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DROITS DE LA PERSONNE

A GUIDE FOR MANAGING THE RETURN TO WORK



Canada

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Introduction

Absences due to disability or illness are among the most challenging human resource situations facing employers today. Indeed statistics show that costs generated by disability and income programs are steadily rising, as are productivity losses. The National Institute of Disability Management and Research estimates that at any given time, 8 to 12% of Canada's workforce is absent due to illness or injury.

Several factors are contributing to Canada's growing rates of prolonged employee absenteeism, including stress related to technological change and organizational restructuring, an aging workforce that is more susceptible to long-term illness, and difficulties balancing work and family responsibilities.

The Canadian Human Rights Commission (CHRC) receives many complaints based on disputes regarding the transition back to work after a prolonged employee absence. The Commission is committed to helping employers manage these cases so that the employee can return to work safely, quickly and efficiently. That's why it has developed this booklet of guidelines to support managers and supervisors in handling return-to-work situations.

Inside you will find:

- an outline of the key legal principles that apply to return-to-work situations
- step-by-step procedures to guide your approach to case management
- a series of case studies demonstrating how you could deal with different hypothetical scenarios

While these guidelines will assist you in dealing with return-to-work situations, they are **NOT** to be taken as legal advice for individual cases, as each case has unique circumstances. You should consult with senior managers, legal advisors, or others in your organization for advice on resolving complex return-to-work cases.

For more information, you are encouraged to refer to the additional resources listed at the end of this booklet. These resources are available online.

1

KEY LEGAL PRINCIPLES





The *Canadian Human Rights Act* (CHRA) has established several key principles that protect the rights of employees and employers and help create workplaces that are productive and respectful. In this section, we provide a brief overview of the principles that are relevant to managing an employee’s return to work. By taking a proactive approach, employers can resolve unclear situations where employees need accommodation, and reduce the number of complaints that are filed.

1. Protection from Discrimination

According to the CHRA, “all individuals should have an equal opportunity to make for themselves the lives that they are able and wish to have.” It also states that individuals should have their needs accommodated, consistent with their duties and obligations as members of society, without being hindered by discrimination based on the factors or “prohibited grounds” listed below.

- Race
- Colour
- Religion
- Sex
- Marital status
- Disability
- National or ethnic origin
- Age
- Sexual orientation
- Family status
- Criminal conviction for which a pardon has been granted

Protection against discrimination is particularly important in cases where an employee has been away and is planning a return to work. Research has shown that many of the complaints filed with the CHRC arise from these situations. In return-to-work cases, disability is the ground most likely to be at issue. Discrimination following absences due to pregnancy and maternity leave may also be grounds for complaint.

What is workplace discrimination?

Workplace discrimination means putting an employee at a disadvantage based on prohibited grounds. Discrimination results in barriers to workplace equity because it blocks access to equal opportunities. Discrimination may happen intentionally or inadvertently—workplaces often have policies that apply to everyone, but some employees may not be able to meet certain expectations for reasons concerning a disability or other prohibited ground.



As the CHRA explains, employers need to examine how their workplace rules might affect employee rights, and then take action to prevent discrimination.

2. The Duty to Accommodate

The “duty to accommodate” is a legal principle that requires employers to identify and change any rules, practices, expectations, or procedures that have or may have a discriminatory impact based on the CHRA’s prohibited grounds.

An employer also has a duty to accommodate the specific needs of employees so that they can perform to the best of their potential. However, the duty to accommodate is not unlimited. An employee’s right to equality must be balanced with an employer’s right to run a productive workplace.

Generally, employers should look at situations involving the duty to accommodate on a case-by-case basis, since each will have unique circumstances. By incorporating good communication practices, employers can make sure that staff members have what they need to do their work to the best of their ability.

There are, however, certain circumstances under which an employer is not required to provide accommodation, as in cases of undue hardship.

What is undue hardship?

The term “undue hardship” refers to the limit of an employer’s capacity to accommodate without experiencing an unreasonable amount of difficulty. Employers are obligated to provide accommodation “up to the point of undue hardship.” This means an employer is not expected to provide accommodation if doing so would bring about unreasonable difficulties based on health, safety, and/or financial considerations.

There is no precise legal definition of undue hardship, nor is there a standard formula for determining undue hardship. Each situation is unique and should be evaluated individually. Undue hardship usually occurs when an employer cannot sustain the economic or efficiency costs of the accommodation.

Generally, some hardship can be expected in meeting the duty to accommodate. Employers are required to carefully review all options before they decide that accommodation would cause undue hardship. It is not enough to claim undue hardship based on an assumption or an opinion. To prove undue hardship, employers have to provide evidence.



