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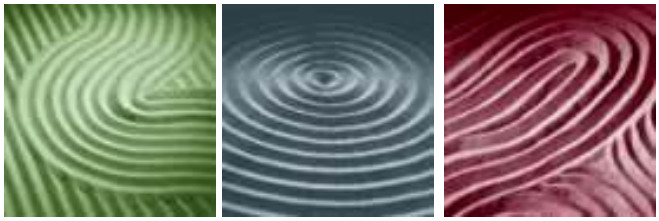

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The Duty to Accommodate: New Frontiers

Gita Anand and
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THE DUTY TO ACCOMMODATE: NEW FRONTIERS

INTRODUCTION*

Six years ago, following the Supreme Court of Canada's decision in *Meiorin,*[1] the duty to accommodate took on new meaning. In *Meiorin*, the Court articulated a three-part test to assist in determining the existence of discrimination and the scope of the duty to accommodate. The Court also directed employers to create workplace standards to reflect differences between individuals or to revise standards that have a discriminatory effect on individuals with various capabilities.

Given current and projected demographic and societal realities, the duty to accommodate is facing new frontiers. These new frontiers relate to, for example, challenges associated with increasing demands on employee time for elder and child care. Moreover, as much of the population will suffer stress or stress-related illnesses as they deal with these societal pressures, how will employers react? What is the fallout of these pressures? What will the duty to accommodate require?

This paper addresses some of the emerging trends and challenges relating to accommodation issues, particularly with respect to family status, addictions, and religious beliefs. It offers some practical tips to deal with "last chance agreements" and for accommodating pregnant and nursing employees.

ACCOMMODATING FAMILY STATUS

By all accounts, Canadians are stretching themselves thin as they continue to struggle to strike that illusive balance between (growing) work demands and (competing) family obligations. The work-life balance quandary is taking its toll. More Canadian employees today are single parents and more are shouldering 'multiple care-giving demands' in addition to their work obligations.[2] A 2001 survey of Canadian employees found that 58 per cent were experiencing high levels of

* The authors thank Jennifer Jamieson, student-at-law, for her assistance in the preparation of this paper.

[1] [1999] 3 S.C.R. 3.

[2] Karen L. Johnson, Donna S. Lero & Jennifer A. Rooney, *Work-Life Compendium 2001: 150 Canadian Statistics on Work, Family & Well-Being* (Guelph: Centre for Families, Work and Well-Being, University of Guelph, 2001) [*WorkLife Compendium*].

role overload and about 30 per cent reported moderate levels of work overload. Overall, as the researchers suggest, the data indicates that "the proportion of the workforce experiencing high levels of role overload has increased substantially" in a decade (1991 to 2001).[3] In 2001, 70 per cent of employees were parents with an average of 2.1 children per parent; 60 per cent had elder care responsibilities; and 13 per cent had both child and elder care demands (the "sandwich generation").[4] The participation rate for women in the workplace with a youngest child aged 3 to 5 grew from 37 per cent in 1976 to almost double, 66 per cent in 1999; for those women with an infant or toddler (age 3 and under), participation in the workplace more than doubled between 1976 and 1999, from 28 per cent to 61 per cent.[5] Further, in 2001, almost a quarter of families with children were single parent families, with the majority of these families headed by women.[6] Albeit slowly, the law of accommodation is evolving; and, according to recent developments, decision makers are acknowledging these modern realities.

The development of the law surrounding "family status" in particular remains in its infancy.[7] Only five per cent of all of the complaints filed with the Ontario Human Rights Commission between 2003 and 2004 cited family status as a ground for discrimination, with the

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[3] Dr. Linda Duxbury & Dr. Chris Higgins, *Report 4: Who is at Risk? Predictors of Work-Life Conflict* (Ottawa: Public Health Agency of Canada: 2001) [*Report Four*]. A 1999 survey of Canadian employees found that almost half (46 per cent) were experiencing a moderate to high level of stress as a result of trying to balance work and home. This number was significantly lower (26 per cent) in similar survey ten years earlier: see JL MacBride-King and K. Bachmann, *Is Work-Life Balance Still an Issue for Canadians and Their Employers? You Bet It Is?* (Ottawa: Conference Board of Canada, June 1999) at 1, cited in Melanie Manning, *Pregnancy, the Workplace and the Law* (Aurora: Canada Law Book, 2003) at 224.

[4] *Report Four, ibid.* Another survey found that in 1999, 15 per cent of employees reported having both elder-care and child-care obligations; this was up from 9.5 per cent 10 years earlier: see also Kevin D. MacNeill, *B.C. Court of Appeal recognizes that human rights protection of "family status" extends to an employee's substantive childcare obligations: a comment on* Health Sciences Association of British Columbia v. Campbell River and North Island Transition Society, (Paper presented to the Law Society of Upper Canada, Human Rights Update 2005, March 9, 2005) [McNeill].

[5] *Work-Life Compendium* at 9.

[6] J. Jenson, "A Decade of Challenges; A Decade of Choices: Consequences for Canadian Women," online: Canadian Policy Research Network <www.cprn.org>.

[7] As the Human Rights Commission has acknowledged: "It may…be fair to say that Canadian human rights policy and case law on family status is somewhat underdeveloped.": see Ontario Human Rights Commission, *Human Rights & the Family in Ontario: Discussion Paper* (Ontario: March 2005) [*Discussion Paper, 2005*].

majority of these claims relating to employment.[8] According to the Commission, the low number of complaints "...may be related to the general lack of awareness of human rights protections related to family status or the Commission's lack of a formal policy framework for responding to these complaints."[9] The Commission intends to develop a formal policy statement with respect to discrimination on the basis of family status.

