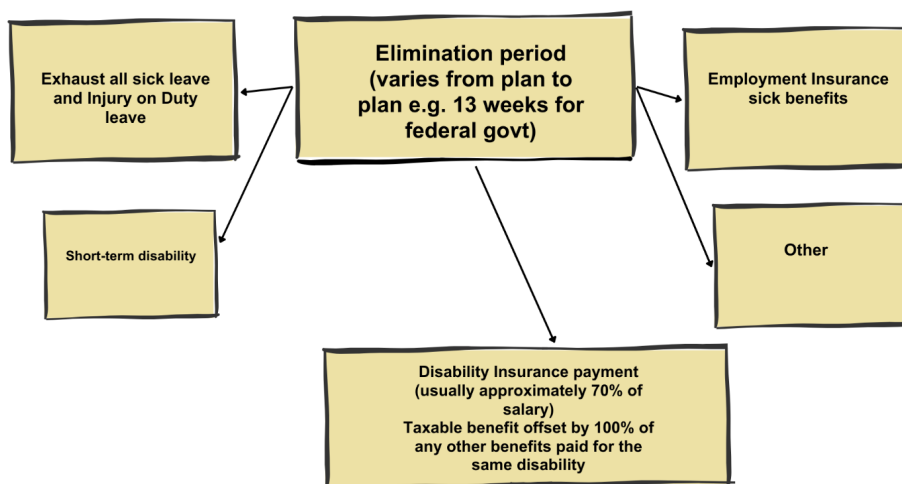
The insurance company or employer may ask for additional information to support the claim. Once the Insurer feels they have enough information, the claim will be approved or denied.

If approved, benefits will be paid directly to the worker. If denied, the worker can appeal, but in the meantime, will be subject to leave, employment insurance, personal savings and/or social services for financial benefits.

DI appeals should be brought to the attention of the PSAC Regional Office.

**NOTE** - An independent appeal process is unique to the Federal Disability Insurance Plan under Sunlife (in other jurisdictions the Insurer is involved as a decision-maker in the appeal process.)

## Disability Insurance – Elimination Period

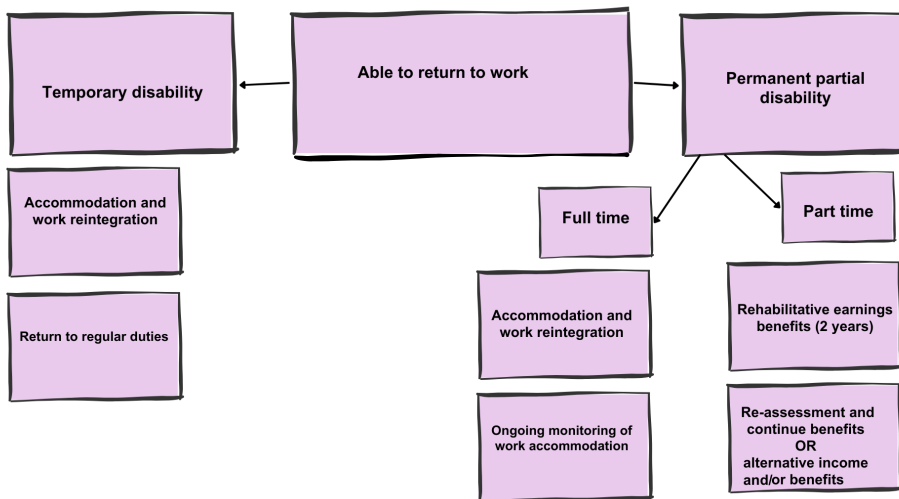


When eligible for Disability Insurance, there is usually an elimination period wherein payment of benefits are deferred to a later period. The elimination period varies from plan to plan; 13 weeks for the federal government (or until all sick leave is exhausted).

Some plans incorporate short-term disability benefits to cover this period as well. If you do not have sick leave or a short-term disability plan, you may be eligible for employment insurance sick benefits or social services. If it takes longer than the elimination period to process your claim and you receive retroactive benefits, the worker will have to pay back interim Employment Insurance sick benefits (if applicable).

DI benefits are paid out as a percentage of your salary (usually approximately 70%). They are a taxable benefit offset by 100% of any other benefits paid for the same disability. It is important that taxes are not automatically deducted at source. A request must be made in order to have taxes deducted. Otherwise, the member will be paying taxes when taxes are due.

## A - Disability Insurance Path for Approved Claims

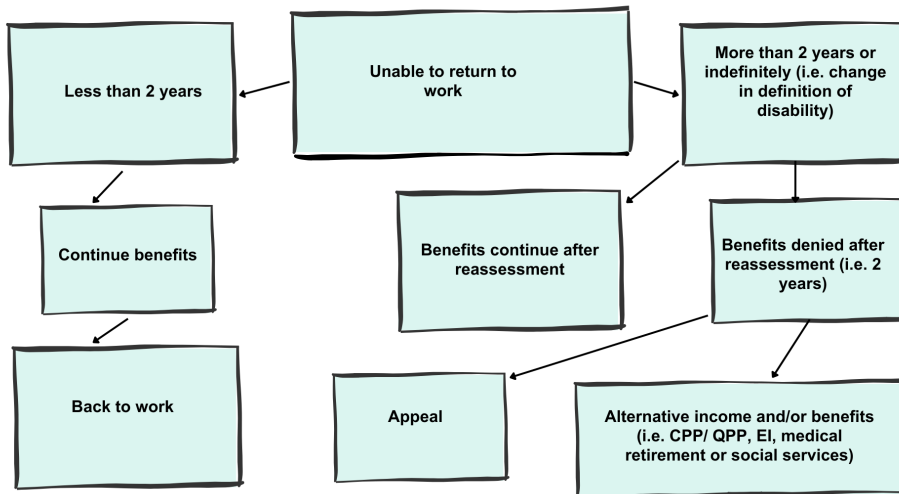


**If the worker is able to return to work and has a temporary disability,** the parties will review pertinent medical information and develop a plan for work reintegration and accommodation until the worker can return to regular duties.

**If the worker has a permanent partial disability and returns to full-time work,** the parties will review pertinent medical information and develop an accommodation and reintegration plan. The accommodation plan will be monitored on an ongoing basis.

**If the worker can only return to part-time duties,** s/he is eligible for rehabilitative earnings benefits (top-up), for up to 2 years. After 2 years, the case will be reassessed. The union representative will act as an advocate throughout these processes. Assistance can be requested through the PSAC Regional Office.

## B - Disability Insurance Path for Approved Claims

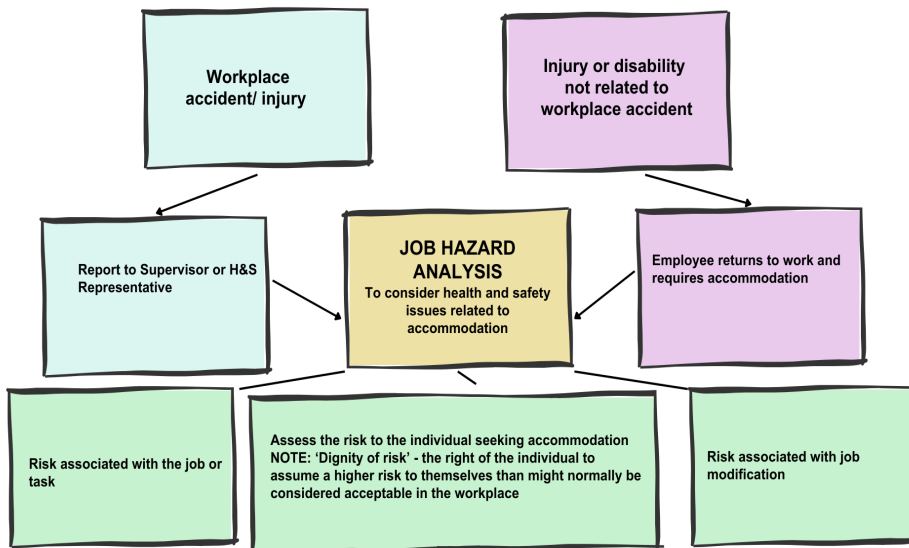


**If the worker is able to return to work and has a temporary disability,** the parties will review pertinent medical information and develop a plan for work reintegration and accommodation until the worker can return to regular duties.

**If the worker has a permanent partial disability and returns to full-time work,** the parties will review pertinent medical information and develop an accommodation and reintegration plan. The accommodation plan will be monitored on an ongoing basis.

**If the worker can only return to part-time duties,** they are eligible for rehabilitative earnings benefits (top-up), for up to 2 years. After 2 years, the case will be reassessed. The union representative will act as an advocate throughout these processes. Assistance can be requested through the PSAC Regional Office.

## Health and Safety & Accommodation



In cases where accommodation measures in the workplace are being considered, the employer should consider health and safety issues as well. Risk assessments are an important tool in the return to work and/or accommodation program.

Many assessment tools rely on a Job Hazard Analysis (JHA) – an examination of the work, broken into logical steps, to identify, then eliminate or reduce risks to the health and safety of workers.

The JHA is important in considering health and safety issues; usually grouped in three different categories:

- 1) Risk associated to the job or task
- 2) Risk to the individual seeking accommodation
- 3) Risk associated with job modification

The JHA should be monitored by a union H&S representative to ensure all things are taken into account for accommodating the worker.

Not all workplaces have functioning H&S committees. Where they do, the committee has a role to play. Where they don't, a H&S representative at the regional and/or Component level should be informed and consulted.

## Hierarchy of Accommodation

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Same job - Same workplace
Modified job - Same workplace
Different job - Same workplace
Similar job - Different workplace
Different job - Different workplace

The hierarchy of accommodation is important for maintaining the financial status of the worker and their job fulfillment.

We cannot depend on the employer to adhere to the hierarchy of accommodation – the union representative will need to monitor and advocate on behalf of the worker. This is easier to implement with large employers – where members can be transferred to alternate employment in the same classification categories.

Where a member's pay level is affected, the Union representative should ask for salary protection, where the member continues to move up the pay increments.

For smaller workplaces, it can be more challenging to accommodate. Solutions can be creative and temporary.

Movement from full-time to part-time employment will have far reaching effects, impacting things like pensions, eligibility for DI and so forth. There are some creative ways for members to stay full-time; including DI top-up and leave without pay provisions.

## Sample Reintegration and Accommodation Form

### SAMPLE: Return to Work Plan 1

The *Workplace Safety and Insurance Act* requires that the workplace parties (workers and employers) co-operate with each other and the WSIB in the process of returning an injured or ill worker to work. The focus of the workplace parties' work reintegration activities is to return the worker to the pre-injury job, with accommodations if required.

Worker Name:	Claim #:	
Pre-injury Job (attach job description):	Injury Date:	
Pre-injury Workplace Location:		
<b>Return to Work Goal</b>		
Plan Start Date:	Plan End Date:	
Return to Work Plan Goal (select one):		
<input type="checkbox"/> Pre-injury job <input type="checkbox"/> Pre-injury job, accommodated <input type="checkbox"/> Alternate work. If alternate work, provide job title or description of work.		
<b>Health Recovery</b>		
Accepted area(s) of injury:		
Is there an active treatment plan that impacts return to work?		
<input type="checkbox"/> No <input type="checkbox"/> Yes, provide details		
Treating Health Professional(s):	Phone No.:	
<b>Functional Abilities</b>		
List functional abilities (what the worker can do):		
List precautions, if any.		
Source of Functional Abilities:	Date Received:	
<input type="checkbox"/> Page 3 of Form 8 <input type="checkbox"/> Functional Abilities Form (FAF) <input type="checkbox"/> Other (Specify):	If not received, when will functional abilities information be made available?	
<b>Pre-injury Job Duties</b>		
	Yes	No
Are the physical demands of the job within the worker's functional abilities?		
Are the essential duties of the job within the worker's functional abilities?		
List job duties the worker can perform:		

List job duties the worker is unable to perform:									
<b>Accommodations/Solutions</b>									
								Yes	No
Are accommodations/modifications to the job duties required?									
Are accommodations/modifications to the workplace/workstation required?									
Is training required?									
Provide details on the type of accommodation/solution required. Attach additional pages, if needed.							Date to be Implemented	Expected Duration	
<b>Work Schedule</b>									
Work Period (from/to)		Days scheduled each week and number of hours per day						Additional Comments on Work Schedule	
Sept 7/11	Sept 13/11	Sun	Mon	Tues	Wed	Thurs	Fri	Sat	
		0 hours	4	4	5	5	6	0	Example
How will the worker be paid for the duration of the Return to Work Plan?									
Rate of pay (e.g., hourly):									
Worker will be paid for hours worked only Or, <input type="checkbox"/>									
Employer will pay full regular wages <input type="checkbox"/>									
<b>Follow-up Schedule</b>									
Outline follow-up dates to monitor plan progress:									

7

- ✓ Union Representatives should be wary of plans that needlessly incorporate provisions already covered in the collective agreement, unless there is good reason to do so.
- ✓ Try to avoid a lot of legal jargon. Put the details of the return-to-work plan in clear language (including a schedule for graduated return to work, if applicable), and additional accommodation specifics as may be required. Include the employer's role in implementing, maintaining and monitoring the accommodation plan.

