

A Manager's Guide to Reasonable Accommodation



Where ideas work

This guide is the responsibility of the Public Service Agency
Province of British Columbia

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INTRODUCTION

“Reasonable accommodation” is an important concept in the area of human rights and discrimination. If the actions, including requirements, rules or policies of an individual or organization have the effect of treating a person comparatively adversely because of the person’s age, race, sex, religion, disability or any of the other grounds listed in *BC’s Human Rights Code* (“Code”), then this effect is “*prima facie* discriminatory.” In that case, the individual or organization must take reasonable steps to eliminate or minimize the harm caused to the person. “Reasonable accommodation” (sometimes simply called “accommodation”) refers to those steps.

Accommodation is a legal duty, and failure to accommodate to the extent required by law means that a person or organization can be found liable for discrimination contrary to the *Code*.

In the employment context, reasonable accommodation refers to the steps an employer must take to modify employment requirements, rules or policies that would otherwise be considered to be discriminatory under the *Code*. What steps are required and what actions by an employer will satisfy the legal duty to accommodate will vary from situation to situation. Satisfying this legal duty requires managers to be attentive, flexible and comprehensive.

It is also important to remember that the duty to accommodate can arise at any point in the employment relationship: it applies to hiring and dismissal decisions, and to terms and conditions of employment, including job duties, and general workplace rules and policies. The purpose of this guide is to assist you three ways:

1. identifying when a duty to accommodate arises;
2. following an adequate accommodation process; and,
3. determining when the duty to accommodate has been met.

Most importantly, since accommodation issues can be contentious, managers must fully document all of their actions in relation to any accommodation process and feel free to seek appropriate assistance, whether from human resources or labour relations.

NOTE: As a service provider, the BC government is also required to provide services free of discrimination. However, services-related issues are beyond the scope of this guide. This guide only addresses discrimination and accommodation in the context of employment.

Satisfying this legal duty requires managers to be attentive, flexible and comprehensive.

KEY CONCEPTS

A. The Concept of Discrimination

Under the *Code*, discrimination refers to treatment of a person or group that is adverse as compared to others, and is based on one or more of the prohibited grounds of discrimination.

1 Grounds of Discrimination

In the context of discrimination in employment, the prohibited grounds are:

- race
- ancestry
- political belief
- marital or family status
- sex
- age (19 years or more)
- criminal or summary conviction offences unrelated to the employment or the intended employment of that person
- colour
- place of origin
- religion
- physical or mental disability
- sexual orientation

This means that the *Code* prohibits treating people worse than others because of one or more of these grounds. The ground need not be the sole reason for the treatment; it is enough if it is a factor in the treatment.

Example: A person may be dismissed for a number of reasons, but if even only one of the reasons is that she is pregnant or a reasonable person would think that her pregnancy was a factor in the dismissal, this is sufficient to establish that the treatment was based on the ground of sex.

Note on Disability:

Since the majority of situations in which the need to accommodate arises involve employees with disabilities, it is important for managers to be able to identify when an employee has a disability and as a result of the disability is adversely affected by some aspect of the job or the workplace as it could give rise to a claim of discrimination.

Many disabilities are obvious; however, many are not. The definition of disability for the purpose of the *Code* is expansive. It includes any involuntary physical or mental condition that has some degree of permanence. It does not include a single temporary injury, a series of temporary injuries or a series of unrelated illnesses. It also includes “perceived disability.” That is, whether or not a person actually has a disabling condition, it is discriminatory to treat an employee as if the employee does in a way that has an adverse effect on the person.

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2 Comparatively Adverse Treatment

It is not enough for the employee to claim that one of the reasons she or he was treated adversely is related to one or more of the prohibited grounds of discrimination. The employee must also show that the treatment was *adverse as compared to others*. The *Code* does not protect people against being treated badly. It only protects people from being treated worse than others for reasons related to the prohibited grounds of discrimination.

Example: If an employer lays off everyone in the department, including a woman who is pregnant, this is not discriminatory on the basis of sex even though it has an adverse impact on her, because the employer is not treating her worse than her non-pregnant co-workers. However, if only the pregnant employee is terminated, this may be discrimination on the basis of sex if her pregnancy was a factor in the decision to terminate her.

The *Code* ... protects people from being treated worse than others for reasons related to the prohibited grounds of discrimination.

The BC Human Rights Tribunal has stated that the prohibited ground (e.g. the person's gender, or the fact that they have a disability), need not be the sole or even primary reason for the conduct or treatment. It will be considered discrimination if the prohibited ground was **a factor** in the treatment or action complained of.