Campbell River

The British Columbia Court of Appeal's recent decision in *Campbell River*[10] is significant in that it attempted to formulate a workable definition of "family status" and thereby bringing some resolution to the patchwork and inconsistent decisions which preceded it.[11] However, as will be discussed, the Court's "test" leaves practitioners with more questions than answers, particularly for employers.

The Complainant in *Campbell River* was a married mother of four. Her third child, a son, had severe behavioural problems that required both parental and professional care. Her son's pediatrician described him as "a very high needs child with a major psychiatric disorder." The medical evidence showed that her son's needs were best met by the Complainant, and particularly after school. According to her son's doctor, this care was "an extraordinary important medical adjunct to [the son's] ongoing management and progression in life."[12] The Complainant filed a complaint after her employer unilaterally changed her work hours, a change which resulted in the interruption of the care she provided to her son after his school day.

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[8] 120 out of 2450 (about 2/3 were in employment), see *Discussion Paper, 2005.*

[9] *Ibid.*

[10] *Health Sciences Assn. of British Columbia v. Campbell River and North Island Transition Society*, [2004] B.C.J. No. 922. [*Campbell River*]

[11] The following cases addressed the issue of "family status": *Brown* v. *Canada (Department of National Revenue, Customs and Excise)*, [1993] C.H.R.D. No.7; *Wight* v. *Ontario (Office of the Legislative Assembly)*, [1998] O.H.R.B.I.D. No.13; and *Woiden* v. *Lynn*, [2002] C.H.R.D. No.18.

[12] *Campbell River* at para.14.

In arriving at its ultimate decision, the Court of Appeal canvassed the existing case law with respect to "family status" and rejected the "overly broad definition" adopted in one line of cases, which the Court considered to be "unworkable."[13] It also rejected the narrow view that family status relates only to the "status" of being a parent or child, as the case may be. The Court also rejected the proposition that there is a prima facie case of discrimination on the basis of "family status" any time there is a conflict between a job requirement and a family obligation. As the Court stated:

> In my opinion, [the concept of family status] cannot be an open-ended concept...for that would have the potential to cause disruption and great mischief in the workplace; nor, in the context of the present case, can it be limited to the "status of being a parent per se"...for that would not address serious negative impacts that some decisions of employers might have on the parental and other family obligations of all, some or one of the employees affected by such decisions.
>
> If the term "family status" is not elusive of definition, the definition lies somewhere between the two extremes urged by the parties. Whether particular conduct does or does not amount to prima facie discrimination on the basis of family status will depend on the circumstances of each case. In the usual case where there is no bad faith on the part of the employer and no governing provision in the applicable collective agreement or employment contract, it seems to me that a *prima facie* case of discrimination is made out when a change in a term or condition of employment imposed by an employer results in a serious interference with a substantial parental or family duty or obligation of the employee. I think that in the vast majority of situations in which there is a conflict between a work requirement and a family obligation it would be difficult to make out a *prima facie* case.[14]

Post-Campbell River: How Far Does the Duty Extend?

Assuming *Campbell River* is followed in Ontario (which presumably it would given that similarity in human rights legislation), an employee will have to meet the following thresholds in order to establish a claim for accommodation on the basis of family status: 1) the alleged relationship falls within the definition of "family status" (i.e., the status of being in a parent-child relationship);[15] and 2) that there is a serious interference with a substantial family duty or

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[13] *Ibid.* at para. 35.

[14] *Ibid.* at paras. 38 and 39 [Emphasis added].

[15] *Ontario Human Rights Code*, R.S.O. 1990, c. H-19 [Ontario Code]. The Ontario Code provides that "family status" is "the status of being in a parent-child relationship." This is much narrower definition compared to other jurisdictions where "family status" has been defined as "the status of being related to another person by blood, marriage or adoption." Not all types of relations are protected under the Ontario Code. The Commission cites the following of examples of relationships which would not be protected under the Code: an individual

obligation. Where both steps are satisfied, an employer will have an obligation to accommodate the employee to the point of undue hardship. It is unclear to what extent an employee's particular circumstances (i.e., subjective criteria) will overcome objective criteria in making the initial determination of discrimination. Arguably, more emphasis on objective criteria may do little to address systemic concerns underlying many of the family status issues. For example, a substantial duty to a single mother of three may not always be a substantial duty to a two-parent household. As for the second step, according to one analyst, the duty will "clearly exist where there is a significant clash between employment and familial responsibilities."[16] This proposition is supported by the court in *Campbell River*, in its statement that in the "vast majority of cases" no prima facie case of discrimination would be found on the basis of the definition it adopted regarding "family status". Once discrimination has been established, however, it is unclear how far the duty to accommodate will extend.

Ultimately, *Campbell River* is in line with trends in other contexts and other areas of the law. There has been a growing recognition that there are social costs associated with child and elder care and that as such, responsibility for such obligations must be to a certain extent a shared societal burden. More recent adjudicative decisions have adopted this policy perspective when determining whether certain rules are discriminatory. Ontario's Rental Housing Tribunal recently had cause to consider "family status" issues in a case challenging the eviction rules under the *Tenant Protection Act*.[17] In that case, a single mother of two was automatically evicted after failing to file a written response to a notice of eviction within the statutorily-mandated five day period. Under the *Act*, a default eviction notice is issued where the Rental Housing Tribunal

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who is providing long-term care for an adult sibling who is disabled; or an individual providing elder care to an aging aunt or grandparent: *Discussion Paper, 2005.*

[16] Barbara G. Humphrey, *Accommodation Post-Meiorin: The Transformation of the Canadian Equality Rights Regime Preparing for New Accommodation Challenges*, (Paper presented to the Canadian Association of Counsel to Employers 2nd Annual Conference, Sept. 9-10, 2005). [Emphasis added.] [*B.Humphrey*]

[17] *Karoli Investments Inc. v. Reid* (2005 CarswellOnt 4841).

does not receive a response within the five days. Citing the *Human Rights Code*, Adjudicator DeBuono held that the specific five-day rule has a discriminatory effect on single parents and other protected groups, such as individuals with disabilities. With respect to the single mother at the centre of the ruling, Adjudicator DeBuono stated as follows: "The combined pressures of parenting and working prevented the tenant from effectively responding within five days." The Tribunal's decision signals, at least provincially, that statutory tribunals are willing to address the broader social context and, in doing so, challenge deeply rooted perspectives of the role of the individual in society.

