

## Seniority vs "duty to accommodate"

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As a steward, I know that the union and the employer sometimes have to find creative solutions to adapt to employees' special needs in order to make it possible for them to continue working. Can you explain how "duty to accommodate" works?



□Duty to accommodate□ language in collective agreements is usually put in place to facilitate access to work for disabled workers.

The Supreme Court of Canada has said that unions and employers have a duty to accommodate. Numerous arbitration awards have dealt with the tensions between negotiated provisions in a collective agreement and the duty to accommodate. This column examines when a union and employer may circumvent the provisions of a collective agreement to facilitate an accommodation.

When does the duty to accommodate override the collective agreement?

As a starting point, disruption of the normal workings of a collective agreement should only come as a last resort to facilitate a duty to accommodate.

Recent awards say that it is unreasonable for an employer to simply override the provisions of a collective agreement without considering other alternatives that are allowed in the provisions of the collective agreement. The employer must consider options that are not unduly unfair to the rights of other employees.

Can employees use duty to accommodate to get a job promotion?

Where disabled employees are already adequately accommodated, they are precluded from using the duty to accommodate as a springboard to job promotion and advancement, or automatic entitlement to a job vacancy.

Accommodation is only reasonable to the extent that it does not cause the employer, the union, or the disabled employee □undue hardship.□ While undue hardship is measured by primarily economic factors for the employer, it is measured in terms of impact on the rights of other employees for the union.

What are the rules when alternative work and modified duties are not available?

Where modifications to the disabled employee's own job or alternative work within the bargaining unit are not available, a union and employer have a duty to consider overriding the provisions of a collective agreement as a last resort to facilitate accommodation.

In cases where alternative work or modified duties have not been available, the duty to accommodate has worked to override the terms of a collective agreement, but only after consideration is given to the effect on

other employees. The placement of less senior employees in vacant positions, for example, has been upheld where that accommodation caused the least amount of interference with the rights of other employees.

What are the rules for bumping and layoffs in the context of the duty to accommodate?

In the absence of express language in the collective agreement, a disability does not give employees entitled to an accommodation additional rights such as the right to bump incumbent employees or protection against layoff.

The duty to accommodate does not protect a disabled employee from a layoff for legitimate business reasons. Where the employer has not thoroughly canvassed all available options or assessed the degree of disability for the grievor, however, the result may be quite different.

In the context of bumping, a recent decision has held that a junior disabled employee could not bump a more senior employee, *unless* the employer had first conducted a thorough review of the workplace and could come up with no other reasonable accommodation.

Is an employee entitled to accommodation outside of the bargaining unit?

Recent cases have held that an assignment outside of the bargaining unit is only acceptable after all other reasonable possibilities of accommodation within the unit have been exhausted.

The employer must make a concerted effort to review with the employee and the union the positions the disabled employee can perform, with or without modification, before considering an assignment outside of the unit.

Where less drastic accommodations □ in terms of the impact on the disabled employee are available within the bargaining unit □ an employer may not impose accommodation outside of the bargaining unit simply because that is least disruptive to the employer's operations.

Where the only reasonable accommodation for a disabled employee is in a non-bargaining unit position, the collective agreement cannot prevent this accommodation. However, a bargaining unit position, and the collective agreement protection it provides, is an important job benefit that is not to be lightly interfered with.



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