<sup>7</sup> <https://www.wsib.ca/sites/default/files/documents/2019-01/samplertwpackage.pdf>

- ✓ Try to be flexible enough in the plan to accommodate changes, if necessary.
- ✓ The union and the collective agreement cannot be a barrier to accommodation. As such, the union cannot refuse to alter provisions of the collective agreement for accommodation purposes (i.e. seniority provisions for shift/position selection; changes in hours of work), unless it can find a reasonable alternative that will provide the accommodation needed.
- ✓ Be sure to protect the confidential nature of the reintegration/accommodation plan; recognizing that in some cases, it may benefit the worker to share some information with colleagues in order to pave the way.
- ✓ You can check with your Component or Regional Office representative to assist in the draft of an accommodation plan; but be sure to obtain permission from the member first.

## **What You Should Know About Return-to-Work Programs**

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### **WHAT IS A RETURN-TO-WORK PROGRAM?**

#### **Accommodation / Return to Work (RTW) Plan due to a disability not resulting from a workplace injury or illness**

A worker who may be out of the workplace due to their disability will require an accommodation / return to work plan.

How the worker will be reintegrated back into the workplace will depend on medical assessments, workers' functional limitations and restrictions, residual abilities and the accommodation required for the disability.

#### **Return to Work (RTW) Program as A Result Workplace Injury or Illness**

Return to Work (RTW) Programs are **meant to facilitate a worker's return** to safe and productive work in a timely manner following an injury or illness in the workplace.

#### **RTW programs involve:**

- 1) accommodating an injured worker's functional limitations and restrictions; and
- 2) co-ordinating services for the injured worker.

### **Elements that characterize Return to Work programs**

#### **Communication**

The RTW planning process involves communication amongst the worker, service providers, the union, and the Employer, as well as developing, implementing and monitoring a RTW plan and follow up after the worker returns to work.

#### **Progress**

Return-to-work programs may involve transitional duties or a gradual return-to-work progression that are guided by timelines, the worker's capabilities, and medical restrictions.

RTW Programs should be seen as **transitional** and, where possible, for a fixed duration with an established start and end date. Flexibility should be incorporated, allowing for and extension or adaptation of the RTW plan, depending on the doctor's ongoing medical assessment.

### **Temporality**

Return-to-work tasks are often temporary; meaningful and productive; designed to help return an injured worker to regular full-time duties (where possible), or to part-time duties (where practicable), in a safe and productive manner; allow graduated hours of transitional or regular duties and can combine offsite treatment with transitional or regular duties.

### **Rehabilitation**

The return to work should have a rehabilitative focus and have key objectives to assist the worker to perform duties that are as close as possible to his or her pre-injury job. In other words, the aim is to have an injured worker return to their pre-injury job with or without modifications and with or without gradual hardening program. Alternative work should only be provided where none of the other accommodation options involving the pre-injury job is available.

### **Hierarchy of return-to-work options**

If employed in the same position the member was in before taking leave is not an option (due to undue hardship) then a hierarchy of return-to-work options should be respected: same job; modified job; different job in same workplace; similar job in a different workplace; different job in a different workplace.

Most organizations that have benefit plans also have some form of disability insurance with a focus on rehabilitation.

A permanent measure to support a worker who has a permanent disability as result of the injury is best framed as accommodation measures, as opposed to return to work measures.

## WHY IS A RETURN-TO-WORK PROGRAM NECESSARY?

For unions, the goal of such programs rests on maintaining an employment relationship between the injured worker and their employer.

Some Workers' Compensation legislation contains specific mention of Return-to-Work obligations (E.g. NB, NS, Ontario, PEI and Québec) and the requirement for the Employer to protect the worker's job for a specific time period (as noted in the respective legislation). In the Federal Public Service, specific Departmental responsibility around return to work exists, with the support of Health Canada's Occupational Health Services.

Unions have bargained return to work and injury on duty provisions in collective agreements which may go further than the legislation.

Human Rights legislation ensures that workers with disabilities are not discriminated against in the workplace, regardless of whether the disability is a result of a workplace injury or not. Duty to accommodate provisions in human rights legislation enshrine these rights for returning workers.

## WHO IS COVERED?

The RTW Program should include workers with **permanent disabilities as well as temporary disabilities**. In many cases, disability insurance applies to workers who have completed six months of employment. The qualifying period may vary based on the disability insurance carrier and the Employer. Qualifying conditions exist for workers' compensation cases.

## WHEN DOES A RETURN-TO-WORK SITUATION ARISE?

Typically, return to work situation arise from:

- the return of a worker who has been receiving workers' compensation
- the return of a worker who has been on disability insurance
- the return of someone who has been injured or who has become disabled, but who has not qualified for income replacement programs (workers compensation or disability insurance)
- long term leave situations

## HOW DOES IT WORK?

If an employee is ready to come back to work, they should go to their medical practitioner and provide them with a copy of their job description (if one hasn't already been provided), so that the medical practitioner can assess whether or not the member is ready to return to work, and if so, whether or not they have any functional limitations or require accommodation.

Return to Work Programs should **lay out the steps** that need to be taken to support the returning worker.

Return to work discussions should ensure that any work-related **causes for the absence** are identified and eliminated. Return to Work Programs should not create a revolving door response to unsafe working conditions.

**Individual assessments** are key to RTW Programs. These programs should not be seen as one size fits all measure but should respond to the needs of the individual's return to work situation. In addition, work related and non-work-related disabilities should be treated in a similar manner.

**Job hazard analysis** ensures that the job duties and tasks are assessed (using job related criteria) and compared with the functional limitations of the returning worker. Typically, job hazard analysis will assess physical requirements of job duties (tools used, postures required, endurance...) and will involve observing workers performing job duties. In cases of mental health disabilities, factors such as communication, exposure to conflict, the nature of their contacts with others would also need to be assessed – if noted by the medical practitioner. The returning worker should be an active participant in the job analysis and evaluation.

**Timeframes** spelled out in the RTW Plan should not be arbitrary but should respect the needs of the returning worker. Having timeframes associated to key activities ensures accountability for their implementation. However, timeframes may require adaptation where they interfere with a successful return to work. The parties will need to be flexible where medical information supports adjustments to the RTW plan. There should be on-going follow up to ensure that the return-to-work plan is successful.

Once a worker attains their maximum medical recovery level, accommodation carried out through the return-to-work program should become permanent.

Accommodation is the primary responsibility of the Employer, who is in the best position to initiate and implement accommodation measures. Return to work programs do not automatically involve unions. Therefore, it is important for the member to include the union in the process as early on as possible. The union representative can play an important role working with the parties to ensure the RTW program is one that best meets the member's needs.

There is also a key role for Employers and unions in building co-worker support for the returning worker. The support by co-workers is critical to a successful return to work situation, particularly when the situations involve job tasks modifications or job re-bundling. The union should participate in a return-to-work plan for their members. Amongst other accommodation requirements outlined by the medical practitioner, they should also work with the member and the employer to ensure applicable emotional/mental supports are in place, and that appropriate job training is available to the member upon their return to work, where warranted.

## **WHOA!**

**Medical assessments** should be completed by the medical practitioner who is best placed to understand the medical condition of the returning worker - her/his treating physician. Physicians may be able to provide a diagnosis and treatment - but not be able to provide a functional analysis. Additional expertise may be required.

There is an **increased focus on medical assessments** in cases of the return to work of workers with disabilities and it is important to understand the difference between a medical prognosis (the expected duration, the function, and a description of the course of the disease) and a functional limitation (the inability to perform an action or a set of actions, either physical or mental, because of a physical or emotional restriction). This is an issue that we encounter often in the Federal Public Service, when contradictory second assessments are carried out by Health Canada.

Wherever possible, RTW Programs should comply with **collective agreement rights and/or obligations**. All other options should be explored first. However, collective agreements cannot stand in the way of the duty to accommodate when the only means of accommodating would result in the suspension of collective agreement rights or obligations. The union representative should keep in mind:

- layoff and recall provisions for the injured worker should be the same as if they were not injured
- wages of the injured Employee should be the same as if they had not been injured

**Confidentiality rights** of returning workers should be protected. Information sought should directly relate to the Return-to-Work Program and only be used for this purpose. Workers' Compensation or other income replacement programs may require signing off on a release of information. The returning worker is not required to disclose a medical diagnosis to their employer. However, information about functional limitations needs to be clear.

Return to Work Programs are likely to **touch on issues** that the Union is trying to pursue elsewhere. Union representatives should be drawing a link with work or discussions at other important tables such as Joint Health and Safety Committees; Employment Equity Committees; Duty to Accommodate Committees.

**Early assistance** can make a difference in the successful re-integration of a returning worker. Workers are less likely to return after a long absence. At the same time, too early a return may jeopardize the rehabilitation of the returning worker or worsen the medical condition.

**Recourse** rights in return-to-work situations can be exercised via:

- Disability Insurance Appeals (not before neutral third party)
- Workers Compensation Appeals Tribunals
- Grievances (when human rights and/or health and safety violations are involved)
- Human Rights complaint
- Health and safety complaint (workplace violence)

## Medical Support for Accommodation

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Re: Lancaster House Audio Conference (Materials).  
ACCOMMODATING "INVISIBLE" DISABILITIES: ENVIRONMENTAL ALLERGIES, CHRONIC FATIGUE SYNDROME, COGNITIVE IMPAIRMENT, MENTAL STRESS - Thursday, November 12, 2009 12:30 p.m. – 2:00 p.m. EST



It has been held by arbitrators<sup>8</sup> that an employee bears the onus of coming forward and identifying the nature of their disability and any resulting medical restrictions, so as to facilitate a proper assessment of what accommodation is required. On the other hand, a lack of clarity in the medical reports provided by an employee will not excuse a failure to accommodate, since the onus, ultimately, is on the Employer to ensure that it has all the information necessary to determine what kinds of duties may be suitable.

The worker only has to disclose medical information which is relevant to the disability being accommodated and does not have to provide access to his/her entire medical file. Diagnosis is not required.

An Employer is only entitled to receive the information necessary to enable it to accommodate the employee. This will include expert or professional verification that the employee has a legitimate functional limitation, a description of the limitation to help the Employer accommodate that limitation, and a professional estimate of how long the employee will need to be accommodated.

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<sup>8</sup> [Brewer's Distributor Ltd v Brewery, Winery and Distillery Workers' Union, Local 300 \(Peebles Grievance\), \[2011\] BCCAAA No 49, 208 LAC \(4th\) 274, 105 CLAS 331](#) : *The disabled employee bears the onus to identify work which she is able to perform together with medical confirmation that she can perform it. In this regard, the physician's opinion must be based on knowledge of the specific physical demands of various alternate jobs. If the employee satisfies this obligation, the onus shifts to the employer to reasonably consider the employee's request during the search for an accommodation.*

## EXCEPTIONS – WHERE THERE IS NO MEDICAL EVIDENCE

In cases where medical information regarding an employee's disability arises after they have been discharged or disciplined, Arbitrators tend to frame the issue as to whether the employee exhibited sufficiently clear symptoms that the Employer should have been aware of a possible disability requiring accommodation. Where the Employer has this knowledge, arbitrators have held<sup>9</sup> that the duty to accommodate arises prior to the employee's discharge or discipline.