Returning to the issue of accommodation in the workplace, some of the following issues will have to be addressed as the case law develops:[18]

- Will an employer be required to provide paid or unpaid time off to an employee because they must tend to medical needs of their children?;
- Will employees who need time of work to care for a sick parent or child be subject to attendance monitoring programs?;
- Will an employee be able to refuse a job assignment or to fulfill a core requirement of their job due to family obligations?;
- Will an employer be required to scheduled shifts that are compatible with child care obligations?; and
- Under what circumstances will an employer provide flexible work arrangements, what will be the criteria?

The Court in *Campbell River* did not address the issue of what constitutes a "reasonable accommodation" or what would amount to "undue hardship" in relation to family status issues, referring the matter back to the arbitrator instead. However, while the outer limits of accommodation may not be defined, accommodation will not likely require employers to

[18] *Discussion Paper, 2005* at 28.

accommodate for individual parental "choices" nor, as some suspect, will it result in "significant burdens being downloaded to employers".[19]

In the meantime, however, employers would be ill-advised to be unresponsive to changes in this area of the law, particularly given the economic impact on the workplace. A 1999 survey found that employees who struggled to balance work and home obligations were absent from work more frequently than employees who reported as having some "difficulty" coping; 11.8 days compared to 5.5 days.[20] At a minimum, the law will require employers to implement informal and cost-sensitive forms of accommodation; this may likely include, for example, permitting extended lunch periods in order to attend a child's medical appointment or permitting an employee to "make up time" for unscheduled time away from work. Other accommodation will require more formal and structured arrangements. Research has long supported the benefits of flexible work arrangements such as telecommuting, job sharing and compressed work weeks.[21]

ACCOMMODATING ADDICTION

Are Last Chance Agreements Being Upheld?

A "last chance agreement" ("LCA") is not a panacea for dealing with an employee suffering from addiction. While an LCA may motivate an addicted employee and provide a necessary impetus for change, an employer cannot evade or curtail its legal obligations by simply getting an employee struggling with addiction to agree to one last chance.

Based on a review of the cases, it appears as though arbitrators will uphold an LCA to substantiate termination of an employee suffering from an addiction in a number of limited

[19] *B. Humphrey* at 15.

[20] Survey resulted reported in *MacNeill.*

[21] See: Canadian Policy Research Networks, *Rethinking Productivity from a Workplace Perspective*, (Ottawa: Canadian Policy Research Networks, 2002).

circumstances, including the following: where the employer has clearly offered and provided the employee with reasonable accommodation and to ask more of the employer would amount to undue hardship; where there are safety issues that relate to the nature of the grievor's position and which makes his or her continued employment would compromise health and safety; where the grievor has failed to show a serious commitment to rehabilitation during the period of accommodation; and where the prognosis for rehabilitation, based on a series of major or minor relapses, is not encouraging. Arbitrators have recognized that relapses are common in most recovery efforts and have held that employers must be tolerant of at least a single relapse or a number minor relapses. Ultimately, however, where an employee's conduct amounts to a fundamental breach of the employment contract, and the employee has lost the trust and confidence of the employer, co-workers and the public in general (a particular concern in certain sectors, such as health care), arbitrators will look for tremendously persuasive mitigating factors to get around an otherwise valid LCA.[22] Given the above review, and despite the sound labour relations reasons for entering into such agreements,[23] it is clear that arbitrators will not apply a rigid contractual analysis to the enforcement of these agreements and will not enforce such agreements where to do so would be a violation of an employer's duty to accommodate an employee with a disability.

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[22] See for example: *Health Sciences Centre,* [1999] M.G.A.D. No. 58 (Jones).

[23] See Arbitrator Levinson's statement in *Kimberly-Clark Forest Products Inc. v. Paper, Allied Industrial, Chemical and Energy Workers International Union, Local 7-0665*, [2003] O.L.A.A. No.49 at para.17:

> Arbitrators have articulated persuasive policy reasons for enforcing and giving effect to the terms of last chance agreements containing a prescribed penalty where such agreements have been breached. They include the importance of the parties being able to rely on the terms of the last chance agreements they negotiate, the fostering and promoting of confidence in the parties' ability to resolve their disputes and to fashion their own solutions instead of having a third party impose one, not making last chance agreements meaningless and discouraging or taking away the incentive for employers to enter into future last chance agreements by giving employees a "second last chance."

See also Arbitrator Knopf's statement in *Hamilton Street Railway Co. v. Amalgamated Transit Union, Local 107 (Davidson Grievance)*, [2000] O.L.A.A. No. 921 at para.79:

> The terms of a Last Chance Agreement must be honored and respected in order to encourage parties to continue to try to resolve problematic situations humanely without litigation. If Last Chance Agreements are ignored, unions and employees could attempt to enter into them without concern for the consequences of a breach. Ignoring Last Chance Agreements would also result in an unwillingness for either side to rely upon the adherence to their terms. Employers, unions and employees must all be held to the terms of their bargain if there is any hope for an improved situation in the future.

