

THE DUTY TO ACCOMMODATE

1	What type of employee are you?	3
1.1	Overview.....	3
1.2	How to know if you are a federally regulated employee?.....	3
2	introduction to human rights legislation.....	5
2.1	Human Rights Legislation across Canada	5
2.2	Applicable Legislation	5
2.2.1	The Canadian Human Rights Act.....	5
2.2.2	The Employment Equity Act	6
2.3	What is discrimination?	6
2.4	What is a disability?	7
3	Disclosing a disability	8
3.1	When are you legally obligated to disclose your disability?	8
3.2	How much information must you disclose?	8
3.3	To whom should you disclose?.....	9
3.4	employer's obligation in respects to privacy	9
4	Your right to equal employment	10
5	Employer's duty to accommodate	11
5.1	Definition of duty to accommodate	11
5.2	What are the parameters of the duty to accommodate?	11
5.2.1	When does the duty to accommodate come into play?	11
5.2.2	Accommodation	12
5.2.3	Undue hardship.....	13
5.2.4	<i>Bona fide</i> occupational requirement.....	14
5.3	Rights and obligations.....	15
5.3.1	Employee	15
5.3.2	Employer	16
5.3.3	Union.....	16
6	Losing your job	17
6.1	When can an employer terminate your employment?.....	17
6.1.1	General principles.....	17
6.1.2	Human Rights and Frustration of Employment Contract	17
6.2	What are the employee's rights after losing their employment?	18

7	Filing a complaint with the Canadian Human Rights Commission	19
7.1	Overview.....	19
7.2	The process.....	19
7.2.1	Filing a complaint	19
7.2.2	After you've filed your complaint.....	20
7.2.3	The Tribunal's decision	20
7.3	What should you expect?.....	20
7.3.1	Corrective measures.....	20
7.3.2	Others implications	20
8	Information for Human Rights Commissions in Canada.....	22
8.1	Canada (federal)	22
8.2	Provinces.....	22
8.3	Territories	24
9	Sources consulted	27
9.1	Articles.....	27
9.2	Websites.....	27
9.3	Case law.....	28
9.4	Legislation	29

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The following information is not intended as legal advice. Do not rely upon this information as an alternative to advice from a legal professional. Should you have questions about a legal issue, you should seek legal advice.

1 WHAT TYPE OF EMPLOYEE ARE YOU?

1.1 OVERVIEW

Canada's constitutional separation of powers between the federal and provincial governments establishes which government, federal or provincial, can take action or enact legislation on certain areas of Canadian life. This distinction becomes important when you file a human rights complaint. In your case, it is important to know under which jurisdiction a complaint must be addressed. This will depend on whether you are a federally or provincially regulated employee.

1.2 HOW TO KNOW IF YOU ARE A FEDERALLY REGULATED EMPLOYEE?

There exists a presumption that the everyday regulation of businesses and employment contracts within these businesses falls under provincial jurisdiction. The only exception applies when the business is a federal undertaking. This means that the business, **due to its nature, falls under a federal "head of power" assigned by the Constitution. For this reason, only certain employment sectors in Canada fall under the federal jurisdiction.**

In order to know if you are a federally regulated employee, the principle nature of the work you are doing must be functionally linked to the federal undertaking.

The following are a few key examples of federal businesses. Do you work for...

- The federal government?
- A bank?
- A transportation company (such as an aviation, navigation, train, bus or trucking company) that extends beyond the limits of a province?
- A telecommunication company (such as Bell or Rogers)?
- A radio or television broadcasting station?
- A telephone company (with connections between provinces or that is part of a company who is continuously extra-provincial)?
- An internet service provider?
- A post office?
- A nuclear power plant?

While these are only guidelines, if you answered yes to any of the above, it is a strong indicator that you are a federally regulated employee.

TIP: Talk to your employer or seek legal advice if you are still uncertain whether you are a federal employee before filing a human rights complaint.