3. Privacy Rights

The right to privacy is another legal principle to keep in mind when organizing for an employee's absence and return to work. While in certain cases employees are required to give details on a medical condition, there are limits on what employers should request and what employees have to reveal. Medical information should only be shared, within the workplace, on a need-to-know basis and must be kept confidential.

In addition, there are restrictions on when an employer can ask an employee to take a medical exam. Please refer to Part 2 of this booklet for more information on this.

2

STEP-BY-STEP GUIDELINES FOR MANAGING THE RETURN TO WORK





Managing a return-to-work case is often a complex responsibility. Return-to-work cases present challenges because they involve the careful balancing of an employer’s right to manage a productive workplace with a worker’s fundamental right to equality, dignity, and privacy. Employers—and those representing employers, such as directors, supervisors, or human resources officials—may be unsure of how best to approach a return-to-work case, particularly when the employee requests difficult or unexpected accommodation measures.

This section contains general guidelines to support you in approaching a return-to-work case. These guidelines clarify what you are entitled to as an employer, what your legal obligations are, and what you can expect from employees, unions, and other stakeholders during the return-to-work process.

These guidelines are NOT intended to replace your organization’s internal policies regarding return-to-work/accommodation case management (if your organization has such policies in place, as is recommended). Instead, they are meant to show that an open communication process facilitates efficient case management and ensures a better outcome for all parties. Consult your organization’s human resources department if you require information on any internal policies that may be in effect.

The step-by-step procedures presented below describe the general phases that apply to most return-to-work situations. Use these procedures to help guide your approach and decisions, but also keep in mind that you should evaluate each case individually, as each presents unique circumstances.



Step #1: Gather details and assess the situation

- **Maintain contact with the employee during a prolonged absence**

In most cases, but not all, it is a good practice to maintain occasional contact with an employee during their absence. By getting in touch with the employee once in awhile, you can find out how they are doing and, in some situations, find out approximately when they might be able to return to work. This will give you time to make arrangements in advance. However, you should not contact the employee so frequently that they feel pressure to return to work before they are able.

- **Respond when the employee tells you they are ready to return to work**

The first step in managing a return-to-work case begins when an employee contacts you to tell you when they will be ready to resume work. They may contact you by phone, email, fax, or letter, or they may speak with you in person.

In certain cases, you may already have scheduled a date for the employee to return to work. If the employee doesn't get in touch with you by the agreed-upon date, you should try to reach them to get an update on their condition. In other situations, you may have

no clear idea when the employee will be ready to resume work, as is often the case with absences due to illness or injury.

If the employee requests accommodation measures that raise questions or concerns, you should immediately tell them that you'd like to discuss their request further. You should emphasize that you are concerned about the employee's health and need to better understand the situation in order to make a decision and find appropriate solutions.

Supervisors are entitled to ask for additional time to assess an accommodation request if the employee doesn't provide enough notice prior to their expected return to work. For their part, employees have a responsibility to give their supervisors enough time to prepare for their return to work, particularly if they are requesting accommodation for specific needs.

If you need extra time to consider an accommodation request, you should ask the employee if they are able to return to their job (without measures for accommodation) until a decision is made. If the employee is unable to do this, you should arrange for temporary accommodation measures. If that is not possible, the employee will have to remain on leave. If you advise the employee to stay on leave, you should have records on hand



to demonstrate that you researched various options for temporary accommodation.

- **Create a case file**

Be sure to create a case file for each return-to-work situation you manage. Take detailed notes during all conversations and meetings regarding the situation. Keep copies of these notes in the case file.

A case file is critically important for several reasons:

- The file will become an important resource for reviewing case details.
- With these records, you can easily track the progress of each case.
- A case file will provide you with a record of all correspondence with employees, health specialists, and other stakeholders, should any misunderstandings arise.
- A detailed case file helps to document and demonstrate your efforts to meet your duty to accommodate, should a case be appealed.

- **Review any medical information submitted by the employee**

During the initial stages of managing a return-to-work case, you should review any health or medical information that has been submitted

by the employee, such as a doctor's note or certificate. Before returning an employee to work, you need to be certain that you have enough information about their capabilities and limitations related to the job duties.

As a supervisor, you have a responsibility to protect the health and safety of employees while they are at work. Therefore, you are entitled to gather certain health and medical information about an employee as they are preparing to return to work.

You are entitled to find out how the employee's medical condition will affect their ability to complete job duties. Note that you are NOT necessarily permitted to obtain a diagnosis of a condition, only details of how the condition may have an impact on the job. For example, you might be advised that an employee needs to attend weekly medical appointments and is taking medication that would prevent them from operating heavy machinery, but you would not be told the exact diagnosis or cause of the condition (such as depression). Please refer to Step #2 for more details on what medical information you are entitled to obtain.



