

AN HR PROFESSIONAL'S GUIDE TO NAVIGATING THE ACCOMMODATION OF MENTAL HEALTH DISABILITIES



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L E G A L



One in three Canadians will experience a mental illness at some point in their lifetime,¹ so it comes as no surprise that mental health has become a mainstay in Canadian public discourse. An issue with wide-ranging implications, mental health also has a direct impact on Canadian workplaces. In fact, in any given week, 500,000 Canadians are unable to work due to mental health problems or illnesses.²

In part due to its pervasiveness, the duty to accommodate mental health disabilities is one of the most important human rights issues affecting workplaces. It is also one of the most challenging for employers to navigate effectively given the intricacies of each situation. Moreover, if employers fail to fulfill their duty to accommodate mental disabilities, they may expose themselves to significant legal liability.

Given the complexity of the topic, many questions naturally arise: how should the accommodation process be handled? What are the risks of not accommodating your employees? What constitutes the point of undue hardship? How do you know whether you've done enough to fulfill your duty to accommodate up to the point of undue hardship?

This white paper aims to clarify the duty to accommodate as it applies to mental health disabilities in the employment context. After reading this white paper, human resources professionals will have a clearer understanding of:

- The state of the law surrounding an employer's duty to accommodate an employee's disability up to the point

of undue hardship

- Potential legal risks in failing to accommodate an employee's disability
- Influential factors that inform whether the duty to accommodate disabilities has been fulfilled

An Employer's Duty to Accommodate Disabilities: The State of the Law

In the context of human rights and discrimination, a mental disorder is considered to be a disability.³ In Canada, it is unlawful for employers to discriminate on the basis of disability in the context of employment. In addition to this, employers have a duty to create a workplace that is free from harassment on the grounds of disability.

What Constitutes Discrimination?

Most employers are aware that it is discriminatory to fire an employee or to deny them a job or a promotion simply because of their disability. Less well-understood is the concept of "constructive" or "adverse-effects" discrimination. Constructive or adverse-effects discrimination occurs when a rule, requirement or policy results in unequal treatment on the basis of disability.

Take the example of an employer that has a policy requiring all employees to work late on Tuesdays. Everyone is treated the same under this policy. However, the policy adversely affects



an employee who attends a support group meeting on Tuesday evenings as part of his treatment for a mental health disability.

While it is not the employer's intention to discriminate, the effect of the policy is nevertheless discriminatory on the basis of disability. Discrimination can take place without an employer's intent to discriminate, which emphasizes the need for employers to be vigilant and proactive in ensuring that they are fulfilling their duties under human rights law.

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What Constitutes Undue Hardship?

Employers have a duty to accommodate a worker with a mental health disability in the same way they would be required to accommodate a worker with a physical disability. However, it is not discriminatory to refuse to promote or hire someone whose disability makes them incapable of performing the bona fide occupational requirements of the job without undue hardship. Once the employer becomes aware that an employee may need accommodation, the burden rests on the employer to demonstrate that the employee cannot be accommodated without undue hardship.

However, the duty to accommodate is not limitless. For instance,

if a person's mental health disability renders them unable to attend work for an indefinite period, even after reasonable accommodation, an employer is not required to continue to employ the person.

Additionally, in the employment context, employers are not required to provide accommodations that would fundamentally alter the employment relationship. For instance, an employer would not be obligated to create a job that would engage an employee in tasks that are not useful to the employer in order to accommodate the employee.

What constitutes undue hardship will depend on the context. Unfortunately for employers, there is no set formula to determine what accommodation is appropriate in a given situation. Accommodation depends on the individual and will vary from person to person. However, courts regularly consider the following factors: cost, availability of outside funding, and health and safety.

How do Cost and Health and Safety Factor into Undue Hardship?

Employers may be able to claim that an employee cannot be accommodated without undue hardship based on cost considerations.

However, they should expect to support their claim of undue hardship with objective evidence such as financial statements

and budgets, and expert testimony. Employers are also obligated to take advantage of any outside sources of funding, such as government programs, that may be available to help defray the cost of accommodation.

It should be noted that not all cost is considered “undue”. Employers may be obligated to bear some hardship when accommodating an employee with a mental health disability. This means an employer may have to incur some of the costs of accommodation. However, employers should also be aware of the availability of government funding programs that can help to offset these costs.

Employers also have obligations under health and safety legislation to provide a safe workplace. An employer would not be expected to accommodate an employee if accommodation would require a significant risk to health and safety. The burden is on the employer to prove there is an objectively significant health and safety risk.

The Legal Risks of Failing to Fulfill the Duty to Accommodate Disabilities

Employers who fail to meet their duty to accommodate employees with mental health disabilities expose themselves to significant legal liability. Employees who believe they have been discriminated against can make a claim to the human rights tribunal, and, if they are successful, they may be awarded damages for injury to dignity, feelings or self-respect. The tribunal can also order the employer to compensate the employee for lost income. These damages can be significant.