The information on this website is applicable specifically to federally regulated employees and employers. If you are a federal employee, you must file a human rights complaint through the *Canadian Human Rights Commission*. If you are a provincially or territorially regulated employee, you should refer to the resources available in your jurisdiction (see below) which may be of more use to you and your specific concerns.

2 INTRODUCTION TO HUMAN RIGHTS LEGISLATION

2.1 HUMAN RIGHTS LEGISLATION ACROSS CANADA

The following are pieces of human rights legislation that govern throughout Canada in their respective jurisdictions:

- Alberta Human Rights Act (<http://www.qp.alberta.ca/documents/Acts/A25P5.pdf>)
- British Columbia Human Rights Code (http://www.bclaws.ca/Recon/document/ID/freeside/00_96210_01)
- Canadian Human Rights Act (<http://laws-lois.justice.gc.ca/PDF/H-6.pdf>)
- Manitoba Human Rights Code (http://web2.gov.mb.ca/laws/statutes/ccsm/_pdf.php?cap=h175)
- New Brunswick Human Rights Act (<http://www.canlii.org/en/nb/laws/stat/rsnb-2011-c-171/latest/rsnb-2011-c-171.html>)
- Newfoundland Human Rights Act (<http://assembly.nl.ca/Legislation/sr/statutes/h13-1.htm>)
- Northwest Territories Human Rights Act (<https://www.justice.gov.nt.ca/en/files/legislation/human-rights/human-rights.a.pdf>)
- Nova Scotia Human Rights Act (<http://nslegislature.ca/legc/statutes/human%20rights.pdf>)
- Nunavut Human Rights Act (<http://www.gov.nu.ca/sites/default/files/gnjustice2/justicedocuments/Consolidated%20Law/Current/634389913091384419-123249367-consSNu2003c12.pdf>)
- Ontario Human Rights Code (<https://www.ontario.ca/laws/statute/90h19>)
- Québec Charter of Human Rights and Freedoms (<http://legisquebec.gouv.qc.ca/en/showdoc/cs/C-12>)
- Saskatchewan Human Rights Code (<http://www.qp.gov.sk.ca/documents/English/Statutes/Statutes/S24-1.pdf>)
- Yukon Human Rights Act (<http://www.gov.yk.ca/legislation/acts/huri.pdf>)

Refer to section “What type of employee are you?” to see where your search should begin!

2.2 APPLICABLE LEGISLATION

For your purposes, we will examine the *Canadian Human Rights Act* and the *Employment Equity Act* which both apply to the federal employment sector in Canada.

2.2.1 The Canadian Human Rights Act

Human rights legislation was created to recognize the dignity and value of all Canadians and to ensure that all are treated equally and are able to be active members of society. This is true for both federal and provincial legislation, including the *Canadian Human*

Rights Act. The piece of legislation puts in place mechanisms in order to ensure that the rights of all persons are protected. The legislation is reparative and not punitive.

In terms of employment and labour law, the *Act* recognizes that all employees falling within a protected class of discrimination should be accommodated unless doing so would cause undue hardship for the employer.

If you are denied an accommodation and fall under a protected class of discrimination, you can file a complaint with the Canadian Human Rights Commission about any discriminatory behavior that occurs during (1) the interview and screening process, (2) the employment relationship and (3) the termination of the employment.

Important: Please note that you must file a complaint within one (1) year of the alleged discriminatory conduct.

2.2.2 The Employment Equity Act

The *Employment Equity Act* has a goal of eliminating inequality for reasons unrelated to ability to perform a job in federal workplaces. This piece of legislation explains that equality is more than treating everyone the same but that it sometimes requires special treatment in order to achieve true equality.

The *Act* creates an obligation placed on your employer to identify and eliminate barriers in the workplace and put in place new policies, practices, and accommodations in order to ensure that there is a representation of all occupational groups in the workplace. Your employer must conduct an analysis of the workplace in order to evaluate the representation of these groups and must set goals and act accordingly in order to increase representation where needed.