Tip

Be open-minded

There are many ways to approach a return-to-work situation. Research shows that the more options you are at least willing to consider and discuss, the more cooperation you'll receive from the employee, their colleagues, and other stakeholders, such as union representatives.

For their part, the employee is obligated to provide documents that clarify health restrictions and describe the type of accommodation that would be most effective to facilitate their return to work.

- **Meet with the employee**

In complex cases, you should ask the employee to attend a meeting as soon as possible to verify details of their expected return to work and any associated accommodation requests. In straightforward situations, a discussion over the telephone will suffice. Note that the employee has a legal obligation to actively participate in the accommodation process.

During the meeting or telephone conversation, take detailed notes so that you will better understand and recall the discussion. Add a copy of these notes to the case file.

When speaking with the employee, you should attempt to clarify anything that is unclear in medical information provided by the employee.

Another important point to establish during this meeting is whether or not the employee would like a union official to represent them during the return to work/accommodation process (see Step #3 on page 15 for more information on this).

- **Request employee's consent to obtain further medical or health information (if necessary)**

As a supervisor, you have a duty to make informed decisions on accommodation. In order to do this, you need to gather adequate information about the employee's situation, and abide by privacy and human rights laws while doing so.

If you feel you don't know enough about the employee's situation, you need their consent to retrieve additional information. If the employee refuses to cooperate, explain to them that you cannot properly assess their needs and cannot proceed with the accommodation process until you get this information.



It's important to ensure that the employee knows that this information will only be used to determine appropriate accommodation measures. You should also explain that the organization has standard procedures to make certain that the employee's medical information is kept confidential and shared only on a need-to-know basis. Contact your organization's human resources department if you need more details about these procedures, so that you can describe them to the employee.

Step #2: If necessary, consult with health and medical specialists

In general, supervisors are entitled to receive the following medical information:

- *Information about the employee's current medical condition*
You are entitled to find out how the employee's medical condition will affect their ability to complete job duties.
- *Prognosis for recovery (if available)*
You are entitled to know if the condition is temporary or permanent (if the medical professional has this information; sometimes a prognosis cannot be established). If it is a temporary condition, you are permitted to find out how long accommodation might be required.

– *Information on the employee's capabilities for alternative employment*

If it is determined that the employee is not capable of performing their normal or modified job duties, alternative positions must be considered. You are entitled to know the employee's capacity to perform alternative work.

Tip

Provide detailed information

When consulting with doctors and other health specialists, such as occupational therapists, it's vital to provide as much detailed information as possible about an employee's job duties and the workplace setting. Describe the work environment so that the specialist understands how and where the employee works and what equipment is used for the job.



- **If medical information provided is inadequate, obtain expert advice**

If—after meeting with the employee and reviewing any medical document they have submitted—you feel you cannot make an informed decision on how to accommodate an employee, you may take steps to learn more about the employee’s health status.

- *Request clarification from the employee’s doctor or health specialist*

As a first step in clarifying health information, you need the employee’s consent to make further inquiries with the employee’s own physician. If after that you are still unclear, you can then seek additional information from an outside specialist.

- *Request that the employee undergo an independent medical assessment*

A medical exam by an independent assessor is allowable only in a few specific circumstances. Generally, medical exams are permitted in cases where an employee is returning to work after a serious illness or accident.

You may request an exam if you have reason to believe that an employee is not fit to do their job, and that a return to work might endanger their health or the well-being of others. In this circumstance, you must

prepare a clear explanation of why you feel the employee’s return to work presents a real, immediate, and significant risk to the employee’s health. Be sure to document these reasons in the case file. It is NOT acceptable to request a medical exam simply out of worry that the employee’s medical condition may come back or get worse.

Step #3: Consult with union representatives (when necessary)

- **Determine if it is necessary to consult with the union**

A union representative can provide you with valuable advice as you explore various options to accommodate an employee who will be returning to work.

You are required to include the union in return-to-work/accommodation discussions when:

- Your proposed accommodation measures will affect the rights (e.g. seniority rights) of other employees under collective bargaining agreements; and/or
- The employee tells you they want their union representative present during discussions regarding accommodation options.



Tip

Stay positive

In communications with all stakeholders, stay positive and upbeat as much as possible. If you show that you're committed to working through the accommodation process, you'll develop a rapport with stakeholders and earn their trust. This can help to get the situation resolved and get the employee returned to work more quickly.