Last chance agreements can be a form of accommodation in themselves.[24] However, as Arbitrator Picher held in *Canadian Pacific Railway and Canadian Council of Railway Operating Unions*, "[t]he mere fact of a last chance agreement does not, of itself, confirm whether there has been sufficient compliance with the duty of accommodation established under human rights legislation of general application, legislation which the parties cannot contract out of."[25] In that case, Arbitrator Picher upheld the grievor's dismissal after he violated the terms of an LCA. The employer had originally reinstated the employee on the condition that he enter into an LCA for absenteeism problems. When the grievor violated the terms of that LCA, he disclosed to the employer that he was an alcoholic. The employer did not invoke the LCA after learning of the grievor's addiction; rather, it drafted a new agreement which included a requirement that the grievor enter into an employee assistance-type contract, as well as agree to undergo some form of rehabilitation. In holding that the grievor's dismissal be upheld, Arbitrator Picher noted that the employer had reasonably accommodated the grievor to the point of undue hardship on the basis that there had been two LCAs, in addition to the services of the an employee assistance program. Arbitrator Picher also noted the safety sensitive nature of the grievor's duties and found that a third LCA was not justified.

Arbitrators are also clear that where there is a unionized workplace, an LCA entered into without prior consultation with the union is at a minimum highly suspect. This issue was addressed most recently in *Core-Mark International Inc. and UFCW, Local 401*.[26] In that case, the grievor was addicted to cocaine and, following his second leave of absence, entered into a "last chance" agreement with the employer. The union was not involved in this process. The agreement provided, amongst other things, that the employee would submit to random drug

[24] See for example: *York Region District School Board and CUPE, Local 1196 (Bowyer)* (2004), 128 L.A.C. (4th) 317 (Craven).
[25] (June 2002).
[26] (2005), 138 L.A.C. (4th) 237 (Sims).

testing for one year and that he could be terminated if the testing indicated drug use. In finding that the agreement was not enforceable, Arbitrator Sims held as follows:

> Without any prior discipline the Employer decided to impose a new and serious condition to the grievor's continued employment; random drug testing for one year. That involves an intrusion into the grievor's rights which, even if justified by his admitted drug use and addictions problem, called for Union involvement as part of the essential balancing of interests when such an intrusion is undertaken.

Practical Tips for Drafting LCAs

Based on the above review, employers and unions should consider the following practical drafting tips:[27]

1) The agreement should provide a detailed outline of all previous attempts at "accommodation", including the dates and specific programs participated in or which were offered by the employer. There should be a statement by all parties that these previous efforts amounted to reasonable accommodation.

2) There should be a statement to the effect that the LCA itself is a form of accommodation and that breach of the agreement would constitute "undue hardship".

3) A clause should be added wherein the employee acknowledges his or her addiction and an accompanying clause outlining the purpose of the agreement.

4) Conditions of continued employment should be explicitly stated (e.g., that the employee provide medical assessments every month; that they enter and remain in a program of rehabilitation for a specified period of time).

5) Time frames should be reasonable. The parties should work together to devise a schedule which is capable of being followed. Unrealistic time frames and goals will unlikely to be seen as good faith on the part of the employer.

[27] See also D. Jarvis and P. Meier, "Last Chance Agreements ("LCAs"): Still Alive and Well?" (Lecture Paper presented during the Canadian Bar Association's *Human Rights in the Unionized Workplace: Evolving Rights, Responsibilities and Remedies*, April, 2001).

6) Account for relapses. Create rehabilitation stages and stagger discipline where appropriate. This will necessarily depend on the individual employee, and the history and nature of the addiction, amongst other considerations.

7) Spell out consequences clearly. An employee must be aware of the consequences of breach, particularly where breach will result in dismissal.

8) Include a statement that indicates that the employer takes responsibility for his or her own recovery.

Some practitioners suggest adding a term which expressly limits an arbitrator's jurisdiction to substitute a lesser penalty in the event of breach. Given the consistent approach to the interpretation of these agreements, such contractual language cannot guarantee the limitation of an arbitrator's jurisdiction with respect to determining issues of accommodation.

Smoking: Is Accommodation for Smokers the Final Frontier?

There is a widespread movement across the province and other parts of the country to urge Canadians to stop smoking or to prevent them from starting in the first place. Both the public and private sectors have adopted various forms of anti-smoking regulation. Dalhousie University was the first Canadian university to institute a complete campus-wide ban on smoking.[28] Smoking is not permitted anywhere on university property, including buildings and outside spaces, nor is smoking allowed in private cars if they are parked on campus property. Students, employees and guests at the university must leave university property to smoke.

However, despite the laudable efforts of governments, health organizations and the private and public sectors, Canadians remain addicted. In Ontario, tobacco is the leading cause of preventable deaths, killing more than 16,000 every year. The government reports that tobacco-

[28] Online: Dalhousie University, Environmental Recognition <http://environmentalhealthandsafetyoffice.dal.ca/radiatio_4551.html>.

related diseases cost the province at least $1.7 billion in health care each year, resulting in more than $2.6 billion in lost productivity and accounting for at least 500,000 hospital days each year.

Addiction to nicotine and cigarette smoking has now been recognized as a disability for purposes of human rights obligations. In *Cominco Ltd. v. United Steelworkers of America, Local 9705*,[29] Arbitrator Larson found that a "heavy" addiction to nicotine is a disability which attracts the obligations under human rights legislation in British Columbia. At issue in that case was the employer's policy prohibiting the use of tobacco anywhere on the employer's premises and prohibiting employees from personally possessing tobacco products anywhere on the employer's premises while at work. The union argued that the anti-smoking policy was discriminatory on the basis that it placed undue stress on addicted employees who could not control or curb the cravings or withdrawal symptoms. The union argued that the appropriate accommodation would be to allow smokers to smoke in designated safe outdoor areas.