In the case where an employee was terminated following a post-violation drug and alcohol test failure, the employee must establish that they have a disability and that there is a connection or causal link between the disability and the violation that occurred. This may require medical or expert evidence. Absent such evidence, or where the employee denies that they have a substance abuse problem, the issue is not whether the employer discriminated against the employee but whether the employer had just cause to terminate the employment.<sup>10</sup>

Denial of drug or alcohol addiction raises particularly perplexing issues, because denial is often one of the symptoms of the disease. In some cases, denial ought to be considered as part of the disability and there remains an onus on the Employer to accommodate. Nonetheless, the obligation on an Employer has its limits. Where the Employer has repeatedly offered accommodation in the form of treatment, but the employee continues to deny the need for medical assistance or the existence of a problem, evidence of rehabilitation efforts after discharge may be irrelevant. Additionally, it may be difficult for the Employer to assume that an employee's use of alcohol or drugs is based on an addiction, unless the employee acknowledges this or there exists other compelling evidence.

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<sup>9</sup> [Carter v Neurologic Rehabilitation Institute of Ontario, \[2011\] OHRTD No 160, 2011 HRTO 170](#) : The test is whether the respondent knew or ought reasonably to have known that the applicant had a disability requiring accommodation ... Consequently, an employer need not be informed of the specific cause of the employee's condition or the exact diagnosis in order to be put on notice that an employee has disability-related needs requiring accommodation: see *Wall v. The Lippé Group*, 2008 HRTO 50 (CanLII)

<sup>10</sup> *Canadian National Railway and Teamsters Rail Conference (F.A.), Re.* : <https://www.hrreporter.com/opinion/canadian-hr-law/no-duty-to-accommodate-if-employee-not-suffering-from-addiction/322448> - The arbitrator concluded that at the time of the incident, the worker did not have a substance abuse problem that could be considered a disability under the Charter of Rights because he was only an occasional user of cocaine. The arbitrator held that absent an addiction, CNR was not under a duty to accommodate.

## Sample Release of Information Form

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I authorize my treating medical practitioner to provide the following information to the Human Resource person responsible for my file information:

- verification that I am experiencing an injury or medical condition that currently affects me from performing the duties of my job.
- whether returning to work is possible, and if so when can I return to work.
- what, if any, accommodations should be made to my job duties or in the workplace to enable me to safely return to work.

To be clear, you are not required to provide a diagnosis; the release of any medical information is limited to answering the attached medical questionnaire, as well as clarifying the provided answers.

I understand that I will be provided with a copy of this information.

\_\_\_\_\_  
Name

\_\_\_\_\_  
Date

## Sample Medical Questionnaire/ Functional Analysis

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Re: Alberta Human Rights Commission, Obtaining and Responding to Medical Information in the Workplace: A Summary for Employers, 2009

Physicians name and address:

I saw \_\_\_\_\_ (patient's name) on \_\_\_\_\_ (date)

Date of injury or illness, if applicable \_\_\_\_\_

This patient is medically able to work with limitations or restrictions as of \_\_\_\_\_ (date).

*Restrictions or limitations (see page 2 for details)*

In my opinion, these restrictions or limitations are:

Temporary \_\_ for how long \_\_\_\_\_

Permanent \_\_ date of next appointment \_\_\_\_\_

Needs further assessment \_\_ date of next appointment \_\_\_\_\_

My opinion is based on the factors indicated below:

Information provided by the patient \_\_

My examination of the patient and my assessment of the findings and health information \_\_

I have provided this form to the patient named above

\_\_\_\_\_  
Physician's signature

\_\_\_\_\_  
date

## Specific Functional Restrictions and/or Limitations

Patient's name \_\_\_\_\_

### DEFINITIONS:

- **Restriction:** This patient is advised not to perform this activity in any capacity
- **Limitation:** This patient is able to perform the activity in a reduced capacity. For example, the patient is not able to perform the job with the usual speed, strength or number of repetitions, or for the usual duration

Check only those items that apply in section A and provide details in section B

### SECTION A:

PHYSICAL	Restriction	Limitation	MENTAL	Restriction	Limitation
sitting			thinking reasoning		
standing			concentration		
walking			memory		
lifting			critical decision-making		
carrying			interpersonal contact		
pushing pulling			alertness		
climbing stairs			other (specify in section b)		
climbing ladders			<b>ENVIRONMENTAL</b>		
climbing scaffolding			exposure to heat and cold		
crouching			exposure to dust/fumes/odor		
crawling			exposure to chemicals		
kneeling			food handling		
bending twisting turning			other (specify in section b)		
repetitive activity			<b>OTHER</b>		
sustained postures			shift/attendance duration		



## Examples of Positive Policies and Practices for Persons with Disabilities

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### Recruitment

- job posters in alternate formats
- building networks with community groups that work with and on behalf of people with disabilities
- building/work site accessibility

### Testing

- additional testing support measures
- ensuring physical testing is related to *bona fide* occupational requirements
- a pre-test job orientation if the disability impacts on ability to read or understand written job information
- alternative forms of testing

### Staffing

- seeking out referrals of persons with disabilities or designating the position for a person with a disability
- sensitization training on disability issues for selection committee members
- having the staffing board representative of equity communities (i.e. persons with disabilities)

### Training

- revising training schedule to accommodate learning disability
- ensuring accessible training tools (i.e. technology, reading materials, etc.)
- making sure training is held in accessible space
- formalizing on the job training/job shadowing

### Workplace Accessibility

- regular workplace accessibility audits
- funds set aside for accessibility and accommodation measures

### Working Conditions

- subsidy program for accessible transportation
- disability awareness training
- workplace sensitization with regards to disability issues
- barrier free extended health care and drug coverage
- adaptive technology
- flexible working hours

### Retention

- effective return to work of workers with disabilities by creating multi-disciplinary accommodation committee
- mentoring by other workers with disabilities
- exit interviews

## Working Through Accommodation: Scenarios

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Please read your assigned scenario and discuss what you would do at each step. Write a few notes down regarding your decisions and be prepared to report back to the group when you are finished. You have 45 – 60 minutes to complete the task.

### Scenario 1

#### **Step 1**

Simi works in an office as an administrative assistant for a group of 4 senior staff; processing reports, drafting letters, booking travel & accommodation, preparing materials for meetings, etc. She has been on sick leave for two weeks. She has gone to her doctor who claims that chemicals in the workplace are making her sick. Her doctor has told her she needs to be away from the workplace for two to three months for treatment and recuperation. She only has 11 days of sick leave left in her bank.

**What does she need to know?**

**What steps should she take at this time?**

**What can you do to assist her?**

**Who should be involved?**

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#### **Step 2**

Simi has been off work for 6 weeks now. She just found out that her worker's compensation claim has been rejected on the basis that her condition could have been caused by something outside of the workplace. She disagrees.

**What does she need to know?**

**What steps should she take at this time?**

**What can you do to assist her?**

**Who should be involved?**

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**Step 3**

Simi has been away from work for 10 weeks and feels that she is ready to return to work. Her doctor is hesitant, but on her insistence, has filled out a medical questionnaire and wants her to return to work gradually – two to three hours per day in the workplace and the rest of the time spent working from home. In addition, the doctor has recommended Simi be provided with a workspace free from carpeting and away from where office supplies are stored and that she be relieved from doing photocopies.

Simi is very concerned that there are too many scented products at work and that this will make her return to work difficult. She would like the Union to work with the Employer on a return-to-work plan.

**What are the Employer’s obligations in this scenario?**

**What are Simi’s obligations?**

**What are your next steps?**

**Who should be involved?**

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**Step 4**

Simi has been back to work for 5 weeks. Unfortunately, she has only been able to come into the workplace 6 days at 3 hours per day, in total. Her supervisor has let her work the rest of the time from home but is concerned that Simi is not fully integrated into the workplace and that it is affecting her ability to provide on the spot support to senior staff, as is a big part of her job description.

The supervisor has been giving her low priority work to keep her busy; something management feels cannot be maintained. The Employer has made an attempt to accommodate Simi by providing her with a closed office with no carpeting and assigning the photocopying to someone else. In addition, they have published their no-scent policy and supervisors were asked to review it at a staff meeting. This hasn’t seemed to make a big difference with regards to scented products being used at work and by her colleagues.

Simi isn't sure she will ever be able to come back to work and wants to be able to work from home full-time. She has a short, one-line letter from her doctor written on a prescription pad, making this recommendation. The Employer is not happy with this request. They want to know what else they can do to keep Simi in the workplace.

They have asked her to sign a release form that would allow their doctor to consult with her's on this issue. Simi has refused to sign the medical release form and wants your help in getting approval to work from home full-time. In the meantime, the Employer has sent her a notice of discipline for refusing to sign the medical release form.

- What are your next steps?**
- What advice will you give Simi in this circumstance?**
- What is your strategy with the Employer?**
- Who should be involved?**

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**Step 5**

Simi has been off again on sick leave for a week after being given a one-day suspension for refusing to fill out the medical release form.

She has no sick credits and her worker's compensation appeal is not scheduled for another 2 months. She still has not signed the medical release form but she did provide the Employer and the Union with additional information from her doctor supporting her need to work from home, citing workplace chemicals as the main concern.

The Employer would prefer that Simi come back to the workplace and has indicated that they are prepared to accommodate her at another facility, if necessary. They are not prepared to support Simi working full-time from home until all other avenues have been looked at. Simi wants to file a grievance for discrimination and constructive dismissal.

**What advice would you give Simi at this point?**  
**What are your next steps?**  
**Who should be involved?**

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## Scenario 2

### **Step 1**

Arthur is a Union representative who works in purchasing and stores at a warehouse for a large crown corporation. His work location is a mere 5-minute drive from his home. He is the only Union representative in that section and has been missed by the members.

Arthur has a reputation with the Employer as a troublemaker and his supervisor has commented on more than one occasion to other staff about how peaceful it is at work without him there.

Arthur has been on long-term disability for six months because of a flare-up of his fibromyalgia symptoms after moving furniture at home, leaving him completely unable to work. He is now ready to return to work. He has a doctor's note stating that he is able to work a sedentary job requiring no lifting, stretching or standing for long periods and provided there is a quiet place with a bed where he can rest from time to time.

The Employer does not want Arthur to return to work until they have a second medical opinion that he is fit to do so. They have advised him to stay on leave and they are asking that he seek a second opinion and see a doctor recommended by the corporation.

**What advice would you give Arthur at this point?**

**What are your next steps?**

**Who should be involved?**

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### **Step 2**

Arthur has seen a company doctor; someone agreed upon by the parties. The company doctor supports a return to work, but only on a part-time basis, performing light duties. This advice conflicts with Arthur's doctor's findings that Arthur can work full-time on modified duties with some accommodation.

The Employer has found part-time work for Arthur in another work location because they feel they cannot accommodate sedentary work at the warehouse and because this place has a quiet room where they have put a small bed for him to use for resting, as required. This new position requires Arthur to drive an additional 30 minutes to work. They are advising him to report to work in 4 days' time.

**What advice will you give Arthur?**

**What are your next steps in resolving this issue?**

**Who should be involved?**

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**Step 3**

Arthur has been back to work for 2 weeks. He is finding the drive to the new work location a strain and has been experiencing increased pain as a result. Going to work is getting harder by the day. Arthur's doctor has given him a note indicating that the drive is exacerbating his symptoms and reiterating the request for full-time sedentary work at his previous work location.

The Employer continues to rely on the perspective of the company doctor that Arthur cannot return to full-time, modified work. His pay is topped-up by disability insurance but other issues regarding his status as a full-time Employee are still outstanding. Arthur has confided in you that he cannot continue to drive 30 minutes to and from work each day.

**What advice will you give Arthur?**

**What can you do to assist him at this point?**

**Who should be involved?**

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**Step 4**

Arthur is off work again. His doctor maintains he is fit to come back to work in the warehouse on a full-time basis, if he is provided with modified duties and a program of gradual reintegration into the workplace. The Employer maintains that the only suitable work they can find for Arthur is at the alternate work location, and that Arthur shouldn't return to work (*based on the most recent lack of success in returning him to part-time duties*) until the company doctor says he can return. They want Arthur to sign a release form allowing their doctor to consult with his so that they can better determine a reasonable return to work plan.

**What advice will you give Arthur?**

**What are your next steps?**

**Who should be involved?**

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**Step 5**

After a series of unsuccessful meetings with the Employer, Arthur is completely frustrated. His frustration has led to a relapse due to stress, and his doctor is now confirming his inability to return to work in the immediate future. Arthur wants to file a worker's compensation claim because he believes his relapse is due to the Employer's ongoing obstruction and interference with the return-to-work process.