- **Arrange to speak with a union representative**
Once you have assessed the situation and determined that the union should be involved, arrange to speak with a union representative, either in person or over the phone. Review the case details with the union official, while taking care to respect the confidentiality of any personal information collected from the employee. Remember that personal information must only be shared on a need-to-know basis. Be sure to take notes and keep a copy in the case file.

Unions have a responsibility to cooperate with supervisors to find accommodation solutions for employees returning to work.

The courts have made it clear that unions are required to support accommodation measures regardless of what has been specified in collective agreements. In other words, unions cannot block a viable accommodation option, such as a transfer to another position, because it may violate the terms of a collective agreement; in fact a union can be held liable if it hinders such efforts to accommodate.

However, collective agreement provisions are to be respected. Supervisors are obligated first to explore the accommodation options that will not interfere with rights and entitlements provided under collective agreements.

Step #4: Review the accommodation options with the employee and other stakeholders

- **Decide on your accommodation options**
As a supervisor, it is your responsibility to ensure that all accommodation options have been explored, and that the option chosen is consistent with medical information obtained and best meets the needs of the employee, the employer, and other stakeholders. In situations where co-workers will be affected, you are obligated to select an option that is least likely to interfere with seniority and collective agreement rights.



Remember that you are not required to implement a perfect solution for the employee, or one that they specifically demand. However, the employee is entitled to a solution that meets their medically verified needs. Keep an open mind when considering the various approaches to accommodate the employee. If there isn't one obvious solution, look at the possibility of using a combination of options.

If you determine that accommodating an employee would result in undue hardship to the employer, you may choose to decline the request. Keep notes in your case file as to why you have rejected the request. You may need to explain your reasoning if the employee chooses to appeal the decision through a higher level in your organization, or if the case is referred to the Canadian Human Rights Commission.

If you are considering declining an accommodation request, you are encouraged to discuss the matter with advisors from your organization's human resources department. Please refer to section on "undue hardship" on page 7 for more information on your legal right to refuse accommodation requests.

- **Discuss your recommendations with the employee**

After you have consulted with stakeholders and collected the necessary information, you should prepare to present the employee

with one or more of your recommended options to accommodate their return to work. It may also be beneficial to include other stakeholders, such as a representative from your organization's human resources department or union officials, in this discussion.

Schedule a time to review your recommended option(s) with the employee and other stakeholders (if necessary). During this meeting, you'll have the opportunity to answer any questions and clarify any points that may be misunderstood. This also gives the employee a chance to respond to your proposed solutions and provide any feedback to help finalize them.

If the employee refuses your proposed accommodation measures, you may decide to explore other options or, as a last resort, deny their request (if you feel you have met your duty by offering them a reasonable accommodation option). Be sure to take notes describing the employee's reasons for refusing the accommodation. It is recommended that you contact your organization's human resources department or other designated officials for further guidance before halting the accommodation process.



Step #5: Implement accommodation measures

Having reviewed your recommendations with employees and stakeholders, and made a decision, you are ready to move ahead with implementation. You should work as quickly as possible to implement the accommodation measures you have selected. The employee can get back to work without delay, and you will demonstrate that you are committed to an effective return-to-work process. This contributes to building an organizational culture of trust and respect—values that boost the overall productivity of the workplace.

- **Monitor the effectiveness of the accommodation**

Once the employee has returned to work, you should periodically evaluate the effectiveness of the accommodation measures. Speak with the employee to find out if they are able to work productively, and if any of the accommodation measures need adjustment. When applicable, verify that the employee's co-workers are comfortable and able to manage any reassigned or additional job duties. If you need assistance with reassigning duties among co-workers, seek guidance from your organization's human resources department or other designated officials.

- **Advise the employee of the appeals and complaints process (if necessary)**

If you feel that you have done everything reasonably possible to meet your duty to accommodate, and the employee remains dissatisfied, tell them they have the option to appeal the decision at a higher level in the organization. Give them information on how to begin this process, according to your organization's internal policy. You should also advise the employee that they can take their concerns to the Canadian Human Rights Commission.



Roles and Responsibilities in the Return-to-Work Process

Employers (including employer representatives, such as directors, supervisors, and human resources officials), employees, and unions share in the responsibility to find solutions for managing the return to work. Below are lists summarizing the main roles and responsibilities that each party has in the process.