Although intentional discrimination is clearly prohibited, except in the case of a Bona Fide Occupational Requirement (see below), discrimination does not require proof that the

employer or manager intended to discriminate. Unintentional acts may amount to discrimination. The focus is on the impact on the particular employee and whether it is related to a prohibited ground. Also, treating all employees in the same way does not necessarily mean that you are not discriminating against some of them. If a universal rule has a worse impact on some employees than on others for reasons related to a prohibited ground, then applying the rule to everyone may be discriminatory.

Example: For valid operational reasons, an employer may require that its employees work shifts that include Saturdays. For some individuals, working Saturdays may be an inconvenience. For individuals whose religious beliefs prohibit working on a Saturday, this requirement may have a much more severe impact, requiring them either to violate the tenets of their religion or to violate the requirements of their job. In this situation, the Saturday work requirement may be found to discriminate against certain employees on the ground of religion.

Determining that an employment rule or requirement has an adverse impact on an employee because of a prohibited ground is not the end of the story. It is only the first step. Such discrimination (often called "*prima facie* discrimination") does not mean that the employer is liable under the *Code*. It does mean that the employer is obliged to justify or provide an acceptable explanation for the discrimination.

B. Bona Fide Occupational Requirement

In order to justify a rule or requirement that is *prima facie* discriminatory, the employer must be able to establish a Bona Fide Occupational Requirement. To establish a bona fide occupational requirement you must show three things:

- that the employer adopted the standard for a purpose rationally connected to the performance of the job;
- that the employer adopted the particular standard in an honest and good faith belief that it was necessary for the fulfillment of that legitimate work-related purpose; and,
- that the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees (who have personal characteristics falling within a prohibited ground) without imposing undue hardship on the employer.

The last requirement is often referred to as the duty to accommodate or to provide reasonable accommodation.

Example: including Saturdays on a shift schedule is rationally related to the need for the business to stay open on Saturdays and was obviously created in the good faith belief that Saturday opening was good for the business. Requiring all employees to be available for work on Saturdays is not a *bona fide* occupational requirement unless the employer can also show that it would incur undue hardship by altering the shift schedule to allow employees whose religions forbid work on Saturday not to work these shifts.

C. The Duty to Accommodate / Reasonable Accommodation

What constitutes a reasonable accommodation will turn on the facts of a particular case. Generally, an employer must be willing to modify or relax any aspect of the job or the workplace that is necessary to alleviate or eliminate the harsher impact of the requirement on the particular employee or group of employees that is related to the prohibited ground of discrimination. A reasonable accommodation can take many forms including, but not limited to, modifying job duties, altering a building or work site, providing technical aids, altering hours of work, permitting absences or breaks, and finding another, more suitable position for the employee. The employer must do everything that is “reasonable” in the circumstances, even if it means incurring some “hardship”. Hardship includes expense, negotiating with the Union, creating impacts on other people’s jobs, among other things. The law requires the employer to do everything it can to accommodate the needs of the employee to the point of *undue* hardship.

It is important to remember that while accommodation is a shared obligation of the employer, employee and union (if applicable), the primary obligation to provide a reasonable accommodation likely rests with the employer. This is because the employer is in the best position to know its operational requirements and how they could be modified to accommodate the employee.

The employer’s responsibilities include:

- initiating the process as soon as it is aware that there may be a need to accommodate
- seeking information from the employee regarding limitations

- sharing necessary information with the other participants (employee, union) and involving them in the process
- making that process a priority, so that it moves along in a timely way
- exploring possible accommodations
- offering to the employee one or more accommodations that are reasonable in light of the employee's needs, to the point of undue hardship

The employee also has responsibilities in the accommodation process. These include:

- facilitating the process
- providing relevant information about needs that are related to the condition (e.g. the disability or other ground)
- participating in the process in good faith
- taking actions that are reasonably necessary to achieve an accommodation (e.g. following a treatment program)

If the employee does not fulfill their responsibilities and this effectively blocks the process, the employer may not be required to accommodate the employee further.

Finally, if the employee is unionized, the Union is also responsible for doing its part to assist in achieving a reasonable accommodation, short of undue hardship. Often, this may mean that the Union will be required to agree to some modification of the collective agreement. If it does not act reasonably, the Union may be liable for discriminating against the employee. You should consult with a Human Resources consultant if you believe this situation has arisen.