2.3 WHAT IS DISCRIMINATION?

Discrimination is a distinction, based on personal characteristics, that causes a person or group of persons to be disadvantaged or denied an advantage that others have. The *Canadian Human Rights Act* prevents your employer from discriminating against you based on 11 specified grounds.

These grounds are: race, national or ethnic origin, color, religion, age, sex, sexual orientation, marital status, family status, disability and pardoned convictions. For your purposes, we will only be examining discrimination on the ground of a disability. It should be noted that you can be discriminated against on more than one ground at one time.

Discrimination is analyzed uniquely on the effect the *Act* has on you as an employee, and not based on the intention of your employer. Discrimination also includes any retaliation suffered for making a human rights complaint in regards to a disability issue.

2.4 WHAT IS A DISABILITY?

The *Canadian Human Rights Act* states that a disability includes both mental and physical disabilities as well as drug or alcohol dependence and also refers to past or current disabilities.

In the *Employment Equity Act*, the term is defined by describing a person with a **disability as a person who has “a long-term or recurring physical, mental, sensory, psychiatric or learning impairment”**. The disability makes the person feel disadvantaged and the employer is also likely to determine that the person is disadvantaged in the workplace.

It should be noted that the *Employment Equity Act* does not consider accommodation for short-term disabilities while the *Canadian Human Rights Act* does.

The term has also been defined in many cases and has been given a broad interpretation. The following are some examples of recognized disabilities:

- Blindness and severe visual impairment
- Deafness and severe hearing impairment
- Speech impairment
- Mobility impairment, such as paraplegia, quadriplegia, amputation, neurological conditions that can effect mobility such as Multiple Sclerosis etc.
- Chronic pain, such as arthritis, migraines, back pain, etc.
- Addictions, for example, to alcohol or drugs, etc.
- Learning disabilities such as Attention Deficit Disorder (ADHD), dyslexia, etc.
- Chronic diseases or conditions, such as diabetes, asthma, cancer, etc.
- Psychiatric disabilities, such as depression, schizophrenia, etc.
- Environmental sensitivities
- Developmental disabilities such as autism, down syndrome, etc.

3 DISCLOSING A DISABILITY

3.1 WHEN ARE YOU LEGALLY OBLIGATED TO DISCLOSE YOUR DISABILITY?

If you have a visible disability, disclosure of your disability to your employer may not be a concern to you. However, you may still need to disclose information about your visible disability if you are in need of a specific accommodation where there are functional limitations which would not be apparent to your employer.

Furthermore, in many cases where your disability is not visible, you do not have the legal obligation to inform your employer about it. On the other hand, in some cases it becomes your legal obligation to disclose your disability.

Firstly, you must disclose a disability when you are in need of an accommodation in the workplace, during the interview process or at any other time in relation to your employment or the process of applying for employment. The reason for this is that your employer cannot be held liable in a human rights complaint when the company is unaware of a disability. Essentially, what your employer, or individuals working on behalf of the employer with respect to hiring/management or human resources, do not know cannot be held against them.

Secondly, you must disclose your disability if it is likely to affect your work performance, attendance or your ability to effectuate the essential duties of the job. As a general principle, if you choose not to disclose your disability, it is important that you be able to complete all the essential duties of the job before accepting it.

Finally, if your disability creates health or safety risks for yourself or your co-workers, you are also legally obligated to inform your employer about it.

3.2 HOW MUCH INFORMATION MUST YOU DISCLOSE?

When disclosing your disability to your employer, you have the obligation to give sufficient information in regards to your disability in order to support your request for accommodation and in order for your employer to properly and promptly fulfill the duty to accommodate.

You have no obligation to give your employer the exact diagnosis of your disability, but you must describe the nature of the disability and any functional limitations that you may have in fulfilling your job duties. Your functional limitations should be assessed by a medical professional and, in some restricted cases, your employer may be within his rights to ask for further information or assessments.

In the event that your disability is affecting your work, if you choose not to cooperate or share relevant information about your disability, your employer may have met the duty to accommodate and may be within their rights to terminate your employment.