**What are your next steps?**

**Who should be involved?**

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### Scenario 3

#### **Step 1**

Ali is a Training Officer working for a midsize government department. His duties include research, course design and facilitation. Ali suffers from back pain and is returning from a two-month sick leave. His doctor has filled out a medical questionnaire indicating he must continue to see a physiotherapist two times a week; he cannot stand for long periods and is restricted from stretching, lifting or bending. His doctor says he would benefit from an ergonomic assessment but at the very least, requires an obus form for his chair and will have to take breaks from sitting for longer than 45 minutes at a time. Ali has asked that you meet with the Employer to help draft a return-to-work plan.

**What, if any, information do you need to prepare for such a meeting?**

**What are your next steps?**

**What creative strategies might you invoke to support Ali's cause?**

**Who should be involved?**

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#### **Step 2**

You and Ali have met with the Employer. They are prepared to modify Ali's work so that he is doing course design full-time, allowing for regular breaks in his work schedule. They have agreed to bring in an ergonomist to assess his workstation and will pay for an obus form, if advised by the ergonomist that it is necessary.

Ali is not happy with the Employer's plan. He has already acquired an obus form and wants the Employer to pay for it now. He also wants to do some facilitation and feels that he can adapt his facilitation style to meet with restrictions outlined by his doctor.

The Employer feels that they have met with their obligations to accommodate Ali and furthermore, aren't willing to risk his health or the integrity of their training by having him continue to do facilitation.

**What are your options at this point?**  
**What will you advise Ali?**  
**How will you deal with the Employer?**  
**Who should be involved?**

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**Step 3**

Ali has been doing modified work for three months now. He is still going to physio and is feeling better, but additional medical reports from his doctor maintain the need for accommodation as noted previously.

Ali feels that his ability to do course design is hampered because he no longer has hands-on classroom experience. Also, his colleagues have been able to attend training in conference settings that have enriched their tools for course design, and he has been denied this opportunity because of the “hands-on” nature of the training.

Furthermore, Ali is upset because he no longer gets to travel as he used to when facilitating – impacting his job fulfillment and enjoyment.

He feels that the Employer should allow him to take on some facilitation at this time and he maintains that he can adapt his facilitation to his medical restrictions.

**What, if anything, can you do for Ali at this time?**  
**What more do you need to know to be sure you are doing the right thing?**  
**Who should be involved?**

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**Step 4**

You have managed to negotiate an opportunity for Ali to do some facilitation. Two weeks ago, he traveled to Toronto to co-facilitate a 2-day session with an out-of-town colleague. Unfortunately, on his return trip, Ali had a fall coming down the escalator at the airport and exacerbated his back injury. He has been off work since and now wants to file for worker's compensation. It doesn't look like he will be back to work any time soon.

**What can you do to help Ali at this point?**

**What are his next steps?**

**Who should be involved?**

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**Step 5**

Ali is back to work after a 10 week leave. His doctor advises that the restrictions noted previously still apply. Ali goes for massage and physio on a regular basis. Ali maintains that he should be allowed to facilitate as part of his job. The Employer disagrees, using the previous incident of falling as rationale for restricting his job duties once again, to course design. Ali has returned to modified duties, under duress. He is not at all happy with the accommodation plan (*which the Union has not signed*) and is ready to file a grievance on the basis of discrimination.

**How will you advise him?**

**What are your next steps?**

**Who should be involved?**

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## Scenario 4

### Step 1

Zoe has been working as a support worker for a women's collective for the last 10 years. It is a fairly small organization with 3 programs offering: employment assistance, a drop-in center and referral for women in crisis. Zoe has worked in all 3 programs, but currently works at the drop-in center.

All program staff work together as a team, but each program has a Program Director who is responsible for management of staff in their specific area of responsibility.

Zoe has a disability that is exacerbated by stress, leaving her exhausted and unable to cope at times. Her colleagues know she has a disability, but she has not, and is not willing to, disclose the diagnosis.

Over the past 3 weeks, Zoe has been taking an average of 3 days a week of sick leave. She comes to you because she is frustrated with her Program Director who she feels is disorganized, inconsistent and unprofessional with her. She feels the work team is becoming dysfunctional, especially in her Program. Her doctor has suggested she take some significant "time away" from work (*return date to be determined*), to relieve the stress and get well.

**What information do you need from Zoe to assist her?**

**What are her options now?**

**What are your next steps? Who should be involved?**

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### Step 2

Zoe has been on sick leave for a total of 7 weeks. Her doctor has written a note indicating Zoe can come back to work on a gradual basis, working back to a full-time schedule over a 5-week period.

He also recommends that she be kept away from the source of her stress at work. She wants you to help design a return-to-work plan for her successful reintegration into the workplace. She believes this would entail reassignment so that she doesn't have to deal with her new Program Director.

**What information would better help you with this request?**

**What are your options?**

**What are your next steps?**

**Who should be involved?**

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**Step 3**

You have met with Zoe and the Employer. The Employer is willing to provide a gradual return to work for Zoe, but they are not willing to reassign her to another position. They feel that Zoe is in one of the least stressful positions in the collective. They also said that reassignment would cause undue hardship as it would mean re-training someone else to do her job and they don't have the money in their very small budget to do this.

They argue that Zoe needs to give the new Program Director a chance to learn the ropes and that she needs to be more supportive of the Director in her role.

They say that stress is an integral factor in all the jobs at the women's collective. They are interested in finding alternative ways of assisting Zoe to deal with workplace stress. One suggestion is to send her on a stress management course.

Zoe is anxious about returning to the same conditions she left.

**What advice would you give Zoe at this point? Why?**

**What are your next steps?**

**Who should be involved?**

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**Step 4**

Zoe returned to work for 3 weeks. During that time, she took a one-day stress course recommended by her Employer and learned some breathing exercises and time-management practices. She found the course juvenile and unhelpful.

Zoe continues to be extremely unhappy with her Program Director who she says is very disorganized and unprofessional. Zoe has shown signs of illness and fatigue at work; sometimes manifesting itself into distraction, forgetfulness and emotional outbursts, (i.e. crying at work). For a second time, Zoe submitted a doctor's note asking that she be reassigned away from the primary source of her stress; her Program Director.

The Employer refused. Given the nature of her work, they have sent her home on paid sick leave saying that she may put the clientele at risk if she were to stay at work in her present state. They are asking that she pursue a medical leave and have referred her to EI and CPP for follow-up. Zoe does not want to be on sick leave. She wants to be reassigned to a different position per her doctor's recommendation.

**What more, if anything, do you need to know to help Zoe?**

**What are her options?**

**What would be your best course of action? Who should be involved?**

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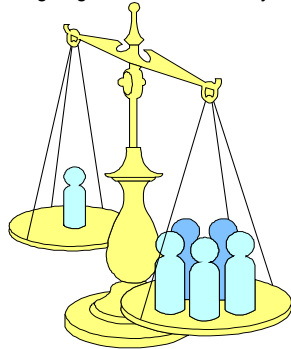
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## Accommodation and the Duty of Fair Representation

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Modified from "Accommodating the Mentally Disabled Employee: The Union Perspective" by Catherine Sullivan, BC Government & Service Employees' Union, Burnaby, BC, with the assistance of Law Co-op Student Patrick Hayes, for the Continuing Legal Education Society of British Columbia, November 2008



Accommodation is a multi-party responsibility. The *Central Okanagan School District No. 23 v. Renaud*, (1992) S.C.J. No. 75, established the scope of union's duty to accommodate:

- A union bears a duty to accommodate if it becomes a party to discrimination.
- A union can become a co-discriminator and acquire a duty to accommodate by:
  - participating in the formulation of a discriminatory work rule, or collective agreement provision, or
  - obstructing the Employer's reasonable efforts to accommodate an employee.
- The union and the Employer share the obligation to take reasonable steps to remove or alleviate the source of the discriminatory effect. They are equally liable if nothing is done.
- The Employer is usually in a better position to facilitate accommodation and is therefore expected to initiate the process.
- The union's duty arises if its cooperation or involvement is required to make the accommodation possible.

Similar to the employer, unions can satisfy the duty to accommodate by demonstrating undue hardship.

The test for undue hardship **for the union**<sup>11</sup> can be met by demonstrating prejudice to other union members: “Any significant interference with the rights of [other members] will ordinarily justify the union in refusing to consent to [an accommodation measure].” (*Renaud*, para. 38)

However, some interference with rights of other members is permissible. For example, interference with seniority rights has been permissible by some tribunals.<sup>12</sup>

Lastly, the union is responsible for ensuring its policies, processes and procedures will not have a discriminatory effect on individuals or groups within the union.

#### An Historical View of the Duty of Fair Representation

The union’s control of the grievance process includes the authority to decide whether to pursue a grievance to arbitration, and to settle a grievance on the member’s behalf.

The union’s authority is limited, however, by the duty of fair representation, which prohibits a union from representing a member in a manner that is arbitrary, discriminatory or in bad faith.

In the labour context, the term “discriminatory” is interpreted broadly, in the sense of singling out a person for adverse treatment based on irrelevant considerations. This includes, but is not limited to, discrimination based on prohibited grounds under human rights legislation.

In general, Labour Relation Boards have held unions to a reasonableness standard in the conduct of grievances. The union must have put their mind to the case and came up with a reasoned decision whether to proceed or not.

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<sup>11</sup> [Central Okanagan School District No 23 v Renaud, \[1992\] SCJ No 75, \[1992\] ACS no 75, \[1992\] 2 SCR 970, \[1992\] 2 RCS 970](#): The primary concern with respect to the impact of accommodating measures is not, as in the case of the employer, the expense to or disruption of the business of the union but rather the effect on other employees.

<sup>12</sup> E.g. [United Steelworkers Local Union 5890 v. Evraz Inc. NA \(Seitz Grievance\), \[2015\] S.L.A.A. No. 2](#)

### Representing Members with Mental Health Disabilities

- *K.H. v CEP Local 1-S* [1997] S.L.R.B.D. No. 44 (Sask. Labour Relations Board), and *Bingley v. Teamsters, Local 91*, [2004] C.I.R.B. No. 291 (Canadian Industrial Relations Board) established that unions will be held to a higher standard in representing members with mental health disabilities. These cases suggest that when a member has some kind of disability, the union must not only handle the grievance in an “ordinary” manner, but has to be proactive, more attentive and put some extra effort into the case.
- In *Bingley*, the Board established guidelines to evaluate whether the union satisfied its duty of fair representation are:
  - whether the union’s intervention was reasonable where the Employer failed to implement appropriate accommodation measures;
  - whether the quality of the process that allowed the union to come to its conclusion was reasonable
  - whether the union went beyond its “usual” procedures and applied an extra measure of care in representing the employee
  - whether the union applied an extra measure of assertiveness in dealing with the Employer

### Issue of Member’s Mental Capacity

The obligation to investigate mental capacity may arise because, in many cases, a symptom of their disability is denial of a disability, or they may be reluctant to disclose or discuss their condition for fear of stigma or negative consequences.

#### **Thus, the following questions may arise:**

- What is the union’s duty to a member who fails to disclose a mental disability?
- Should a union investigate a grievor’s competency?

- What is the union's responsibility if the grievor refuses to cooperate, is incapable of participating in the process or refuses to provide necessary medical information?
- To what extent does the grievor have a duty to facilitate the grievance process?

It may or may not be possible, in such cases, for union representatives to identify possible mental health issues arising from observations made by the Employer or by the union in relation to the grievor's behaviour. So, does a union have an obligation to investigate the mental capacity of a grievor (and to what extent) ?

In *Canada Safeway and U.F.C.W. Local 401* (1992), 26 L.A.C. (4th) 409, the arbitrator commented on the employer's duty to investigate the competence of a grievor.

The arbitrator held that, even though the grievor had failed to disclose his mental disability, the employer was obliged to investigate because the nature of the disability was such that:

**“a reasonable person observing his conduct would conclude that his behaviour was abnormal and that he would probably benefit from professional help.”**

The arbitrator emphasized that professional expertise was not always required to identify the issue of mental capacity. In the arbitrator's view, the obligation to investigate mental capacity arises because, in many instances, employees with mental health disabilities will be reluctant to disclose or discuss their condition.

The principle in *Canada Safeway* may also apply to unions in their handling of grievances.