D. Undue Hardship

What constitutes excessive or undue hardship that would justify an employer in not doing more to accommodate the employee will depend on all of the circumstances. Hardship is not "undue" unless the employer would encounter significant difficulty in the workplace in doing anything more to accommodate the employee. The standard is a high one to meet because the law recognizes that this is the point that the employee's right to be free from discrimination is outweighed by the employer's need to structure and conduct its workplace in a certain way.

The following factors are often relied on by Employers who say they cannot accommodate an employee any further because it would cause undue hardship:

- risks to health or safety of the employee, co-workers, or others
- cost
- effect on workplace productivity
- interference with collective agreement provisions
- impact on the rights and interests of other employees
- inter-changeability of the workforce and facilities
- size of the operation

Employers cannot rely on discriminatory attitudes of the public, clients or co-workers in arguing that an accommodation would cause undue hardship (e.g. clients who do not want to be served by a woman).

THE IMPORTANCE OF DOCUMENTATION

The importance of comprehensive documentation of the whole accommodation process cannot be over-emphasized. Record all efforts made to accommodate an employee. You should proceed on the assumption that others may scrutinize what you did long after your involvement is over. All those involved in the process should be aware of the need to record their efforts and that third party scrutiny is a possibility. At a minimum, you should document the following:

1. Record any request for accommodation or how you became aware of the need for accommodation, including all information provided by the employee and/or the employee's physician or other person about the disability or characteristic requiring accommodation.
2. Keep dated notes of all efforts made to determine the extent of the employee's need for accommodation that, if met, would allow the employee to fully participate in their employment. Where it is determined that a need does not exist or that the need can be met in a less intrusive manner than what has been suggested, keep notes of the rationale for the decision.
3. Keep dated notes of all conversations, meetings and telephone discussions held in relation to the matter.
4. Record the accommodation options considered including those rejected as being unsuitable or as constituting undue hardship, including the rationale for the rejection.
5. Record all expert advice obtained to assist in the accommodation process.
6. All offers of accommodation and the employee's response should be in writing. Where an employee rejects an offer of accommodation that you consider meets their need, document that refusal. In appropriate circumstances, you may provide written advice to the employee stating that the employer discharged its duty to accommodate by making a reasonable offer of accommodation. Consultation with the Human Resource advisor should take place prior to the issuance of any such letter.

You should proceed on the assumption that others may scrutinize what you did long after your involvement is over.

IDENTIFYING WHEN THE DUTY TO ACCOMMODATE ARISES

The duty to accommodate can arise in one of two ways. Usually, the employee asks for an accommodation of some kind, either formally or informally. Sometimes, however, it is the employer that begins to suspect that an accommodation is required, based on reports of co-workers or observation of the employee. Even if the employee does not ask for an accommodation, the law says that, when it is reasonable to suspect that an accommodation may be necessary, the employer has a “duty to investigate” or make inquiries of the employee to see if an accommodation is needed. Because of the sensitivity of these situations, you may wish to speak with a Human Resources consultant before raising the matter with the employee.

In assessing whether you are obliged to accommodate the employee, you must consider whether any *prima facie* discrimination has occurred that would give rise to the legal obligation to provide reasonable accommodation. This means that you must determine if:

- one of the enumerated prohibited grounds of the HR Code exists
- there has been some adverse impact on the employee; and
- a prohibited ground of discrimination was a factor in that impact.

There are two common situations of adverse impact. First, an adverse impact may arise because the employee is no longer able to perform his job and/or comply with other workplace requirements as the employee used to be able to do. This is often because the individual has developed a disability. However, other grounds of discrimination can also arise, such as converting to a religion or becoming pregnant. Often the test of adverse impact is not very onerous, and courts have assumed that an adverse impact exists, on the basis that the new situation is adverse for this individual.

Second, an adverse impact may arise because a new rule, policy or requirement is being introduced. In these situations, adverse impact usually requires the employee to show that the new requirement had a negative impact on the employee relating to a prohibited ground. For example, a change in shift schedules may have an adverse impact on employees with certain religious faiths, or those who have medical conditions that mean they cannot work at night.

You must keep in mind that the adverse impact must be related to a ground of discrimination, and the *needs* it creates, and not simply a function of the preferences of the employee. To put it bluntly, everyone may prefer to work a day shift; only very few employees have a disability or other needs relating to prohibited grounds that require them to work only day shifts.

To determine whether you are required to accommodate the employee, you will need to get more information from the employee about their situation as it affects their ability to work as required. You should work with the employee to get this information from a reliable source.