Arbitrator Larson ultimately found that the policy discriminated against employees who are "heavily addicted". In finding that the policy was discriminatory, Larson relied on medical and scientific evidence put forth by the union that indicated that those heavily addicted to nicotine experienced symptoms of withdrawal, depression, anxiety and a certain degree of functional impairment as a result. In particular, the evidence showed that those employees who are heavily addicted would be unable to work an entire shift without experiencing serious problems associated with the withdrawal of nicotine. In finding heavy addiction to nicotine to be a disability, Arbitrator Larson focused the inquiry on "impairment". As he noted:

> Quite apart from the evidence, it seems to me that it is inappropriate to determine whether a person may be disabled by reference to whether the condition is temporary or permanent. As a pure matter of principle, a person can be disabled for even a relatively short period of time and then fully recover. Subject to issues of substance, the issue should turn, not on whether the disablement is temporary or permanent, but the degree to which normal function is impaired. If one were to accept that any condition that is temporary could not constitute a disability, even drug addiction and alcoholism would not meet the test, because a person can equally recover from those

[29] [2000] B.C.C.A.A.A. No. 62 [*Cominco*].

> conditions. Yet it has long been settled that drug addiction and alcoholism are disabilities protected by the human rights legislation. They are no less ephemeral than an addiction to tobacco. The same may be said of many diseases and illnesses which are curable.[30]

While the issue of appropriate accommodation was referred back to the parties, in a commentary about the *Cominco* case, Arbitrator Larson made the following statement:

> I suspect...that pressure will mount on some employers to install properly ventilated smoking rooms, as the parties to a collective bargaining relationship struggle with the issue of how best to control the devastating effects of smoking on employee health.[31]

It will be interesting to see how arbitrators implement the *Cominco* decision. In Ontario, in particular, employers will soon have to reconcile the competing obligation to accommodate employees who are heavily addicted to nicotine and smoking with adherence to the province's new anti-smoking legislation. In June 2005, the Ontario government passed the *Tobacco Control Statute Law Amendment Act, 2005*,[32] which will prohibit smoking in all workplaces and indoor public spaces in the province by May 31, 2006. The Act prohibits smoking in any enclosed workplace. The Act defines an "enclosed workplace" to include buildings, structures and vehicles. "Designated smoking areas", which were permitted under the former legislation, will also be prohibited.[33] Under the new legislation, employers are responsible for ensuring that there is strict compliance with the Act, both from employees and those entering a workplace, including ensuring non-complying employees are removed from the workplace. Given this new legislation, it appears as though Arbitrator Larson's comments are likely to constitute an unreasonable accommodation. A more difficult issue for arbitrators and adjudicators will be to resolve the competing accommodation issues for smokers and non-smokers with a particular sensitivity to cigarette smoke, such as those who suffer from asthma or emphysema.

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[30] *Ibid.* at para. 181.

[31] D. Larson, "Smoking in the Workplace: An Arbitrator's Perspective" in *Labour Arbitration Yearbook*, vol. 1 (Toronto: Lancaster House, 2001-02).

[32] S.O. 2005, c. 18. This Act will change the name of the *Tobacco Control Act, 1994* to the *Smoke-Free Ontario Act* as well as add new amendments. The *Smoking in the Workplace Act* R.S.O. 1990, c. S-13 will be repealed on May 31, 2006.

[33] The *Smoke-Free Ontario Act* will permit smoking in designated rooms in hotels where certain requirements are satisfied.

At the same time, *Cominco* makes clear that sweeping and across-the-board policies that prohibit employees from smoking during work hours, or, as was the case in *Cominco*, possessing cigarettes while at work will violate human rights obligations. Providing a smoking cessation program is likely to be a minimum requirement for accommodating a smoking addiction. According to commentators Echlin and MacKillop, allowing an addicted employee to smoke during breaks and providing for designated smoking areas outside of the physical workplace will likely be held to be a reasonable form of accommodation.[34] It is likely that "economic" arguments (based on research which suggests smokers are less productive, are more likely to be absent and cost an employer more to insure) will not be persuasive in and of themselves.

Nicotine addiction and cigarette smoking raise a number of interesting and peculiar issues. Unlike alcohol consumption (in certain contexts) and illicit drug use, smoking is not illegal per se nor is its use likely to cause immediate danger or impairment, both to the individual or the employer. As such, where there is no risk to the employer or other employees, how can the law justify "forcing" an employee to quit in order to keep their job? In other words, will an arbitrator uphold the termination of an employee with a heavy addiction to nicotine and smoking where over time that employee refuses to quit smoking? Will such an employee find that the employer's duty to accommodate will cease at some point? It may be that adjudicators will not treat the continued use of nicotine in the same manner as they treat the continued use of alcohol or drugs. Arbitrator Larson's comment in *Cominco* about the disciplinary nature of the employer's policy is appropriate: "It assumes that addicted smokers will be able to control their habit through the normal coercive effect of discipline."[35]

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[34] Randall Scott Echlin and Malcolm J. MacKillop, *Creative Solutions: Perspectives on Canadian Employment Law*, 2nd ed. (Aurora: Aurora Professional Press, 2001) at 113.

[35] *Cominco*, *supra* note 26 at para. 235.

To be sure, accommodating addicted smokers is not the final frontier. The law reacts to social change. Once there is social buy-in (following a period of social conditioning), it is likely the law will follow to reflect these new and emerging social values. Human rights legislation will be there to fill the void to ensure those who are addicted.