In *Love v. Teamsters Local 132*, [2001] O.L.R.B.D. No. 509, the Ontario Labour Relations Board addressed the extent of a union's obligation to investigate the capacity of a grievor with a mental health disability. In that case, the grievor was uncooperative throughout the grievance process and denied that he had substance abuse problems. The union decided not to proceed to arbitration, which prompted the grievor to file a duty of fair representation complaint. The grievor alleged that the union had failed to account for his addiction in its handling of the grievance.

The Board was reluctant to interfere with the union's decision in light of the grievor's "assertion of competence and the lack of any clear evidence to contradict that assertion." This was not a case, like *Canada Safeway*, where it was apparent based on the grievor's behaviour, that he likely suffered from a mental health disability.

The Board acknowledged the difficulties inherent in dealing with grievors with mental health disabilities, and found that the union had acted reasonably in the circumstances:

*Unions attempting to represent members with possible mental disabilities face difficult challenges that can compromise their ability to get clear instructions and/or the ability of the member to accept reasonable recommendations necessary for the mounting of an adequate defense.*

*In this case, Love's refusal to accept that he was suffering from substance abuse and/or psychological problems meant that he continued to refuse to cooperate in the provision of medical evidence which might have resolved the company's concerns about these areas and would have been important in order to mount a successful case at arbitration. In these circumstances, and with an apparent lack of concern on Love's part to respond to the union and/or to participate effectively in his own defense, the union decided, after obtaining the advice of counsel and seeking the approval of the membership, that the case was very unlikely to succeed at arbitration and therefore chose not to proceed. (para. 45) While it may have been preferable that the union simply take its chances at arbitration, given the grievor's length of service and his unfortunate situation, and particularly given the union's apprehension that he may indeed have been suffering from a substance abuse problem, albeit one he refused to admit, the Act does not permit such second-guessing of a union's analysis with the benefit of hindsight. (para. 47)*

In cases where a member denies health problems and refuses to pursue a medical defense in response to a workplace allegation, the union representative has to ensure that they have well documented their attempts to request this information and the member is uncooperative.

This is to minimize a union's liability for a failure to provide that evidence (over the member's objections) at a future hearing. (See *Breeden v. West Vancouver Professional Fire Fighters' Union*, [2002] B.C.L.R.B.D. No. 376 where the arbitrator found the union was justified in not proceeding further when a grievor could not be convinced to provide a necessary consent to obtain medical information.)

## Stigma, Changing the Way We Talk

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Our words matter. Combating stigma related to mental illness, suicide, and substance use starts with how we use language – something that continuously evolves. We must all be aware of any outdated language being used in the media and around us every day. Everyone can be a champion against stigma when advocating the use of accurate and respectful language. So, as you communicate with others, be mindful of the impact of your language.<sup>13</sup>

### **Person-first language**

Person-first language focuses on the individual while de-emphasizing the illness, disability, or condition. Using it shows respect for an individual as a person rather than as ‘abnormal’, ‘dysfunctional’ or ‘disabled’.

For example: an individual who lives with schizophrenia, a person with lived or living experience of substance use.

### **Identity-first language**

Identity-first language is rooted in the relationship between a personal-cultural identity and disability. Individuals and groups who use it as part of their identity focus on their unique abilities rather than the disability.

For example: autistic person, deaf person

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<sup>13</sup> [https://mentalhealthcommission.ca/wp-content/uploads/2021/06/language\\_matters\\_cheat\\_sheet\\_eng.pdf](https://mentalhealthcommission.ca/wp-content/uploads/2021/06/language_matters_cheat_sheet_eng.pdf).

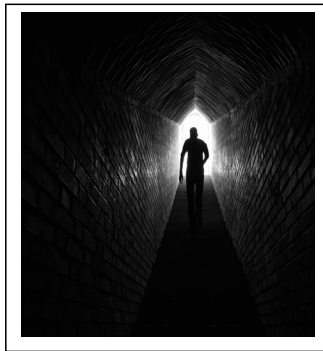
## Reference Guide

STIMATIZING	RESPECTFUL
It drives me <b>crazy</b> .	It <b>bothers/annoys/frustrates</b> me.
This is <b>nuts</b> .	This is <b>interesting/strange/ peculiar/funny</b> .
This individual <b>suffers</b> from depression.	They <b>live with/are experiencing</b> depression.
<b>Mentally ill</b> or <b>insane</b> person.	Person living with a <b>mental health problem</b> or <b>illness</b> .
<b>Committed</b> suicide, <b>successful</b> suicide.	<b>Died</b> by suicide.
<b>Failed</b> or <b>unsuccessful</b> suicide attempt.	<b>Attempted</b> suicide.
Substance <b>abuse</b> .	Substance <b>use</b> or substance <b>use disorder</b> .
Everyone who is a <b>junkie</b> .	Everyone who <b>uses substances</b> .
They used to be an <b>addict</b> .	They are <b>in recovery</b> .
You've been <b>drinking a lot. Why can't you just stop?</b> You know I'm concerned.	I notice you're <b>drinking more than usual</b> . Have you noticed the change or do you have any concerns? If so, is there <b>anything I can do to help?</b>
I have been <b>clean</b> for six months.	<b>I haven't taken any substances</b> in six months.
I think they're <b>high on the job; they should be fired</b> .	I think they have a <b>substance use problem</b> . We should explore whether there is anything we can do to help them get to a better space. Don't we have <b>policy that keeps the workplace safe and cares for someone who is ill?</b>

## Steps to Reduce Stigma

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1. Know the facts. Educate yourself about mental illness including substance use disorders.
2. Be aware of your attitudes and behaviour. Examine your own judgmental thinking, reinforced by upbringing and society.
3. Choose your words carefully. The way we speak can affect the attitudes of others.
4. Educate others. Pass on facts and positive attitudes; challenge myths and stereotypes.
5. Focus on the positive. Don't reduce people to their mental illness or their substance use disorder.
6. Support people. Treat everyone with dignity and respect; offer support and encouragement.
7. Include everyone. It's against the law (discrimination) to deny jobs or services to anyone with mental health issues.



## The Duty to Accommodate an Employee who has a Substance Addiction THE DUTY TO ACCOMMODATE

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### AN EMPLOYEE WHO HAS A SUBSTANCE ADDICTION

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There is a distinction between substance use (something that the employee has control over – e.g. an employee who decides to have a drink before work for “fun”), and substance dependence/substance use disorder (something the employee has little to no control over because it is disability-related). The Employer has a duty to accommodate employees in the latter category, but the duty to inquire may still apply in both cases. Indeed, when an employer observes changes in an employee’s attendance, performance or behaviour that may indicate possible substance dependence, it triggers the employer’s legal obligation to initiate a discussion with the employee about a need for accommodation of a disability.<sup>14</sup>

Duty to accommodate for employees with a dependence may mean more leniencies with respect to lateness, absences, leaves of absence and opportunities for employees to face their addiction. This could take the form of rehabilitation through the Employee Assistance Program (where applicable), with local outpatient programs and/or in residential treatment centers.

While substance use disorder is an “illness” and therefore a disability, it is also treatable if the employee recognizes that they have a dependence problem.

A common symptom of substance use disorder is the denial of the dependence. If there are reasonable grounds to believe that there is an dependence issue, then the employer must be proactive in trying to address it before disciplining or terminating an employee. An employer cannot rely on the defense that it did not know the employee had a

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<sup>14</sup> Canadian Human Rights Commission, *Impaired at work: A guide to accommodating substance dependence*, 2017: [https://www.chrc-ccdp.gc.ca/sites/default/files/publication-pdfs/chrc\\_impaired\\_at\\_work\\_v2018-3\\_eng.pdf](https://www.chrc-ccdp.gc.ca/sites/default/files/publication-pdfs/chrc_impaired_at_work_v2018-3_eng.pdf)

substance addiction problem because the employee did not self-disclose this information.

Undue hardship is usually reached when significant attempts are made to accommodate the employee and the employee refuses rehabilitation treatment.

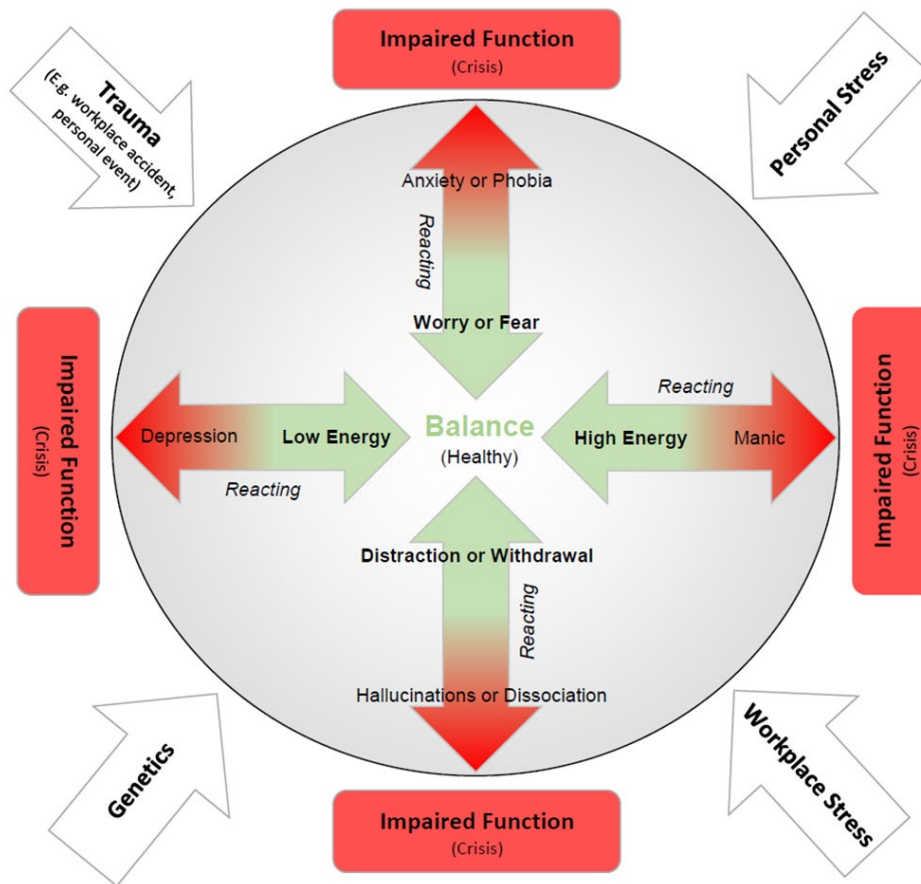
It is important to note that the case law varies on how much the employer must be proactive and how much the employer must do to accommodate an employee with an addiction, particularly taking into consideration the health and safety of others and the employee. In some workplaces, there are drug and alcohol policies to require employees to submit themselves to testing.

The Employer is not required to tolerate the behaviour for unlimited time as a form of accommodation, although addiction is sometimes a mitigating factor when discipline or discharge is invoked. In such cases, three questions should be asked:

1. Has the employee given the Employer just cause for discipline?
2. Was the discipline excessive in the circumstances, taking into account the Employer's duty to accommodate?
3. If excessive, what would be appropriate?

Unions also have a duty to inquire into whether the employee has a substance addiction as part of their duty of fair representation.

## Continuum of Mental Health Diagram



## Sample Return to Work Agreements

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### Sample Workplan A

[http://www.mentalhealthworks.ca/wti/workplace\\_planA/](http://www.mentalhealthworks.ca/wti/workplace_planA/)

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*This agreement is meant to provide a basis for conversation between an Employee and an Employer when there is a mutual goal of keeping the Employee in the workplace as a productive, contributing member through a respectful and equitable process.*

### **Request for Workplace Agreement for John Doe**

This agreement was developed in consultation with John Doe and Union steward, Jane Smith on April 9, 2017. This agreement does not supersede any existing company policies, collective bargaining agreements or applicable legislation. It is developed in good faith that all parties will conform to the spirit and intent of returning John Doe to work in a manner that maintains a balance between health and productivity.