Furthermore, if an employee is dismissed as a result of their mental health disability, they can bring a claim in court for damages for wrongful dismissal. In this case, employers can potentially be on the hook for punitive damages.

Wrongful dismissal doesn't only occur when an employee is dismissed by the employer. An employee can claim to have been constructively dismissed if the lack of accommodation makes it impossible for them to do their job.

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Apart from the legal risks, there are also business risks that arise from the failure to accommodate. Lack of accommodation can make it difficult or impossible for an employee to attend work or to fulfill the requirements of their job, resulting

in significant lost productivity. These business risks may counterbalance the costs associated with accommodation.

How can Employers Accommodate Employees' Mental Health Disabilities?

One challenge for employers when it comes to accommodating mental health disability is a lack of awareness about what type of accommodation is required. Unlike the case of physical disability, where the barrier to accommodation is often readily apparent, it is not always simple to identify the appropriate accommodation in the case of mental health and other “invisible” disabilities.

While accommodation should always be tailored to the individual circumstances of the employer and the worker, the following list suggests some possible accommodations that may be considered in the case of mental health disabilities:

- ✓ **Flexible or modified work schedule**
- ✓ **Modified break policies**
- ✓ **Alternative work assignments**
- ✓ **Working from home, or telecommuting**
- ✓ **Modified job duties**
- ✓ **Alternative supervision arrangements**
- ✓ **Short or long-term disability leave**
- ✓ **Reduced or part-time work schedule**
- ✓ **Removal of job requirements or changes to policies**

Not all accommodations will be appropriate, or even feasible, in a particular case. As well, accommodations should always respect the employee's dignity and not result in further stigma.

Working Together: Accommodation as a Shared Responsibility

Accommodation is a shared responsibility. The worker is also required to participate in the accommodation process, for example, by complying with reasonable requests for information. If a worker refuses to cooperate with the employer's good faith efforts to accommodate the employee, then it is likely that a court would find that the employer has met its duty.

Similarly, if the employer neglects to meet with a worker to discuss accommodation prior to dismissal, the employer will be found to have failed to meet its duty. This is true even if the employer believes that no accommodation is possible and that

meeting with the worker would be futile.⁴ In some cases, the employee may not believe that they have a mental health disability. This can be a difficult situation. If an employer is aware that a worker may have a mental health disability requiring accommodation, the employer has a duty to attempt to accommodate that person. However, there are limits to what the employer is able to do without the worker's cooperation. If the employee refuses to participate in a process of accommodation a court would likely find that the employer has met its duty.

Influential Factors that HR Professionals Should Consider

After applying machine learning (a subset of artificial intelligence) to hundreds of past duty to accommodate cases, we've found that there are several factors that influence the question of whether an employer has fulfilled the duty to accommodate.

Among the various factors that we've found to be influential are:



Cost of accommodation



Availability of outside funding



Health and safety issues



The employee's position



The employee's cooperation



Availability of medical evidence



Anti-discrimination policies, if any

Artificial Intelligence and Duty to Accommodate

Now, there is a platform that uses machine learning to synthesize the information from hundreds of past cases to make a prediction about how a court or tribunal would decide new situations. For example, an HR professional tasked with determining whether the employer's duty to accommodate disabilities up to the point of undue hardship has been fulfilled can use artificial intelligence-powered software in two steps.

First, the platform gathers information from the user about the situation at hand. The tool considers numerous factors, including those listed above, that have been determined to influence a

court, tribunal or arbitration panel's decision-making.

Second, the platform uses machine learning to compare the information provided by the user to patterns found in the data from previous cases decided in court. The software then provides a prediction on whether an employer would be found to have fulfilled their duty to accommodate an employee's disability. By considering all of the relevant factors and assessing those factors based on a comprehensive body of case law, the platform is able to determine, with a high degree of accuracy, how a court would be likely to rule in a particular case.

The benefits of this type of approach to HR professionals are clear. It allows them to:

- Mitigate the risk of litigation.
- Quantify risks using data-driven insights.
- Ensure employees are treated fairly.
- Standardize how issues are handled.
- Determine next steps confidently.

Of course, artificial intelligence-powered platforms can't replace professional expertise, but they can provide an objective and sound prediction of how a court would rule in new circumstances. Far from replacing HR professionals and lawyers, artificial intelligence enables them to know where they stand and make confident, timely decisions, whether that means finalizing a decision or deciding to consult internal or external counsel.

References

¹<https://www.canada.ca/en/public-health/services/about-mental-illness.html>

²<https://www.mentalhealthcommission.ca/English/what-we-do/mental-health-matters>

³*Battlefords and District Co-operative Ltd. v. Gibbs*, [1996] 3 SCR 566, 1996 CanLII 187 (SCC).

⁴*Canadian National Railway Company v Teamsters Canada Rail Conference*, 2018 ABQB 405.