Employer/Supervisor's Responsibilities

1. Ensure employees are aware of their right to accommodation, explain details about the workplace accommodation policy, and distribute copies of the policy.
2. Once a request is received, discuss the accommodation options with the employee.
3. Take notes and keep records of all discussions about accommodation.
4. Take an active role in exploring alternative approaches and solutions to accommodate the employee.
5. Obtain expert opinion and advice from a designated human resources or health specialist when necessary.
6. Keep information/medical records confidential.
7. Grant accommodation requests in a timely, reasonable manner, to the point of undue hardship (see page 7 for information about undue hardship).
8. Be willing to review and modify the accommodation agreement if the circumstances change or the solution is no longer working.
9. Provide details to justify decisions where accommodation has been denied.
10. Advise employees about their right to appeal and their right to approach the CHRC.





Employee's Responsibilities

1. Request accommodation when needed and suggest appropriate measures, if possible.
2. Provide information/documentation from a qualified health care professional to clarify health restrictions and describe the type of accommodation that would be most effective.
3. Cooperate with any experts who are asked to provide guidance on the situation.
4. Respond to the employer's reasonable request to undergo an independent medical exam.
Note: employees cannot be forced to submit to an independent medical examination, but failure to comply with a request may delay the accommodation process.
5. Allow a reasonable amount of time for the employer to reply to the request for accommodation.
6. Participate in any discussions regarding possible accommodation solutions.
7. Listen to and consider any reasonable accommodation options that the employer proposes.
8. Achieve the agreed-upon job performance standards once accommodation is provided.

9. Work with the accommodation provider on an ongoing basis to manage the accommodation process.
10. Advise the employer of changes in accommodation needs.

Union Responsibilities

1. Take an active role as partners in the accommodation process.
2. Provide accommodation advice and guidance.
3. Support accommodation measures regardless of the collective agreement, unless to do so would impose undue hardship.
4. Work with the employer to address existing barriers in the collective agreement, ensuring that no new barriers are added.

3

CASE STUDIES





Employers (including employer representatives such as directors, supervisors, and human resources officials), employees, and unions share in the responsibility to find solutions for managing the return to work. In this section, we provide hypothetical case studies demonstrating these roles and responsibilities. Following each case study are general guidelines for how you might consider approaching the situation if you were the employer or supervisor.

Case Study #1

Employee submits insufficient medical information, refuses to cooperate

An employee approaches his supervisor and says that his doctor has advised him to take eight weeks of sick leave to recover from “stress and burnout.” The employee hands his supervisor a doctor’s note to confirm this advice, and explains that he needs to be away from work starting right away.

The supervisor notes to himself that this employee has had a troubled history with the organization. The employee has been disciplined on several occasions and has in turn filed a number of grievances against the supervisor and various co-workers. He has made no secret that he would prefer to transfer from his current night shift to a day shift or to a different location, but he doesn’t have the seniority to successfully apply for any of these positions. With this new request for leave, the supervisor is concerned that the employee and the doctor randomly requested a lengthy absence.

Nonetheless, since the employee presented a valid doctor’s note, the supervisor grants the employee’s request. The supervisor schedules the start and end dates of the sick leave.

A few days before he is supposed to return to work, the employee delivers another doctor’s note saying he should be transferred to the day shift immediately.





Gather details and assess the situation

Ideally, you would have maintained contact with the employee during their absence and determined that accommodation measures may be necessary prior to their return to work.

In this situation, the employee didn't give you adequate notice prior to their preferred return-to-work date. You should tell them you need more time to consider their request. An employer is entitled to ask for more time to examine and implement an accommodation request when there isn't enough information to make an informed decision.

The doctor's note presented by the employee states that they should be switched to a day shift immediately. However, the note does not provide sufficient information on how the employee's condition will affect their ability to perform their job, nor does it indicate if this is a permanent or temporary situation. Finally, the note does not indicate what alternative work duties the employee would be able to do.

In this case, you should ask the employee if they are able and willing to return to their regular night shift until a decision can be made about the requested shift change. If the employee is unable to do this, look at whether the employee can be temporarily moved to the day shift. If that is not possible, it may be necessary for the

employee to remain on leave. You should keep a record of these proceedings on file.

Consult with health and medical specialists

Since there aren't enough details to make an informed decision, you would have to tell the employee that you need the information clarified by their physician and/or an independent medical assessor.

At this point, you should describe to the employee the organization's internal policies for collecting and protecting the privacy of personal information. Ask for the employee's consent to contact the doctor that supplied the note.

WHAT IF ... the employee refuses to allow you to contact their doctor, or refuses to participate in an independent medical assessment?

An employee has a responsibility to fully cooperate in the effort to find options for reasonable accommodation. This involves permitting a supervisor to gather the appropriate health and medical information they need to make an informed decision, provided that privacy and human rights are respected in the process.



If an employee refuses to help you obtain the health information you need, you should advise them that you cannot continue with the accommodation process—their request will be delayed until such information can be gathered.