**To allow a successful return-to-work for John Doe, the following accommodations are requested to be provided on the first day returning to work:**

- An office in a reasonably quiet and low traffic area;
- A team meeting in the morning that encourages all team members to:
  - Share what they have achieved in the past year;
  - Discuss projects they are currently working on;
  - Explain new processes.
- Graduated return-to-work plan (see table – next page)

Start Date	Duration	Plan
April 21, 2024	2 weeks	<ul style="list-style-type: none"> <li>• 3 days/week for 4 hrs/day from 9:00 am to 1:00 pm without a lunch break.</li> <li>• Primarily computer-based training and orientation.</li> </ul>
May 5, 2024	2 weeks	<ul style="list-style-type: none"> <li>• 3 days/week for 5 hrs/day from 9:00 am to 2:30 pm with a half hour for lunch – Monday, Wednesday and Friday.</li> <li>• Consider John's capacity and ability on his first project. Depending on the project demands, John will hold discussions about additional projects as he is ready.</li> </ul>
May 19, 2024	2 weeks	<ul style="list-style-type: none"> <li>• 4 days/week – Monday, Tuesday, Wednesday and Friday with all days except for Tuesday continuing at 9:00 am to 2:30 pm with a half hour for lunch. Tuesdays will be at 4 hours from 9:00 am to 1:00 pm without a lunch break.</li> <li>• This time frame is expected to allow John to begin work on a project or a number of projects as negotiated based on capability and complexity.</li> </ul>
June 2, 2024	2 weeks	<ul style="list-style-type: none"> <li>• 5 days/week with Monday, Wednesday and Friday continuing at 5 hours per day and the times described above; Tuesday and Thursday being 4 hours per day from 9:00 a.m. to 1:00 p.m. with no lunch break.</li> </ul>
June 16, 2024	2 weeks	<ul style="list-style-type: none"> <li>• 5 days a week with Monday, Wednesday and Friday being increased to a regular 7-hour work day and Tuesday and Thursday remaining at 4 hours per day at the hours described above.</li> <li>• At the end of the 12 weeks, the intention is that John will be back to 5 days a week and functioning at 7 hours per day.</li> <li>• It is expected and intended that John will monitor his effort at all times to maintain his well-being.</li> <li>• It is the quality of work rather than the quantity that is the objective during this time</li> </ul>

- During the first eight weeks, John has requested to avoid meetings where the number of participants exceeds eight. In the event that John's input is required, he will contribute in writing and review the minutes of the meeting.
- Scheduled 10-minute weekly meetings with John's manager will be set up to discuss John's workplace progress and well-being. These meetings are intended to:
  - Answer the question "How is everything going?", allowing John a chance to reflect on and share his experiences in the workplace over the past week.
  - Monitor commitments and deadlines; ensure that these are renegotiated as required bearing in mind that John's perfectionist tendencies compel him to sometimes commit to unreasonable deadlines or objectives.
- Where possible, supervisors should clearly and specifically state their expectations around task completion in writing and provide John with an opportunity to seek clarification.
- To avoid John's frustration with delays, it is suggested that his manager attempt to mitigate the situation by refusing unreasonable deadlines or providing sufficient support to remove the pressure associated with these.
- Occasionally, John may need to remove himself from the work environment to take a short walk. It would be appreciated if his team could understand how John benefits from this.

**John wishes to commit to the following to ensure that his return-to-work plan is successful:**

- To complete his computer-based training and all available classroom training within the first three months of his graduated return-to-work plan.
- To resist his tendency to minimize problems so that his manager may have an accurate and honest assessment of how he is doing and how the manager may be able to help.

- To continue his regular check-ups with medical professionals and maintain his healthcare regime that preserves his health and well-being.
- To actually take his breaks, including lunch, to ensure a more productive workday and maintain balance on a daily basis.

**To assist his manager in addressing future issues, John has shared that:**

- Addressing issues immediately and directly is preferable to 'walking on eggshells' or letting things build into bigger issues.
- His manager may need to closely monitor his perfectionist and over-achieving tendencies in order to ensure John's continued well-being. Questioning his willingness to take on too much can go a long way to sustainable productivity.
- After completion of the graduated return-to-work plan, John will be able and willing to do all required tasks. However, John's tendency to take on too much should still be monitored.
- John wants to continue to experience respectful and courteous discussions with his superiors around performance and workplace issues.
- Feedback that is specific and work-related is preferable to generalities.

**The above document accurately describes my request for an effective graduated return-to-work plan.**

[Signature] \_\_\_\_\_  
John Doe  
Employee of Your Organization  
Date: April 9, 2024

## **Sample Workplan B**

[http://www.mentalhealthworks.ca/wti/workplace\\_planB/](http://www.mentalhealthworks.ca/wti/workplace_planB/)

### **Request for Workplace Agreement for Jane Doe**

This is an agreement between Jane Doe and Union steward, John Smith on April 6, 2024 as a starting point for a successful return-to-work plan. This agreement does not supersede any existing company policies, collective bargaining agreements or applicable legislation. It is developed in good faith that all parties will conform to the spirit and intent of returning Jane to work in a manner that maintains a balance between health and productivity.

#### **To allow a successful return-to-work for Jane, the following accommodations are requested:**

- A graduated return-to-work plan.
- Jane will begin with a nine-week plan, but retain flexibility for a few additional weeks if necessary.
- The suggested graduated return-to-work plan is as follows and will begin April 6, 2024 (next page):

<b>Start Date</b>	<b>Duration</b>	<b>Plan</b>
April 6, 2024	2 weeks	<ul style="list-style-type: none"><li>• 3 hours per day, 5 days per week – 9 am to 12 pm</li><li>• In office work only</li></ul>
April 20, 2024	1 week	<ul style="list-style-type: none"><li>• 4 hours per day, 5 days per week – 9 am to 1:00 pm</li><li>• No lunch break</li></ul>
April 27, 2024	1 week	<ul style="list-style-type: none"><li>• 5 hours per day, 5 days per week – 9 am to 2:30 pm</li><li>• ½ hour for lunch</li><li>•</li></ul>

Start Date	Duration	Plan
May 4, 2024	1 week	<ul style="list-style-type: none"> <li>6 hours per day, 5 days per week – 8 am to 2:30 pm</li> <li>½ hour for lunch</li> </ul>
May 11, 2024	1 week	<ul style="list-style-type: none"> <li>7 hours per day, 5 days per week – 7:30 am to 3:00 pm</li> <li>½ hour for lunch</li> </ul>
May 18, 2024	Ongoing	<ul style="list-style-type: none"> <li>8 hours per day, 5 days per week – 7:30 am to 4:00 pm</li> <li>½ hour for lunch</li> </ul>

**Throughout the graduated return-to-work plan, Jane requests the following:**

- A short meeting to review and clarify expectations.
- Assigned tasks will be given in writing on a weekly basis.
- After the first two weeks, someone who is knowledgeable about regulations will accompany and assist Jane with her first assignments.
- Her supervisor will be available to answer questions and update Jane on processes and procedures that have changed during Jane's leave.

**At the end of the graduated return-to-work plan:**

- After two weeks of full-time work, Jane will assume responsibility for her work plan.
- Subject to approval by management, Jane will be given opportunities for training to improve and/or update her knowledge base.
- Jane will continue to receive directives and instructions in writing to avoid misunderstandings.

- Jane will continue to have regularly scheduled 10 minute check-in meetings with her supervisor to review workplace issues regarding her accommodations. Other issues can be discussed at weekly team meetings.
- If Jane begins to cry at work, the workplace will allow her a few minutes to compose herself without worrying or reacting to it.
- At the [formal] meeting scheduled from 10:00 am to 2:00 pm, Jane’s manager will clarify all policies and procedures especially those relating to expenses, attendance management, sick leave, and benefits.
- Jane will clear up past expense issues.

**To assist with this process, Jane has committed to:**

- Assuming the responsibility of advising her supervisor if the tasks are too little or too much for her to accomplish during the graduated return-to-work plan.
- Doing good work.
- Showing up on time.
- Leaving a note on her chair and removing herself from the workplace for a few minutes to compose herself if she becomes upset.
- Recording answers to questions around clarification of processes and procedures to reduce the time required of her supervisor to explain tasks.
- Inputting and supplying receipts for all expenses and time sheets on a daily basis.
- Paying all personal expenses and cell phone charges on the credit card bill.

**In all work situations, new issues arise around workplace relations, performance management, and problem solving. To assist in making this ongoing process successful, Jane requests the following from her supervisor:**

- To balance positive reinforcement with necessary constructive criticism.

- Use a solution-focused approach to performance management.
- Refrain from speaking in anger. When either party is upset, they will wait until they are calm enough to have a civil conversation.
- Remain respectful of all parties in all interactions.

This agreement is based on good faith and going forward with a fresh start. To succeed, all parties must agree to work towards the common goal of a successful return-to-work plan.

[Signature] \_\_\_\_\_

Jane Doe

Employee of Your Organization

Date: April 6, 2024

## Accommodations for People with Mental Health Considerations

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[www.mentalhealthworks.ca](http://www.mentalhealthworks.ca)

There is no comprehensive list of accommodation for people who are dealing with mental health issues. Accommodations tend to be based on the individual needs of Employees as well as on the resources available to the Employer. In some instances, a small Employer will be unable to provide the same type of accommodation as a larger Employer. In most cases, accommodations are inexpensive and involve workplace flexibility rather than capital expenditures.

It is important to note that the following are suggested examples only. Given the scope and diversity of psychiatric disorders, limitations may affect cognitive, emotional and social functioning. These limitations may be temporary or intermittent, and, in some cases, may require long-term accommodation. Consequently, each Employee's situation must be reviewed on a case-by-case basis.

The most commonly used accommodations for people with mental health problems include the following:

### Flexible scheduling

- Flexibility in the start or end of working hours to accommodate effects of medication or for medical appointments.
- Part-time work (which may be used to return a worker to full-time employment).
- More frequent breaks.

### Changes in supervision

- Modifying the way instructions and feedback are given. For example, written instructions may help an Employee focus on tasks.
- Having weekly meetings between the supervisor and Employee may help to deal with problems before they become serious.

### Modifying job duties

- Exchanging minor tasks with other Employees.

### Changes in training

- Allowing the person to attend training courses that are individualized.
- Allowing extra time to learn tasks.

### Using technology

- Providing the Employee with a tape recorder to tape instructions from a supervisor, training programs and meetings, if they have difficulty with memory.
- Allowing an Employee to use headphones to protect them from loud noises.

### Modifying the workspace or changing the location

- Allowing an Employee to relocate to a quieter area where they will be free from distractions.
- Allowing an Employee to work at home.

Remember to place the needs and expectations of the complainant at the center of your advocacy process. More than anyone else, they will know what accommodation they need to allow them to work productively. Allow them to give honest feedback about their experiences and needs. Document learning from your reflection and use them to help create positive change in your advocacy work and in influencing organizational processes to better support a trauma-informed, human-centric approach to advocacy

## Situations – Applying What We’ve Learned

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Please read the short scenario your group has been assigned. Take 10 minutes to answer the following questions to the best of your ability. Be careful of stigmatizing or stereotyping when you have your discussion. Be prepared to make a brief report on each question.

- ❑ What problem(s) need(s) your attention here?
  - ❑ What considerations should you be making as a Union representative?
1. A racialized woman who has been on leave due to stress approaches you for assistance. She has been back to work for a week now on a graduated return to work - working 4 hours a day, per her doctor's recommendation. She requires no additional accommodation and is able to carry out the full range of duties required to do her job. She feels that she is being patronized by her male supervisor who keeps checking to see if she needs help with her work and suggesting she may need a little more time off.

2. You have been asked to assist in developing a return-to-work plan for a member who has been absent from work for 2 months due to a leg injury which has left him with a disability. The member is a self-professed recovering alcoholic. During return-to-work plan discussions between you, the member and the Employer, the Employer has asked to incorporate assurances that the member will not be late for work. You have asked to see the member's personnel file and the only record of lateness on file dates back 4 years; just before the member got treatment for alcoholism.
3. A member with a disability comes to you for assistance. She is a young pregnant woman (7 months along), who is hard of hearing. Her hearing disability is getting worse, and she wants to be accommodated so that she can participate in meetings and conference calls.

You ask for a meeting with the Employer to discuss accommodation. They keep putting off the meeting and seem reluctant to make any decisions on accommodation until after the member's maternity leave is over. At one point, the Employee's supervisor suggests to her she might consider taking leave now instead of waiting to take it just prior to her due date.

4. An Indigenous member comes to you for assistance. He has been passed over for a new assignment (at the same classification level), that requires a lot of report writing. The member has a learning disability and requires more time to complete written tasks. In addition, because he is easily distracted by noise, he requires access to a quiet space when doing written work. Currently, his assignments do not involve a lot of report writing so the requirements for accommodation are minimal. You meet with the Employer to discuss why the Employee has not been considered for this assignment. They suggest that the member is not qualified for the assignment and that he takes a course in report writing if he wants to be considered for such assignments in future. They also suggest he may want to upgrade his education if he wants to get ahead in the organization.