In disability situations, you will need to obtain the employee’s permission to get information from the employee’s doctor or other health care provider. You are entitled to the information necessary to establish whether and how the employee’s medical condition affects their work currently and in the future. However, you are not entitled to the information about the employee’s condition generally. Put another way, you are not entitled to a diagnosis; you are entitled to a prognosis, and an assessment of the impact of the condition at work.

In non-disability situations, such as a request based on a religious need, or on family status (e.g. need to care for children), you are entitled to request reliable information that is sufficient for you to determine that this is a real need based on the prohibited ground, and not a preference. You may wish to speak to a Human Resources consultant to assist you at this stage.

THE ACCOMMODATION PROCESS

Once you have determined that there is an obligation to accommodate the employee, you should work with the employee (and the Union, if it is likely that a reasonable accommodation will involve the Union) to identify possible reasonable accommodations. This process will normally include the following steps:

Acquiring necessary information: you will need reliable information about how the condition affects work and what treatment, technologies, or other forms of assistance might reduce or eliminate the conflict between the employee's prohibited grounds related need and the workplace requirements. You may also find it useful to get other information from the employee regarding the employee's qualifications, abilities, and self-imposed limitations (e.g. willingness to relocate or commute). You should obtain all information in writing. You should work with the employee to obtain the relevant information in a timely way, drawing on outside experts as necessary.

Considering possible options: Your first option for consideration should be accommodating the employee in their existing position.

You will have to consider whether the position can be modified by removing duties the employee cannot perform and, in certain circumstances, you may have to consider shifting job responsibilities between employees. For example, a co-worker may be asked to assume some of the disabled employee's duties while the disabled employee may be asked to perform some of the co-worker's duties that they are able to perform given their limitations. You may also have to consider changing shift schedules, allowing an employee more frequent breaks from repetitive tasks, temporary re-assignment, including temporary light duties, or a graduated return to work.

Where it is not reasonable to modify an employee's existing position to accommodate their needs, you may be required to consider alternate placement. When considering alternate placement, you should consider vacancies within the employee's ministry and geographic location, and with other ministries within the employee's geographic location. You may need to enlist the assistance of more senior managerial and/or Human Resource consultant to assist in these efforts. Employers are not required to create and fund a new position to meet the duty to accommodate.

Courts and tribunals place a high value on the promptness of the employer's response to a demonstrated need for accommodation.

Including relevant parties: you should meet with, or at least exchange information with the employee (and Union, where appropriate) on a regular basis. It is very important to keep the employee "in the loop" so that the employee both feels included and that the accommodation is important to the Employer.

Timeliness: while the time required to conduct the accommodation inquiry will necessarily vary considerably from situation to situation, the employer may be liable for failing to meet its duty to

accommodate if there is delay or inaction on the part of management. Courts and tribunals place a high value on the promptness of the employer's response to a demonstrated need for accommodation.

WHEN THE DUTY TO ACCOMMODATE HAS BEEN SATISFIED

The duty to accommodate can be satisfied in several different ways.

The ideal resolution is to offer the employee an accommodation, which meets all “prohibited grounds related needs, is consistent with the employer’s operational requirements, causes little disruption to the workplace or expense to the employer, and is acceptable to the employee.”

The employer is not obliged to offer multiple accommodations at the same time, but if there is more than one reasonable and workable option, more than one can be offered.

The duty to accommodate can also end in other ways:

- acceptance of an offer of accommodation or rejection of an offer that meets the prohibited grounds related need.
- the employee can refuse to provide you with information that is necessary for you to determine what accommodation(s) may be appropriate;
- the Union may refuse to participate in the process or fails to give its consent to an accommodation in a way that renders the employer unable to act; or
- you may determine that there is no accommodation that you can offer without incurring undue hardship for the employer. If you have reached what you believe to be the point of undue hardship, you should speak to your HR Consultant.

All of these situations are complex and may result in complaints to the B.C. Human Rights Tribunal. If you think that one of these situations applies to you, you should contact the appropriate Human Resources or Labour Relations advisor for assistance.

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EXAMPLES

Scenario #1

An employee works on a rotating shift schedule and has developed a stress disorder, which, in his doctor's opinion, prevents the employee from working nights. He wishes to be transferred to a higher classified position in the workplace, which involves only day shifts.