ACCOMMODATING CHRONIC PAIN, DEPRESSION & STRESS

The Supreme Court of Canada has recognized that disabilities are of a "virtually infinite variety" and each must be treated according to the "widely divergent needs, characteristics and circumstances of persons affected by them."[36] The Court in *Nova Scotia (Workers' Compensation Board) v. Martin* was dealing with the treatment of "chronic pain" in the province's workplace compensation legislation. It defined "chronic pain" as "pain that persists beyond the normal healing time for the underlying injury or is disproportionate to such injury, and whose existence is not supported by objective findings at the site of the injury under current medical techniques."[37] The Court addressed the fact that disabilities like chronic pain are often treated with mistrust or apprehension. A unanimous Court held that the workplace compensation provision violated the equality rights of chronic pain suffers as it failed to provide the full range of assistance afforded to employees suffering from other injuries or disabilities. In his decision, Justice Gonthier noted the effect of this differential treatment:

> ...far from dispelling the negative assumptions about chronic pain sufferers, the scheme actually reinforces them by sending the message that this condition is not 'real', in the sense that it does not warrant individual assessment or adequate compensation. Chronic pain sufferers are thus deprived of recognition of the reality of their pain and impairment, as well as of a change to establish their eligibility for benefits on an equal footing with others.[38]

[36] [2003] S.C.J. No.54. [*Martin*]

[37] *Ibid.* at para. 1.

[38] *Ibid.* at para.105.

The Court's decision in *Martin* has been lauded as "extraordinary for its progressive analysis of equality rights, as well as for its sweeping affirmation of the rights of disabled workers."[39] Ultimately, according to the Court, a distinction "will not be allowed to stand when it, intentionally or not, violates the essential human dignity of the individuals affected and thus constitutes discrimination."[40]

Employers must be responsive to all types of disabilities, including those considered to be "non-mainstream." Not only is there a legal obligation to do so, but also, the medical and scientific research indicates that these disabilities are becoming more pervasive. There are tangible costs to employers. The World Health Organization predicts that mental illness, including stress-related disorders, will be the second leading cause of disabilities by 2020.[41] Further, according to the Canadian Institute for Health Information, approximately 20 per cent of individuals will experience mental illness during their lifetime, and about 8 per cent of adults will experience a "major" depression in their lives.[42] According to the WHO, job-related stress accounts for losses of $200 to $300 billion each year for American industries.[43] A recent Canadian study found that 66 per cent of CEOs and 71 per cent of employees say that "stress, burn-out or other physical and mental health problems" are the major factors which have a negative effect on productivity.[44]

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[39] "Rights of disabled workers vindicated by Supreme Court" *Health & Safety/Workers' Compensation Law Reporter* (September/October, 2003), online: Lancaster House <http://www.lancasterhouse.com/index.asp>.

[40] *Martin*.

[41] Online: World Health Organization, Global Burden of Disease Survey < http://www.who.int/en/> [WHO].

[42] Health Canada, *A Report on Mental Illnesses in Canada* (Ottawa: Health Canada, 2002).

[43] WHO.

[44] FGIworld, *Productivity Through Health: A FGIworld CEO Study on Health and Productivity in Canadian Industry*, (2005).

Keays v. Honda Canada

In *Keays v. Honda Canada,*[45] an Ontario court awarded $500,000 in punitive damages in addition to 24 months notice to an employee, after it concluded that the employer terminated the employee in order to avoid having to meet its human rights obligations, namely the duty to accommodate the plaintiff's Chronic Fatigue Syndrome. The plaintiff's disability caused him to take a greater number of absences from work per month. It often caused him to fall asleep at work. He was ultimately terminated when he failed, according to the employer, to submit to a medical assessment by one of Honda's specialists. The plaintiff had provided his own medical evaluations over the entire period of this employment and his illness, and when asked to submit to a medical assessment by one of the employer's specialists, he sought clarification respecting the request.

The Court focused on the nature of the plaintiff's illness and that fact that, unlike a visible physical impairment, his was difficult to detect and assess. However, this, according to the court, "should not be permitted to open the door to oppressive conduct on the part of a superior." As the Court went on to state: "On the contrary, such circumstances should "increase the need to proceed openly, fairly and cautiously."[46] According to the Court, the plaintiff was a "victim of particular vulnerability because of his precarious medical condition and Honda knew this."[47]

After reviewing the evidence, the Court accepted that in this case, the employer had intentionally targeted the plaintiff in "a bid to rid themselves of him because of his increasing need for accommodation." This, as the court noted, despite the fact that the plaintiff was by all accounts "an ideal employee except for his (illness) and who was otherwise valued (by the

[45] [2005] O.J. No. 1145.
[46] *Ibid*, at para. 61.
[47] *Ibid.*

employer) and other workers." The court also found that the plaintiff had made several pleas to the employer for accommodation and had done everything he could to address his illness. However, as the court ultimately found, the plaintiff's "condition was incompatible with the 'lean' and efficient operation demanded by Honda's corporate policy. The computer-managed workplace 'trumped' his human rights."

The *Keays* decision is also of relevance to legal counsel. It will be recalled that the Court in *Keays* found that the employer's in-house legal counsel had acted unethically and in breach of the Rules of Professional Conduct by participating in an attempt to persuade the plaintiff to abandon his request for clarification with respect to the role and findings of the employer's corporate physician. As the Court stated:

> I am also taking account the fact that this large corporation can easily afford to hire its own medical and legal advocates and insinuate them into established patient and client relationships without impunity as to professional and ethical concerns.[48]

Best Practices Post-Keays

The employer in *Keays* has indicated that it will appeal the court's decision. However, whatever the outcome of that appeal (which will most certainly centre around the award of punitive damages), it is unlikely, given the Supreme Court of Canada's approach to equality rights, that the court's findings relating to accommodation will be successfully challenged.

The *Keays* case should be a cautionary tale for employers of every size. The following practices should be considered in light of the decision:

1) Create policies which foster cooperation and early accommodation for all illnesses, including stress, chronic pain and other difficult to assess disabilities.

2) Foster a workplace where employees are encouraged to seek out support at an early stage of their disability.

[48] *Ibid.* at para. 63.

3) Create informal and flexible accommodation arrangements for temporary periods of illness and disability.

4) Encourage participation and involvement of employees, their medical advisors and the unions.