5. A long-term member in her 60's has come to you for assistance. She works as a Project Coordinator in a large federal government department where she has been working for 8 years. The member's supervisor has met with her about work-related matters, informing her that her work is no longer up to par and suggesting to her that it might be time for her to consider retirement. A couple of the member's colleagues have come to you over the past weeks concerned that the member is acting out of character. She is having trouble meeting deadlines and seems unable to retain information unless it is written down. She is unfocused and spends more time popping into her colleagues' offices for a visit than she does working.

They are not happy with the interruptions or the lack of leadership that the member, in her capacity as Project Coordinator, is exhibiting and they are tired of having to pick up the slack and cover for her. They have noticed that others in the department have, on occasion, made unkind and sarcastic remarks about the member, some related to her age. She has confided to you that she has seen a specialist and is undergoing a series of tests for her mental health. However, she is adamant that she is not yet ready or financially prepared for retirement and wants your help.

6. A young member comes to you for assistance. She works at the reception desk at a busy hospital. She is in the midst of a transitioning process from male to female and is anticipating surgery in about 8 months' time. About 6 months ago, the union was involved in a jointly sponsored meeting with the Employer, to sensitize staff to Trans issues and to help lay the foundation for a workplace policy protecting the rights of Trans workers. The Member has been seeing a specialist and a psychologist over the past 2 years and in recent months was diagnosed with anxiety and depression. She's been away from work for 3 months. You are meeting with her and her Employer. She has a note from her doctor saying she is able to return to her full range of duties on a gradual return to work basis over the next 3-6 months. During the meeting, the supervisor agrees to a gradual return to work but is not prepared to return her to the reception desk. The supervisor is concerned about contact with the public and patients, given the diagnosis of anxiety and depression.

Despite the doctor's recommendation, the supervisor is only prepared to have her return to light office duties with no public or patient contact. The supervisor impatiently insists that the organization has done more than enough to support the member with her transitioning process and that this is the time for the member to listen to reason. The member is adamant that she is ready to return to her regular duties per the doctor's recommendation and says that in fact, she finds working at the reception desk helps to relieve her symptoms.

7. An Inuk member comes to you for assistance. He has received a notice of discipline from the Employer. This follows a meeting held 4 months prior where he was given a letter of warning regarding chronic lateness and a series of mistakes in his patient care (approximately 4 over a 3-month period). You meet with the Member and the supervisor. The supervisor indicates that despite ongoing coaching, the member's attendance and work performance have gotten worse. He has recommended termination, and the Employer is prepared to lay the member off if he does not contest the termination. Just after the meeting, the member confides that he is suffering from post-traumatic stress related to his younger brother's death by suicide almost a year ago. He notes that he informed his supervisor about this confidentially, after the previous disciplinary hearing.

## Harassment, Discrimination and Accommodation

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### Applicable Legal Tests for Discrimination:

- First establish a “prima facie” case of discrimination (evidence, if believed, is complete and sufficient for a decision in favour of the complainant, in absence of an answer from the respondent).
- If a *prima facie* case is established, the onus then shifts to the respondent to provide a satisfactory explanation that demonstrates either the conduct did not occur as alleged or was non-discriminatory.
- Conduct may be found to be non-discriminatory if the Employer establishes that it is based on a bona fide occupational requirement (a rule or practice established in the honest belief that it is necessary to accomplish a valid workplace goal and if the Employer establishes that accommodation of the individual’s needs would impose undue hardship considering health, safety and cost.)
- Bear in mind the principles set out by the *Meiorin* and *Grismer* decisions.

### Harassment on the basis of disability:

- Conduct manifested through repeated words, actions or gestures that is vexatious, demeaning or insulting and is directed at another person on the basis of their disability.
- The severity of the impugned conduct must be assessed from the perspective of the reasonable victim.
- The conduct is, by nature, extraneous or irrelevant to the **legitimate** operations and business goals of the Employer
- The harassment generally requires an element of persistence or repetition, although certain circumstances in a single incident may be enough to create a hostile work environment. The more serious the conduct and its consequences are, the less repetition is necessary; conversely, the less severe the conduct, the more persistence will have to be demonstrated
- Harassment may be considered discrimination, especially if based on one of the protected grounds.

### **Examples of harassment on the basis of disability**

- Jokes or verbal attacks based on a person's disability
- Constant questioning of a person's contribution, value or worth as a result of their disability
- Complaints or derogatory remarks about the accommodation provided to a person with a disability
- Communicating and perpetuating stereotypes about persons with disabilities
- Continuously spreading rumours or talking about the person's disability behind their back

### **Examples of discrimination against persons with disabilities**

- Refusal to accommodate a person's disability in a reasonable fashion and timely manner
- Making negative assumptions about a person's physical, mental or intellectual abilities because they have a disability and, as a result, denying that person opportunities
- Failure to design buildings, services, course requirements, etc. to take into consideration the needs of persons with disabilities

### **Recourse routes for Harassment**

Personal Harassment:

- grievance as per the collective agreement
- health and safety provisions in legislation
- often an internal investigation process

Prohibited Grounds:

- grievance as per the collective agreement
- human rights complaint process
- health and safety provisions in legislation
- applicable internal processes

## Tim Day Case Summary

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*Canadian Human Rights Tribunal  
Tim Day and Canadian Human Rights Commission and Canada Post Corporation 2007 CHRT 43*

Tim Day was hired as a mechanic by Canada Post Corporation in April of 1986. In 1992, he was promoted to an EL5, a technical specialist position with supervisory responsibility. In the fall of 1995, Mr. Day experienced a major depressive episode. He returned to work on a gradual basis and has had problems with Canada Post management over a number of issues since.

Mr. Day raised **ten allegations** of discrimination during the time period from April 2001 to August 2006. He alleged violations under the Canadian Human Rights Act; specifically, Section 7 related to discriminatory practices based on disability, and section 14 related to harassment on the basis of disability.

### **The Tribunal looked in to the following issues:**

- 1. Did Canada Post discriminate against Mr. Day with respect to the requirement to wear steel toed boots in April of 2001?**
  - Mr. Day had a foot condition that prevented him from wearing steel toed boots on a continuous basis. He wore running shoes and changed into steel toed boots only in areas where there was a risk of injury. In January 2001 a memo went on circulation requiring all Technical Service Employees wear their steel-toed boots at all times. Mr. Day was asked to update his medical note and issued a 24-Hour Notice of Interview to meet with the Employer to discuss his inability to wear steel-toed boots. Barring no alternatives, his regular practice was continued. Mr. Day felt that being called into an interview constituted adverse differential treatment on the basis of his disability.
- 2. Did Canada Post discriminate against Mr. Day when it placed him on sick leave and removed him from the workplace in November of 2001?**
  - On November 16, 2001 Mr. Day was due to attend an interview regarding work performance concerns. It was cancelled as Mr. Day was sent home and placed on sick leave.

- On November 21, 2001, Mr. Day returned to work with a note from his regular doctor that he was fit to return to work. At the end of his shift, his Supervisor called out to him across the floor then went to meet him. He was told that his doctor's note was insufficient and was escorted from the building by his Supervisor with no other clarification or explanation. Canada Post had received a report from their doctor (*who was also seeing Mr. Day*), which outlined a safety concern with respect to Mr. Day's fitness for duty. This report had been sent to the Employer but not to Mr. Day, nor to his regular doctor; who both received it November 23, 2001.

**3. Did Canada Post discriminate against Mr. Day with regard to preventative maintenance reports in January of 2002?**

- Mr. Day was required to assign and supervise preventative maintenance duties on the day shift. Part of his job was to collect and hand in reports regarding the status of work assigned on Mondays which was to be completed by the end of the week. In 2001, procedures regarding submission of reports changed from submitting them on the following Monday, to submitting them on Friday of the same week. Mr. Day disagreed with the change and with the manner in which the change was implemented. He did not hand in the reports as required and was subsequently interviewed and instructed to comply. He neglected to do so and was given a 3-day suspension without pay. He felt that he was being treated differently from other Employees on the basis of his disability.

**4. Was denial of Mr. Day's request to exchange shifts with a co-worker in January of 2002 discriminatory?**

- From 1997 until April of 2002, Mr. Day was relieved of his requirement to work his night shift rotation at Canada Post whenever he presented a doctor's note indicating that his disability prevented him from doing so. After April of 2002, there was a dispute between Mr. Day and Canada Post with regards to whether or not he continued to require this accommodation.
- In January of 2002, Mr. Day attempted to switch his twelve week block of afternoon shifts with a fellow EL5 who was due to go on days. He was denied this request and felt that the denial constituted adverse differential treatment on the basis of his disability. Shift changes did occur from time to time up until April 2002 – where an arbitration decision required the Corporation to rotate the EL5's through all 3 shifts.

**5. Was the requirement that Mr. Day work the night shift in April 2002 discriminatory?**

- From 1997 – April 2002. Mr. Day was not required to work night shifts, with the stipulation that he present a note from his doctor on those occasions he was scheduled to do so. Sometime in February 2002, Mr. Day had been informed that Canada Post expected that the new drug treatment program he was following would result in a return to work, including night shifts. On March 18, 2002 Mr. Day sent Canada Post a letter saying his doctor had advised him not to work nights; however, this was not substantiated by a doctor's note. In April 2002, Canada Post insisted he work night shift because in their view, the most recent medical evidence, based on review of Mr. Day's file by the Employer's doctor and subsequent consultation with Mr. Day's doctor, indicated that his disability did not prevent him from doing so. Mr. Day disagreed. On April 15, 2002, CUPW faxed a note from Mr. Day's doctor stating "this patient is advised not to work nights for medical reasons". Mr. Day was asked to provide more medical information about his inability to work night shift and he did not. On April 22, 2002, Mr. Day was offered 3 options regarding his rotation onto night shift; take leave without pay or annual leave for the full duration of his scheduled night shifts, work the regular night shift, or work a modified shift from 6 p.m. to 2 a.m.
- He refused all options and did not work the night shift in April 2002 at all. On April 25, 2002, Mr. Day was given a 3-day suspension as a result. Mr. Day felt he was discriminated against.

**6. Was the termination of Mr. Day's employment with Canada Post in May of 2002 discriminatory?**

- Mr. Day did not report for work on the night shift after his 3-day suspension; instead, he called in sick on May 1, 2002 and saw his doctor on May 2, 2002. After the visit, his doctor offered to call-in to the Employer's doctor instead of writing a note for his absence. Mr. Day's doctor spoke to the Employer's doctor on May 7, 2002. Mr. Day had been served a 24 Hour Notice of Interview for his failure to report to work on May 1, 2002. He did not attend due to illness. On May 14, 2002 Mr. Day informed the Post Office that he had been to see his doctor, was having adjustments made to his medication, was waiting for referral to a psychiatrist and that his doctor was filling out forms for disability insurance which would be forwarded presently. These forms did not materialize.

- On May 22, Mr. Day received a letter from his supervisor asking him to report for work or provide an acceptable explanation for his failure to do so. On May 27, 2002, Mr. Day was discharged on the basis of his failure to report for work on his scheduled shift or to provide medical documentation to substantiate his illness. Mr. Day grieved the discharge in May of 2002. Pursuant to a settlement agreement, he returned to work in May of 2003.

**7. Did Canada Post discriminate against Mr. Day in November of 2004 when it eliminated his EL5 position?**

- In the fall of 2004 Canada Post informed Mr. Day that two out of the four EL5 positions in the Glanford plant (where he worked in Victoria B.C.), were being eliminated as a result of a staffing review revealing insufficient work at the plant to warrant the number of technical service staff employed there. Because Mr. Day was less senior than others, his position was targeted for elimination. Mr. Day alleged the elimination of his position was based on removing him because of his disability. Mr. Day's Union representative had been privy to statements made by Mr. Day's supervisor favouring elimination of the EL5 positions as a way of getting rid of a difficult Employee – Tim Day. The Union representative sent a letter to the Employer outlining these concerns. The Director for the Canada Post in the region put the action on hold and requested a staffing review or audit of the workplace by National Headquarters. Of note, is that the Vancouver Plant, a significantly larger operation, had only 2 EL5's while Mr. Day's workplace had 4. Upon receipt of the audit, two EL5 positions were eliminated.