- The first step would be to meet with the employee to fully canvass the nature of the request and the reason for the requested accommodation. You may wish to seek clarification from the employee's physician concerning what aspects of the employee's job they are not able to meet. For guidance in communicating through the employee to his/her doctor, please refer to the Managing Health Related Absences Handbook, which can be found on the Internet at <http://www.pserc.gov.bc.ca/mhra/>. For the purposes of this example, assume the employee has provided sufficient medical evidence to support that the disability exists and that there is a legitimate restriction such that the employee cannot work night shift.
- You should next consider if this is an issue of discrimination with respect to one of the prohibited grounds under the Code. In this case, employee's stress disorder might be considered either a physical or mental disability. Furthermore, the disorder gives rise to an inability to meet their employment obligations as established by the medical evidence provided. There is likely a duty to accommodate this employee in the workplace.
- It is now necessary to consider what possible accommodations may be available and what their impact would be on the Employee's job duties and the workplace. When making this assessment, it is important to understand whether the disability is temporary or permanent. If temporary, a prognosis with respect to recovery would be helpful and ultimately necessary. In the case of a temporary condition that prevents the employee from working night shifts, you may make a temporary modification in this shift assignment. You should assess what effect this would have on the workplace and determine whether a temporary alternate placement may be a better resolution. In this example, the employee suggested one form of accommodation. However, it is not necessary for you to adopt the suggestion because it may not be the only reasonable response to the request. You should consider all options that may be available and balance each option against the operational realities of the workplace while keeping in mind the employee's need.

Assume, for this example that the disability is relatively permanent and the only day shift position at the work site involves a promotion and is what the employee identified as acceptable. This form of accommodation proposed is contrary to the terms of the Collective Agreement and the *Public Service Act*. This factor is to be taken into account in assessing whether the proposed accommodation is reasonable in all the circumstances. Further such an accommodation would negatively impact other workers who may also be interested in the promotion and thus other accommodation options should be identified,

- The employer identifies another day shift position at a different work site that does not constitute a promotion and which is judged to be within capabilities of the employee to be accommodated.
- Once a reasonable accommodation option is identified, the employer advises the employee in writing of the proposed accommodation. Should the employee choose not to accept the accommodation offered, that refusal should be confirmed in writing along with the reasons offered for the rejection. Consider also if a reasonable basis exists for the rejection. If the reason for the rejection is not reasonable and the proposal is, in your view a reasonable one, the employer may have discharged its duty to accommodate under the Human Rights Code. You may wish to seek further guidance in these circumstances.
- After an accommodation is effected, it should be monitored regularly to ensure that it continues to be necessary and that any steps taken continue to address the employee's limitations.

Scenario #2

An employee works as a Health Care Worker in an institutional setting and sustains a shoulder injury as a result of a workplace incident. After a period of recovery, including surgery, the employee is cleared as fit to return to work but not as a Health Care Worker. The attending physician recommends retraining noting that the worker is motivated to find a different career path. The physician notes that retraining as a radiology technician would be 'perfect' for this individual. The employee strongly agrees with the Attending Physician's assessment and has asked that the employer retrain him.

The employer notes that the apparent restrictions have to do with heavy lifting and sustained work using the arms above the head.

- The first step would be to clarify and quantify the nature of the limitations and resulting restrictions and determine if the limitations are temporary or permanent. As this is essentially a medical/functional issue, and this is a WorkSafe BC accepted claim, a good source of functional information would be the case manager at the Board. Other sources of information would include the Attending Physician or Occupational Health.

Upon contacting, the WorkSafe BC case manager; the employer was advised that functional testing has been conducted. The testing confirmed that the employee had a reasonable level of function but there are permanent limitations and restrictions.

- The employer was able to confirm that the employee was disabled and the extent of the disability that required accommodation. The WorkSafe BC case manager was of the view that unmodified duties were unsuitable given the heavy lifting required of unmodified work.
- At this point an identification of possible options to accommodate the employee needs to be carried out. While 'retraining' was identified by the physician as "perfect" for the employee, it was one of other options available to return the employee to productive employment.
- After analyzing the full job duties required by the Health Care Worker position, it was clear that there are some aspects of the job that are beyond the employee's physical capabilities; however, there are many aspects of the work that are not beyond his capabilities. In the particular worksite, there are 3 other Health Care Workers as part of the team, and a re-bundling of the work duties is a possibility. Those parts of the job that are beyond the functional restrictions can be distributed among the other 3 team members and parts of the job duties that are within the employee's functional restrictions can be reassigned to the employee.

The re-bundling of the job duties provided an answer to the functional limitations and restrictions caused by the physical disability. The accommodation, while not 'perfect' from the employee's perspective, is sufficient to allow the employee to return to employment and continue as a Health Care Worker.

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