5) Make decisions in good faith, with a view to encouraging a healthy workplace.

6) Decisions should be made based on adequate information. Avoid making quick decisions respecting issues of accommodation.

7) Do not encourage speedy reintegration after a period of illness where there is medical evidence which does not support such a course.

8) Do not make decisions respecting accommodation on the basis of preconceived notions and stereotypes. Treat all claims for accommodation in the same manner. Create procedures and policies which do not differentiate between disabilities. At the same time, however, be aware of that certain disabilities may warrant a more flexible approach.

It is of critical importance for an employer to react with a view to its legal obligations. In addition to meeting these obligations, employers who heed the warning will likely reap the benefits of a healthier and more productive workplace.

RELIGIOUS ACCOMMODATION

The issue of religious accommodation made news when a professor at York University in Toronto, one of Canada's largest universities, said he would, out of fairness, cancel classes on all major religious holidays observed by his students. The history professor made the statement in opposition to York's 40-year-old practice of canceling classes on the Jewish High Holidays of Rosh Hashanah and Yom Kippur. In defence of his position, Professor David Noble was quoted was stating that "...I have very diverse classes and I want to dramatize the point that we are a

multicultural, publicly funded university, so we should either recognize all religious high holidays or none."[49] For his part, Noble said he believed as a secular institution, York should not be canceling classes for any religious holidays. Noble ultimately abandoned his plans to hold classes after a student filed a compliant with the university and after having received threatening phone messages reports *The Toronto Star.*

Underlying the issues of religious accommodation issue is the fact that despite the multicultural make-up of the country, the workplace reflects the mainstream Judo-Christian traditions and observances.[50] According to Statistics Canada, in 2001, the major religious groups were the following (in descending order):[51] 1) Catholic, 2) Protestant, 3) Christian Orthodox, 4) Other forms of Christianity, 5) Muslim, 6) Jewish, 7)Buddhist, 8) Hindu, 9) Sikh, and 10) Eastern religions.[52]

The Ontario Human Rights Code protects "creed", which the Commission defines as the following:

> Creed is interpreted to mean "religious creed" or "religion." It is defined as a professed system and confession of faith, including both beliefs and observances of worship. A belief in a God or gods, or a single supreme being or deity is not a requisite.
>
> Religion is broadly accepted by the Commission to include, for example, non-deistic bodies of faith, such as the spiritual faiths/practices of aboriginal cultures, as well as bona fide newer religions (assessed on a case by case basis).
>
> The existence of religious beliefs and practices are both necessary and sufficient to the meaning of creed, if the beliefs and practices are sincerely held and/or observed.[53]

The duty to accommodate on the basis of creed arises where "a person's religious beliefs conflict with a requirement, qualification or practice."[54]

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[49] L. Brown, "Religious discrimination alleged at York" *The Toronto Star* (6 October 2005), online: The Toronto Star <www.thestar.com>.

[50] See: *Chambly (Commission scolaire regionale) c. Bergevin* (1994), 115 D.L.R. (4th) 609 (S.C.C.) [*Chambly*].

[51] Excluding the Northwest Territories and Nunavut.

[52] 4.9 million (in a total population of 29,639,035) reported having no religious affiliation.

[53] Ontario Human Rights Commission, *Policy on Creed and the Accommodation of Religious Observances* (Toronto: Ontario Human Right Commission, 1996) at 2.

[54] *Ibid.*at 5.

In the context of employment, religious accommodation typically involves a claim for paid time off in order to observe certain practices. The Ontario Court of Appeal's decision in *Ontario (Ministry of Community and Social Services) v. O.P.S.E.U.*[55] dealt with this issue. In that case, an employee had requested 11 days off with pay in order to observe certain holy days. The employee was a member of the Worldwide Church of God, a bona fide religious denomination, which requires members to observe 11 holy days over the calendar year. Pursuant to the employer's religious observance policy, the employee was entitled to two days off with pay. The policy provided, amongst other things, that an employee could earn days and bank those earned days through the compressed work-week option. The compressed work-week allowed employees the option of compressing their assigned hours, based on a 15-day work week, into a 14-day work week by extending shifts. The "day to spare" could then be used for religious observance purposes.

According to the Court, the employer's policy and specifically the compressed work-week was a reasonable form of accommodation in the circumstances. As Moldaver J.A. stated:

> A review of the relevant authorities leads me to conclude that employers can satisfy their duty to accommodate the religious requirements of employees by providing appropriate scheduling changes, without first having to show that a leave of absence with pay would result in undue economic or other hardship. Indeed, in some instances, scheduling changes may provide the fairest and most reasonable form of accommodation.[56]

As the Court went on to state:

> [T]his scheduling option may represent the most reasonable form of accommodation. If feasible, it enables employees to observe their religious holy days without loss of pay and without having to encroach on pre-existing earned entitlements, while at the same time completing their assigned hours of work, thereby relieving the employer from having to pay them for days on which they provide no service.[57]

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[55] (2001), 50 O.R. (3d) 560.

[56] *Ibid.* at para. 37.

[57] *Ibid.* at para. 51.

