

BULLETIN

Duty to accommodate and "undue hardship"

April 1, 2006

The Report: April / May 2006 vol.27 num.2

by RITU MAHIL



I am in a Grade I position under the Health Science Professionals Collective Agreement, and have been off work for the last nine months due to a disability. I am now ready to return to work, but will require some accommodation due to the ongoing nature of my disability. I understand that my employer has posted a Grade IV position in my discipline.

That position primarily involves desk work, and would be perfect for me given some of my physical restrictions. I know that a few of my colleagues who are senior to me have applied for the posted position. Can I be placed directly into that Grade IV as an accommodation without having to go through the posting procedure?



This will depend on whether your employer can accommodate your physical restrictions in your own position. Where modified duties or alternative work is already available for a disabled employee in his/her own position, further accommodation which interferes with the provisions of a collective agreement and the rights of other employees may not be reasonable. The situation is, of course, different where appropriate alternative work or modified duties is not readily available.

In an accommodation situation, the employer's duty is first to canvass thoroughly all available options before implementing an accommodation that requires going outside of the terms of a collective agreement.

In searching for an accommodation in a return to work situation, there is a duty placed on all parties ... the employer, the union, and the disabled employee ... to be reasonable. It is not considered reasonable for an employer to implement the easiest accommodation possible, particularly if alternatives to the accommodation are available and the chosen accommodation affects the rights of other employees.

Accommodation is therefore 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.

A number of recent awards have suggested that disruption of the normal workings of a collective agreement should only come as a last resort to facilitate a duty to accommodate. Recent awards also indicate that it is not reasonable for an employer to simply override the provisions of a collective agreement, such as seniority and posting procedures, without first considering other alternatives that respect the provisions of the collective agreement.

Thus, your employer, at least initially, has an obligation to consider options other than the Grade IV position given the impact that putting you directly into that job would have on the seniority rights of other members.

Put another way, the employer is required to consider whether the accommodation you require can be achieved without disturbing these rights. The employer cannot prematurely cease its efforts to look for other viable options simply because the Grade IV position is vacant.

It is thus not reasonable for the employer to simply implement the easiest accommodation possible, particularly if the accommodation impacts on the rights of other employees. Instead, your employer is obligated to canvass viable options through which it might accommodate a disabled employee. The employer must consider options that do not create undue impairment of the rights of others.

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.

The duty to accommodate should not be used to override seniority rights in job promotion cases. The seniority rights of the other members of the bargaining unit are extremely important. If you are placed directly into the Grade IV job, this will preclude the other members from exercising those rights.

If it is possible for the employer to accommodate you in your own position but instead places you into the Grade IV position without completing the selection process under the collective agreement, this suggests that there would be "undue hardship" to the other members of the bargaining unit.

A minor inconvenience to the other members may not constitute undue hardship, but the rights of other employees must be considered when any form of accommodation is contemplated. Accordingly, employers are required to seek accommodations for returning employees that interfere as little as possible with the rights of the other members of the bargaining unit. 

Ritu Mahil is HSA legal counsel.

Type:

[The Report](#)

- [Print](#)
- [PDF](#)

180 East Columbia
New Westminster, BC V3L 0G7

Website
www.hsabc.org

Telephone 604-517-0994
1-800-663-2017