Remember that an employer cannot discipline an employee for refusing to undergo a medical examination by a doctor chosen by the employer, nor can the employer discipline an employee for refusing to disclose confidential medical information. It may be helpful if the employer agrees to consult with a physician of the employee's choosing.

In general, you should confirm whether or not the employee can perform their night shift duties. If they cannot, determine whether they could do the job if some of the night shift duties were modified. Finally, if the employee is unable to do their job with modified duties, seek information on what types of tasks the employee would be able to accomplish.

Consult with union representatives

In this example, the employee is requesting accommodation that will have an impact on co-workers' rights and entitlements under collective agreements. Consequently, you would have to

consult with a union representative to discuss options for accommodation. For its part, the union is obligated to assist you in exploring these options. Please refer to page 15 in Part 2 for more details.

If the medical information you collect verifies that the employee should be switched to a day shift, you may need to reassign or reorganize duties that are currently held by the employee's co-workers. You should consult the union about how this will affect seniority rights or collective agreements. Ask the union to suggest potential solutions that will minimize disruption to co-workers.

Review the accommodation options with the employee and other stakeholders

Meet with the employee to review all of the accommodation options that are suitable for the situation. If the medical information supports the employee's need to move to a day shift, then recommend the scheduling option that is least likely to interfere with co-workers' rights under collective agreements.

If the medical information does not support the employee's request, then you are not required to transfer them to a day shift. However,



some changes to their current job duties may still be necessary (if indicated by the medical information collected). You may need to consult with others in your organization to decide on what these modifications would be. You may also need to provide training related to the job's new or modified duties.

WHAT IF ... the employee refuses your recommended accommodation options?

The employee is not entitled to a perfect solution, or one that they choose for themselves. They are entitled to accommodation that meets their medically verified needs. If you have offered reasonable accommodation (to the point of undue hardship), then you have satisfied your duty to accommodate. If the employee refuses your proposed accommodation, they should explain why they have rejected the offer.

Implement the accommodation plan

Following a review of the options with the employee, you should implement the agreed-upon accommodation measures so that the employee can return to work as quickly as possible (if they hadn't returned to the job while the request was being considered). Ensure that you monitor the employee's progress to make certain that the accommodation is effective. If the accommodation doesn't address the verified needs of the employee, you may have to make further adjustments. If the employee remains dissatisfied, advise them of their rights to appeal within the organization and/or their right to file a human rights complaint.





Case Study #2

A case of undue hardship?

Mr. B is a 56-year-old man employed as a deck hand on board a ferry. He has permanently injured his shoulder and back, and has been off work for over a year. He has indicated that he is now fit to return to work. His employer arranges for a fitness assessment to ensure that Mr. B can safely complete his job duties. The assessment shows that he must avoid repetitive lifting, carrying, and twisting, and that he should no longer work on board a ship.

As for education and other skills, Mr. B has completed grade 9 and has very limited reading and writing abilities. He is considered a poor candidate for formal upgrading. He has indicated that he is unwilling to relocate to a position outside of his province.

Mr. B's employer believes that the company is unlikely to find a job that can take advantage of his skills given his medical limitations and geographic preferences. The employer has a limited number of light duty jobs and those positions are in high demand since there has been an increase in the number of employees with disabilities.

In this case, several accommodation procedures have already been completed. You would have already gathered information to assess the situation; consulted with health and medical specialists; and discussed options with the union.

Consider *all* options for accommodation

In order to satisfy the duty to accommodate, an employer must demonstrate that they have explored all possible accommodation options, up to the point of undue hardship.



Mr. B has limited skills and refuses to relocate. This situation may make it very difficult to accommodate him. In spite of Mr. B's preferences, the employer should consider positions in other geographic areas and present them to him. An alternative may be to retrain Mr. B for another position within the organization; however, an employer is not required to create an unproductive position in order to accommodate an employee.

Select the most appropriate accommodation option

After reviewing all potential solutions, the employer should look for a feasible option that accommodates Mr. B's physical limitations and is least likely to interfere with co-workers' rights under collective agreements.

If there are no options for alternative employment, the employer should think carefully about how they would prove that this is a case of undue hardship before considering terminating Mr. B's employment.

Is this a case of undue hardship?

The employer should consider the following questions before concluding that accommodating Mr. B would amount to an undue hardship:

1. Does Mr. B's condition present a health risk to himself?
2. Does Mr. B's condition present a health risk to others?
3. Can any modifications be made to Mr. B's job that will allow him to perform the job?
4. If Mr. B cannot be accommodated in his current position, what alternative positions have been considered?
5. Can Mr. B be moved into a position with a non-bargaining unit or to another bargaining unit?
6. What would be the costs of implementing Mr. B's accommodation? The costs should be quantified and not speculative.
7. Are there reasons why any viable alternatives were not implemented?
8. What discussions have taken place between the employer, the employee, and the union about the situation?
9. Have the employer, the employee, and the union cooperated in attempting to find a solution?