The Court also acknowledged the fact that flexible scheduling options may not always be a viable form of accommodation, specifically, where it "occasions significant hardship or inconvenience to the employee" or where it would be impossible to implement.[58]

Unique accommodation issues also arise where an employee requests a permanent change in schedule on religious accommodation. In *Re Toronto Association for Community Living and Canadian Union of Public Employees, Local 2191*,[59] the employee claimed that she was discharged on the basis of her religion. The grievor was terminated after she failed to work her scheduled shift which included weekend shifts. The grievor was a member of the Scarborough Church of God,[60] which she claimed prohibited her from working on Sundays. As a part-time employee, the employer scheduled her to work weekends. The employer initially offered the grievor the option of working only two Sundays in a four-week rotation and to allow her to start her shift later in the afternoon on the Sundays she was to work in order to allow her to attend the main Sunday service every week. Arbitrator Surdykowski found this was not a reasonable form of accommodation because the grievor "genuinely believes as essential part of her faith that it is necessary to keep the whole of the Sabbath."[61] On this issue, Arbitrator Surdykowski stated as follows:

> When assessing the reasonableness of the Employer's offer of accommodation, the reasonableness of the exercise of the employee's faith is not the issue. Arbitrators determine whether a person's beliefs and practices are a bona fide creed. They do not sit in judgment of the reasonableness of religious beliefs or practices.
>
> Arbitrators do sit in judgment of an employer's efforts to accommodate an employee's genuine religious beliefs and practices. This means the full bone fide exercise by the employee of her genuine religious beliefs and practices.[62]

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[58] *Ibid.* at para. 46. The Court cites the case of *Chambly*, where scheduling changes could not be implemented to accommodate school teachers of the Jewish faith since the annual salary of a teacher was based on 200 working days.

[59] (2005), 138 L.A.C. (4th) 378 (Surdykowski).

[60] *Ibid.* (Arbitrator Surdykowski found this to be a *bona fide* religion).

[61] *Ibid.* at para. 75.

[62] *Ibid.* at paras. 77-78.

Arbitrator Surdykowski also found that the employer's second form of accommodation, an offer to change her part-time status to relief status, was equally unreasonable. In this regard, Arbitrator Surdykowski held as follows:

> I do not doubt that the Employer's wish to treat all part-time employees the same for scheduling purposes was motivated by a desire to treat all part-time employees equally and fairly, but as it obviously recognized itself when offered the first accommodation alternative, that philosophy had to give way to the grievor's rights under the Code. And as far as employee morale is concerned, the grievor had gone more than six years without working a weekend shift without the Employer even paying any attention to it, and it appears that scheduling complaints from employees about other employees' shifts are quite common. In any event, employees have to understand that equal treatment under the law does not necessarily mean the same treatment, or treatment that other employees approve of. They would be wise to remember that there may come a time when their equality rights are unpopular and require protection. That is why we have a Human Rights Code.[63]

In the end, it was held that fully accommodating the grievor by not scheduling her on Sundays did not amount to undue hardship. Rather, according to the arbitrator, the employer could do so without incurring any additional expense and without interfering with its operations.

As the B.C. Human Rights Tribunal recently held in *Derksen v. Myert Corps. Inc.*,[64] an employer is required to make an "individual" assessment of a particular request for religious accommodation. In *Derksen*, the complaint was terminated, according to the employer, for poor management style and for taking an unapproved day off to observe a holy day. The complaint was a member of the Christian Churches of God, which required that he observe a number of holy days, and to refrain from work or trade on certain days. Despite the fact that there was evidence of the employer's "religious tolerance", that, according to the Tribunal, "is not the relevant assessment to be made."[65] According to the Tribunal: "What is required of an employer is that they assess the individual request as against the standard and determine that a request could not be accommodated without undue hardship."[66]

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[63] *Ibid.* at para. 78.
[64] [2004] B.C.H.R.T.D. No.57.
[65] *Ibid.* at para. 70.
[66] *Ibid.*

PRACTICAL ISSUES SURROUNDING PREGNANCY

Approximately half of all female workers are in their reproductive years, and about eight of ten will become pregnant during their working life.[67] Research shows that workplaces which provide support to pregnant and nursing mothers generally have more productive employees, including during the pregnancy term and upon their return from leave. Employers should be implementing practical and in most cases, inexpensive, tools and policies in order to accommodate the special needs that arise during and after pregnancy.

Of course, each workplace is different and policies will need to reflect these differences. It is advisable to consider some of the following before creating and implementing pregnancy-inclusive policies:

1. Solicit input from both female and male employees, including those who have not been pregnant or who have no children. If it is a unionized workplace, solicit the cooperation of the union and other employee committees.
2. Assess the job descriptions of in the workplace. Take an inventory of the skill sets across particular departments.
3. Assess what might be considered "bona fide occupational requirements" of a particular position.
4. Assess the physical characteristics of the workplace (e.g., poorly ventilated lunch rooms)
5. Review employee policies relating to breastfeeding, leaves, sick days, parental care.

Information gleaned from the above will ultimately assist the employer in creating a pregnancy-friendly work environment and ensuring that there is employee and union support for such initiatives from the beginning.

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[67] See: "How to be a Pregnancy Friendly Workplace," online: Best Start <http://www.beststart.org/resources/wrkplc_health/index.html>. Women are also having babies later in life. According to Statistics Canada, 48 per cent of women having babies in Canada are over the age of 30: "Births" The Daily (12 July 2005) online: Statistics Canada <http://www.statcan.ca/Daily/English/041027/d041027d.htm>

An employer may want to consider implementing some of the following "pregnancy-friendly" policies:

- Policies which promote healthy lifestyle by providing education to pregnant or nursing mothers.
- Policies that provide for "sensitivity" training to supervisors and managers with respect to issues relations specifically to pregnancy.
- Policies which aim to ensure a smooth transition from work to maternity leave, including guidelines for assisting in the preparation of relevant documentation relating to benefits, leaves, transferring of work and so forth.
- Policies which ensure a smooth transition back to work following a leave, including retraining and a "gradual" return to full duties.
- Polices which reflect flexible approaches to breaks and time off.

CONCLUSION

Recent developments in the law of accommodation reflect concurrent changes in the broader social and economic context. The law of accommodation has, in large part, been a barometer to our changing social and economic climate. As such, employers will have to be flexible to issues of accommodation. Ultimately, employers will have to adopt a new mindset as new issues continue to emerge and stretch the boundaries of accommodation.