In addition to the above, you have the obligation to inform your employer if an attempted accommodation is not properly working and you need further or alternate accommodations. Your employer will not be discriminating against you if he is not made aware of further issues related to your disability that have a direct impact on performance and full participation in the workplace.

3.3 TO WHOM SHOULD YOU DISCLOSE?

Outside of your legal obligations set out above, it is your prerogative what information about your disability you choose to share and whom you choose to share it with. However, it is clear that not everyone can assist you with an accommodation. You should find out as soon as possible who is in a position to assist you with your accommodation request. For example, depending on the company, your manager/supervisor may be that person or it could be staff in the Human Resources department.

If you are a unionized employee, a great place to start is to discuss with your union representative what steps you should be taking and the right person or office you should disclose information about your disability.

If you are not a unionized employee, you may have to find this out on your own. The appropriate person may differ depending on the size of the business or the workplace. For example, you can disclose to an interviewer during your initial interview, your supervisor when you start working or an Human Resources (HR) representative if there is an HR department within the business (this is usually the case for larger employers).

3.4 EMPLOYER'S OBLIGATION IN RESPECTS TO PRIVACY

When you inform your employer of a disability, the company has a legal obligation to keep that information confidential according to the *Privacy Act*. The necessary information may be shared with people who need to know about your disability and limitations (i.e. your supervisor).

You have the right to ask your employer about the collection and use of the information you provide in regards to your disability. You also have the right to access for your **employer's policies and procedures on collection and use of confidential information** if they exist.

4 YOUR RIGHT TO EQUAL EMPLOYMENT

Your employer cannot discriminate against you based on a protected ground of discrimination while going through the hiring process for a position. The practical difficulty here is that it is very hard to **know, when you don't get offered a position you've applied for**, whether you did not obtain the job in good faith or if the decision was based on a discriminatory factor.

You have the right to file a human rights complaint if you believe you were discriminated against by a potential employer due to your disability. However, this may be very difficult to prove in many cases as discrimination during the application and interview process is not usually blatantly obvious. An example of a more obvious discriminatory practice could be asking to disclose a disability in an application form. Another example would be denying your right to an interview if you are a wheelchair user by not providing you with an interview in a physically accessible location.

In addition, the *Employment Equity Act* requires federal employers to provide equal employment opportunities to certain disadvantaged groups: (1) disabled persons; (2) women; (3) aboriginal peoples; (4) other members of visible minorities. This offers these groups an extra layer of protection as well as more chances in obtaining employment in the federal public and private sectors to ensure equity of representation in the federal government and all employers that are federally regulated.

Finally, as mentioned above, if you need an accommodation during the interview and application process, you may inform your potential employer and he or she will have the duty to accommodate you.

5 EMPLOYER'S DUTY TO ACCOMMODATE

5.1 DEFINITION OF DUTY TO ACCOMMODATE

Your employer is obligated to take every reasonable step in order to accommodate you when you are experiencing discrimination due to a rule, practice or physical barrier in the workplace. Your employer must ensure that you are being treated equally to other employees. The duty to accommodate requires employers to identify and eliminate these rules, practices or barriers that have a discriminatory impact by incorporating alternative arrangements. The duty to accommodate only applies to prohibited grounds of discrimination, such as a disability.

The duty to accommodate is not absolute. Your employer must only accommodate your **needs to the point of undue hardship. Your employer's refusal to accommodate you** may also be justified by a bona fide occupational requirement.

5.2 WHAT ARE THE PARAMETERS OF THE DUTY TO ACCOMMODATE?

It is your employer's responsibility to make serious and genuine efforts when looking for an accommodation suitable for you. It is not sufficient to make assumptions of what accommodation options may or may not be available. In case of a refusal to accommodate, your employer must have concrete evidence showing that the refusal was founded.

5.2.1 When does the duty to accommodate come into play?

Again, as mentioned above, you have a right not to be discriminated against from the application and interview process up to and including the termination of your employment. The duty to accommodate, therefore, comes into play from your first interaction with your potential employer.