Case Study #3

Employee has returned to work with modified duties but still has not resumed her regular job

Ms. T, a ramp agent at an airport, was off work for four weeks following knee surgery. As instructed by her doctor, she has returned to work on a gradual basis, first working two days per week, then three, then four, and then five days per week. She has also not performed the physically demanding tasks that are part of her job requirements. These tasks were assigned to her co-workers, and she has taken on some of their less strenuous duties.

It has been six months and the original medical assessment done by her doctor indicated that Ms. T should be working without restriction by now. However, she has just presented a doctor's note stating that she should continue with light duties until further notice. Her supervisor believes that some of her co-workers resent having to shoulder the increased workload and worries that this situation might lead to workplace injuries.

Having received the note from Ms. T's doctor, the supervisor has to review the temporary accommodation arrangements and determine whether to extend them, adjust them, or find a new solution altogether.

Clarify medical information

The first step in this case would be to clarify whether or not Ms. T's condition is permanent or temporary. If temporary, you would need to find out approximately when she would be expected

to recover, or when you should re-evaluate the situation. You should ask for Ms. T's consent to ask her doctor for this information.

In addition, you may need to ask Ms. T to participate in an independent assessment of her abilities by an occupational specialist. This would provide a clearer sense of which physical tasks she is to avoid. Perhaps she is now able to complete some of the physically demanding tasks, but unable to complete others.



Consider alternative positions or reassigning job duties

If Ms. T's condition is permanent, you should look at alternative permanent positions within the company that match her skill set. You may need to consult with others in your organization for help on this. If no alternative positions are available, you may need to consider making Ms. T's temporary duties into a permanent job.

While you may have concerns that Ms. T's co-workers resent having to take on some of her more physically demanding tasks, remember that the complaints of co-workers would not be considered sufficient grounds to reject a suitable accommodation option. Nonetheless, when evaluating potential solutions, you should consider factors such as an unfair workload distribution, the need for a major reorganization, and the risk of relapse. These factors may influence your selection.

If you are worried about the safety of Ms. T's co-workers, you may need to reassign certain tasks so that the physically demanding duties are more evenly distributed among the group. If co-workers' safety continues to be a concern and the issue cannot be resolved, you may have to seek guidance from others in your organization on ways to resolve this issue.

If you still cannot come to a clear accommodation solution and are wondering if this is a case of undue hardship, remember that you'd have to provide evidence of this based on the health, safety, and financial factors of the case. Please review the section on undue hardship on page 7 for more details.



Case Study #4

Employee returns to work in a safety-sensitive position

Mr. C, a truck driver, has been off for over a year following a diagnosis of multiple sclerosis. His condition has stabilized and his employer, a trucking company, has been informed that he is now in remission. Mr. C's insurance company has determined that he is fit to return to work and has cut his long-term disability benefits.

On Friday, Mr. C informs his supervisor that he is capable of returning to work as of the next Monday. He presents a medical certificate from a specialist in multiple sclerosis indicating that he is fit to work without restriction. The trucking company is concerned that their employee may suffer an attack while on the road, resulting in a catastrophic accident for which they will be held liable.

In this situation, Mr. C has not given you much notice to prepare for his return to work. Since Mr. C holds a safety-sensitive position, you may need additional time to ensure that he is indeed fit to safely complete the duties in his job description. Keep in mind that an employer has a responsibility to protect the health and safety of everyone in the workplace. An employer also has an obligation to minimize the risks of a health or safety problem recurring.

Ideally, you would have maintained contact with Mr. C while he was on leave to find out approximately when he would be ready to return to work. This way, arrangements could be made in advance.

Learn about Mr. C's condition

Mr. C has told you he has been diagnosed with multiple sclerosis (MS). Since you have this information, you should learn about what MS is, whether there are different types of the disease, and how it could affect Mr. C's ability to work. Don't make assumptions based on what you've heard about the disease or stereotypes associated with it. Look for information through the MS Society Web site or at your local library.



Verify that Mr. C can safely resume work

The next step would be to verify that Mr. C is fit to return to his job. You have a medical certificate but since this is a safety-sensitive position, you need to verify that the certificate was completed based on an understanding of what Mr. C does at work. Do not rely on the decision of Mr. C's insurance company to stop paying benefits as an indication that he can return to work safely. Instead, ask for Mr. C's consent to contact the MS specialist who signed the medical certificate for further details. Make sure that the specialist has read through Mr. C's job description and has confirmed that he can safely perform his duties. Verify if any medication he may be taking would have an impact on his ability to perform his job duties.