**8. Was the deletion of the MAM 11 position in March of 2005 discriminatory?**

- As a result of being declared surplus and refusing assignments outside of the Victoria area, Mr. Day was assigned to a PO 4 (mail sorter) position – which he objected to as he felt it was demeaning in that he could not use his technical skills in the job. He subsequently applied for a mechanics job MAM11 B-2 that would be vacant due to pending retirement of a colleague. On the same day the request was made, the Union received notice that the MAM11 position had been eliminated.
- The manager stated that he had made the decision sometime earlier but that he had forgotten to inform the Union of this decision in writing at the time. He clarified that the decision had been taken after old machinery had been replaced by one that required less maintenance.

- Mr. Day felt that his disability was a factor in the decision to eliminate this position. He further argued that in the event Canada Post established otherwise, Canada Post's refusal to keep the position open for him deprived him of an opportunity to assume a position that would have accommodated his disability.

**9. Was the assignment of Mr. Day to a relief letter carrier position in 2006 discriminatory?**

- In May 2006, Mr. Day bid for a letter carrier position in Victoria. He was successful in obtaining the position and route he wanted. Shortly thereafter, there was a reorganization of letter carrier routes and new routes were to be determined by a seniority bid. Mr. Day was on disability leave. During his leave, it was agreed that contact between Mr. Day and the Employer would take place through the Union. The Union agreed that they had likely been informed of the bid, but were unclear about whether or not that information had been passed on to Mr. Day. Mr. Day did not bid and was therefore placed on a relief route – one of the least sought after routes. He alleged that the assignment to a relief route was discriminatory.

**10. Was Mr. Day harassed on the basis of his disability?**

- Mr. Day argued that all of Canada Post's actions in the present case constituted harassment on the basis of disability.

## **Michelle Dawson Case Summary**

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*Canadian Human Rights Tribunal  
Michelle Dawson and Canadian Human Rights Commission and Canada  
Post Corporation 2008 CHRT 41*

Ms. Dawson started her career at Canada Post in December 1988 as a full-time letter carrier. Ms. Dawson was diagnosed as being autistic for the first time in the early 90's. She was a very good Employee with a perfect record. In April 1999, Ms. Dawson's doctor wrote a letter to Canada post. In the letter, he revealed Ms. Dawson's diagnosis and outlined the need for flexibility in scheduling and work job areas as an accommodation for Ms. Dawson. Once her diagnosis was disclosed to Canada Post, things began to go wrong.

On August 9, 2002, Ms. Dawson filed a human rights complaint with the Canadian Human Rights Commission alleging that Canada Post discriminated against her on the basis of disability, in breach of section 7 of the Canadian Human Rights Act (CHRA). She alleged that Canada Post acted in a discriminatory manner and subjected her to harassment contrary to section 14 of the CHRA and that they retaliated against her for having filed a previous human rights complaint, contrary to section 14.1 of the CHRA.

Ms. Dawson represented herself at the hearing without council. She was very critical about how the Tribunal dealt with her requests for accommodation during the hearing. She also stated that the Commission was not co-operative but adversarial.

### **Previous Complaint:**

For the purposes of providing background to the August 2002 complaint (not to be determinative), the Canadian Human Rights Tribunal included in their decision, information regarding a complaint filed by Ms. Dawson in 2001.

- In July 1999, some postal workers expressed concerns about Ms. Dawson coming to work with self-inflicted wounds. This was not the first time she had done so.

- Management sent the director of the Employee Assistance Program to the workplace to meet with Employees and subsequently write a report (The Cantin Report). The report was distributed to various Canada Post managers. This was followed by a workplace meeting with a company nurse in order to provide reassurance to postal station Employees. Ms. Dawson found out about the meetings and the report in November 2000 whereupon she called upon the Employer to have it removed and revoked. The Post Office followed with 2 letters of apology to Ms. Dawson; both rejected. Ms. Dawson's subsequent complaint was settled August 16, 2001 which included payment of money to a charity, and apology to Ms. Dawson. Ms. Dawson was frustrated with delays in meeting the terms of her settlement.
- Ms. Dawson was able to explain her settlement to her co-workers at a five-minute floor meeting on September 6, 2001. After the floor meeting, Ms. Dawson found her colleagues to be respectful and helpful with regards to her disability and the subsequent accommodation required.

**Ms. Dawson raised a number of incidents that the Tribunal addressed.**

**In each case, they made determination as to:**

- 1. whether or not Ms. Dawson had been discriminated against due to her disability**
- 2. whether or not Ms. Dawson had been harassed due to her disability, and**
- 3. if the actions constituted retaliation for a previous human rights complaint she had raised.**

**1. Whether or not the CHRA finds that people with autism are protected by human rights legislation.**

- Ms. Dawson and her specialist provided evidence with regards to autistic people and how they are perceived and treated. Ms. Dawson explained that autistic people process information differently and therefore, require different kinds of information. She noted that there are kinds of information that autistic people cannot work with at all, but alternatively, there are kinds of information that others cannot work with but that autistic people can.

- She explained that autistic people are truthful and take things literally. They need to know what rules apply and, if they aren't going to apply, they need to be told and not have the rules change day after day. She spoke about her self-inflicted injuries as a coping mechanism and that she had exhibited them prior to 1999, with no complaints.
- Ms. Dawson's specialist testified that violence is absolutely not a problem associated with autism. He noted that non autistic people have a poor understanding of autistic people. He testified that lying is exceptional in autistic people and exaggeration or exploitation of their disability for gain is foreign to them. He noted that complete arbitrariness or appearance thereof, is something that autistic people cannot deal with. But within predetermined rules, they can function well. He noted that autistic people process information in a more precise way than non- autistic people. He characterized Ms. Dawson as a very high functioning person who is particularly vulnerable to malevolence of her peers. He said that Ms. Dawson had a habit of self-injuring; a sign of major psychological suffering and a way for autistic individuals to cope with anxiety.

## **2. Allegations related to specific individuals.**

- On May 27, 2002, Ms. Dawson was reprimanded by the Plant Superintendent. She had been raising issues with management related to her settlement and then repeatedly inquiring of management what she had done wrong in relation to issues she was raising.
- On May 24, she was informed by a management representative that the problem was not that she was doing anything wrong; the problem was that she was different.
- In a phone conversation with the same woman, Ms. Dawson was told that she had committed violent acts involving bloodshed on her work floor in front of co-workers, that she had mutilated herself in front of her co-workers and that the big problem was autism. On October 22, 2001, the Ethics Officer at Canada Post told Ms. Dawson that she was violent, that the problems in her workplace were entirely the result of her disability and that in the absence of her autism, there would be no problem. The Director of Human Resources for Canada Post also stated on October 24, 2002, that she believed Ms. Dawson to be violent.

### **3. A meeting that took place in Ottawa on January 14, 2002.**

- After the September 6, 2001 settlement of her first complaint, Ms. Dawson grew increasingly frustrated with delays in having the terms of settlement enacted. She phoned and followed-up with different management representatives, on a number of occasions. Managers compared notes about these conversations and agreed that they needed some help to better communicate with Ms. Dawson. In doing so, they hired psychologist, Natalie Poirer, to make a presentation at the national level to Canada Post managers and CUPW executives. Ms. Dawson was not invited to attend or provide input, nor, to her knowledge, were any other autistic peoples who might have provided some expertise about the experience of autistic peoples. The Union asserted that it had tried, on many occasions, to have Ms. Dawson present at the meeting, but to no avail.
- During the meeting, Ms. Poirer was very negative about autistic people, making comments to the effect that autistic people were selfish and did not have any feelings. The handout provided to meeting participants (which was entered into evidence), put a lot of stress on the negative.
- During the course of the meeting itself, Ms. Poirer acknowledged familiarity with Ms. Dawson's file – something she had apparently denied at the outset of the meeting when she was questioned by the Union. What came to light after the meeting, through discussion with Ms. Dawson, is that Ms Poirer had been Ms. Dawson's psychologist in past. Once Ms. Dawson found out about Ms. Poirer's role in the meeting, her Union wrote 2 letters to Canada Post (January 15, 2002, and January 16, 2002), voicing outrage and concern. Ms. Dawson felt she had been violated and discriminated against.

### **4. Her medical file.**

- After repeated denials of its existence by the Post Office, Ms. Dawson testified that Canada Post kept a medical file on her which she gained access to in October 2001. She asserted that the file was grossly biased and inaccurate and constituted harassment against her. Due to mistrust of the parties, Ms. Dawson refused to enter any part of the medical file into evidence.

## 5. Work-Related Injury

- Following the meeting in Ottawa, Ms. Dawson declared a harassment-based work accident on January 30, 2002 to the CSST, indicating as date of the accident January 14, 2002. Canada Post undertook an investigation of the alleged harassment and concluded there was no harassment. Ms. Dawson went back to work on February 6, 2002. She was not in great shape, but was doing her work. Ms. Dawson submitted doctors' notes from her doctor and her specialist. They included statements from her doctor that; she was "*emotionally fragile*" and from her specialist that "*being autistic, with superior intelligence associated with chronic depression related to adaptation problems due to her handicap...Ms Dawson is capable of good judgment, has good sense of her condition, that she is lucid and capable to make decisions by herself, able to speak about her condition and that no decision concerning her condition should be made without her consent*".
- Canada Post wanted a second opinion; referring to Ms. Dawson being emotionally fragile and inference of chronic depression. Ms. Dawson clearly did not understand or support the reasons for asking for a second opinion. CUPW intervened on Ms. Dawson's behalf. Management reconsidered and informed Ms. Dawson that they wanted permission to contact her specialist for follow-up. Her accident claim referred to harassment and made no note of chronic depression. Her specialist's note was written to inform CSST of her diagnosis, not as an assessment of her workplace accident. She declined.
- On March 11, 2002, Canada Post scheduled a medical evaluation of Ms. Dawson for March 15, 2002. She was informed of this appointment on March 13, 2002 and told it was related to depression and a hernia – neither having to do with her workplace accident / harassment. Ms. Dawson missed the appointment due to confusion related to misspelling of the specialists' name. The appointment was rescheduled for March 28, 2002. In the interim, Ms. Dawson did internet research on the Canada Post specialist to find that he was not an expert in autism, but in violent criminal behaviour. She declined again to attend. On June 14, 2002, the CSST ruled in favor of Ms. Dawson's claim. After the CSST decision, Canada Post decided not to have Ms. Dawson go through medical evaluation with their specialist after all.

## 6. Tape-Recording Conversations

- In May 1999, shortly after she disclosed her diagnosis, Ms. Dawson began taping conversations with management. This took place with their knowledge and permission. She stopped taping at the end of 1999 (or early 2000), but in the fall of 2001 she asked for permission to start taping again. Management declined, noting concern from some managers at the prospect. On February 5, 2002, Ms. Dawson's doctor wrote a note that it would be useful for Ms. Dawson to tape all conversations with management. A subsequent letter written on February 12, 2002, submitted from her specialist, underscores the need for Ms. Dawson to tape-record the conversations that take place between herself and Canada post as she is vulnerable to the malevolence of her peers ... and furthermore, would allow Ms. Dawson to refer to the verbatim of what was said, not approximations.
- Her specialist considered the request related to Ms. Dawson's cognitive handicap and asked that it be addressed with the same respect as are requests made by people who have a medical disability.
- Canada Post asked to speak to Ms. Dawson's physicians in order to find another type of accommodation, such as putting in writing what had been said in the course of a conversation. On May 23, 2002, Ms. Dawson gave her authorization to Canada Post to contact her specialist. The Post Office's authorization to tape conversations with management came in June 2002.

## Template - Reintegration and Accommodation Plan

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**PLAN FOR:** (name and contact information):

**Supervisor's name:** \_\_\_\_\_

It is understood by the parties that changes to this plan will be based on doctor's recommendation and discussed by all parties. A copy of the plan and/or amended plan will be forwarded to the undersigned.

**Plan goals:**

**Work Schedule:** (if graduated or different from the norm)

**Worker Expectations/needs and obligations (includes accommodation measures):**

**Employer Expectations and obligations (includes implementation of accommodation measures):**

**Monitoring of the plan:**

**Signatures of the parties:**

\_\_\_\_\_  
**Employee**

\_\_\_\_\_  
**Manager**

\_\_\_\_\_  
**Union Rep**

\_\_\_\_\_  
**Human Resources**

**Date:** \_\_\_\_\_