Note: If an employer refuses to return an employee to work because of health or safety concerns, they should be able to demonstrate evidence of a verifiable risk. A potential or hypothetical risk is not sufficient grounds to refuse the employee's return to work.

Consider arranging independent medical assessments

If, after contacting the MS specialist, you need further details on Mr. C's ability to work, you should arrange for an independent medical assessment. Also, since Mr. C is in remission and may become ill at some point in the future, you may regularly need to evaluate his ability to work. For example, he may need to participate in annual or semi-annual medical assessments.



Case Study #5

Reasonable accommodation versus perfect accommodation

Ms. K works as a payroll clerk for a large government department. In the past few years she has become increasingly sensitive to airborne allergens, especially mould and perfumes. She experiences headaches, fatigue, gastrointestinal distress, and mental confusion when exposed to certain environmental triggers. She has been off work for increasingly lengthy periods of time. While off work, she has been diagnosed with environmental sensitivities. A Health Canada assessment has indicated that she is fit to return to work but recommends that she avoid air conditioning, perfumes/colognes, and mould.

The employer has instituted a scent-free policy in the workplace and offered to return Ms. K to her position as a payroll clerk in a closed office with air purifiers. The employer has also offered her the option of tele-working. Ms. K insists that, in order to create a healthy work environment, the employer move her to a space in a newly constructed “green” office building in the city. The government does not own or lease any space in this building, and so the employer is unwilling to accommodate Ms. K in this manner.

In this case, several accommodation procedures have already been completed. The employer has gathered information to assess the situation; arranged for a Health Canada physician to assess Ms. K’s condition; and presented her with two accommodation options.

Ensure that your proposed accommodation options meet Ms. K’s medical needs

Ms. K insists that she needs to be moved to an office in a new “green” office building. Before examining the feasibility of this request, you should review the accommodation options that have already been presented—the option of a closed office with air purifiers and the option of tele-working. You need to confirm whether these options would successfully meet Ms. K’s



medically verified needs according to the Health Canada assessment and any other medical information you have gathered. If you need further information, contact the Health Canada physician who completed the assessment.

You should also examine the option of moving Ms. K to a green office building. Determine the costs and feasibility of this option. Consult with the medical experts to find out if this form of accommodation is absolutely necessary, or if the other options would also meet the employee's requirements.

Since the government does not own or lease any space in the green building, moving Ms. K there could prove difficult. If at least one of the other accommodation options meets Ms. K's needs and is the best option from the employer's perspective, then this option may be selected.

Remember that the employer is responsible for choosing the appropriate accommodation solution, not the employee. While it's important to take the employee's preferences into consideration, the employer has a right to run a productive workplace and to minimize disruption for other parties whenever possible. An employee cannot expect a perfect solution and must accept any arrangement that is reasonable in the circumstances. If you determine that at least one of the proposed options in this case will

successfully meet Ms. K's needs, then you will have satisfied your duty to accommodate.

Advise Ms. K of your decision, your reasons, and her right to appeal

If Ms. K remains dissatisfied, advise her of her right to appeal within the organization and/or her right to file a human rights complaint.



Recommended Resources

Following is a list of recommended resources to help you understand issues surrounding human rights in the workplace. You can download these documents by visiting the Web site addresses below. Alternatively, you can request copies by calling the CHRC at 1-888-214-1090.

- Human Rights and the Return to Work: The State of the Issue
http://www.chrc-ccdp.ca/research_program_recherche/RTW_RAT/toc_tdm-en.asp
- A Place for All: A Guide to Preventing Discrimination
http://www.chrc-ccdp.ca/discrimination/APFA_UPPT/toc_tdm-en.asp
- Duty to Accommodate Fact Sheet
http://www.chrc-ccdp.ca/preventing_discrimination/duty_obligation-en.asp
- Duty to Accommodate FAQ
http://www.chrc-ccdp.ca/preventing_discrimination/toc_tdm-en.asp
- Barrier-Free Employers
http://www.chrc-ccdp.ca/discrimination/barrier_free-en.asp
- Bona Fide Occupational Requirements and Bona Fide Justifications under the *Canadian Human Rights Act*
<http://www.chrc-ccdp.ca/discrimination/occupational-en.asp>
- The Privacy Commission of Canada's *Privacy in the Workplace* Fact Sheet
http://www.privcom.gc.ca/fs-fi/02_05_d_17_e.asp
- The National Institute of Disability Management and Research
<http://nidmar.ca>