If you have particular needs due to a disability that may affect your work (protected grounds of discrimination), it is your personal responsibility to inform your employer about them (see section on disclosure).

The duty to accommodate may also arise during the employment relationship, preventing you from work in the same capacity you did before. For example, this may be the case if you become disabled or ill or suffer from an addiction or if you realize that an existent and undisclosed disability is affecting your work performance. Persons with episodic disabilities including Multiple Sclerosis, Lupus or other neurological conditions may experience periods of relative good health and then face a decline in their health and physical well-being which can effect performance, where the employee must work (either in the workplace or from home), as well as the number of hours one can work. A person with a disabling condition that is episodic may need an accommodation such as flexible hours or other flexible work arrangement. Similar circumstances may result when an employee is dealing with a mental health condition. In these circumstances,

your employer also has an obligation to provide you with an accommodation before terminating your employment.

Finally, if you do not disclose your disability, there is still a possibility that your employer has an obligation to initiate the accommodation process in order to see if you are in need of an accommodation in cases where performance problems arise under questionable circumstances. This may be more common in the case of a mental health disability which may not yet be diagnosed or is not constantly apparent. Essentially, if your employer suspects you may have an undisclosed disability which is affecting your work performance, he must act accordingly and appropriately before terminating your employment

5.2.2 Accommodation

An accommodation can manifest itself in different forms. There can be different accommodations for different people and different disabilities. Your employer should adhere to the following three-step test in his attempt to reasonably accommodate your needs.

- (1) Can you perform your job duties as is?
- (2) If not, can you perform your job with modified duties?
- (3) If not, can you perform another existing, modified or re-bundled¹ job?

The efforts made to find you an accommodation must, at minimum, be consistent with the type of work you were hired to do. If your employer is able to offer you an appropriate accommodation, you must be able to perform the essential duties of this new or modified job. However, each case must be evaluated on its own merits and accommodation must remain a factual determination.

The following are some examples of different accommodations that may be available to you:

- Alternative work (another position or modified duties in your current position)
- Alternative work hours
- Flexible break times
- Wheelchair access ramp
- Interpreters

If you are a unionized employee, you should contact your union representative who will **often have good advice on your employer's accommodation practices and policies.**

5.2.2.1 The Accessibility for Ontarians with Disabilities Act (AODA)

In regards to physical accommodations and accessibility, provincial legislation such as the *AODA* was created as a public initiative in order to put into effect the protection of

¹ A re-bundled job generally means that the employer reorganizes or restructures job duties (without undue hardship) in order to accommodate the employee. This is generally a viable option in a larger workplace with many different positions and job duties.

the rights of persons with disabilities enacted in the Canadian Charter of Rights and Freedoms as well as the Ontario Human Rights Code. This piece of legislation applies to all levels of government, non-profit organizations as well as private sector businesses in Ontario.

This legislation, which was enacted in 2005, has the objective of making Ontario accessible to all by 2025. Ontario provincial workplaces must meet general accessibility targets at specific time marks in order to fulfill their obligation under this new legislation.

While the AODA applies not only to employment, it does create an obligation for employers to train their staff on accessibility laws, identify and remove barriers for people with disabilities as well as create new employment practices for the hiring and retention of people with disabilities in the workplace and new policies for accommodation and return-to-work.

While there is currently no federal equivalent to the AODA, such legislation will be enacted in the future. In fact Employment and Social Development Canada, under Minister Carla Qualtrough, Minister of Sport and Persons with Disabilities is now conducting a national consultation on a new Federal Disability Act. Further information on the process is available online:

<http://www.esdc.gc.ca/en/consultations/disability/legislation/index.page>.

To illustrate this further, *Barrier-Free Canada* has been fervently advocating for a Federal Disability Act. The idea is to create federal legislation to complement the existing and future provincial disability legislation in order to make all of Canada barrier-free for persons with disabilities. Visit the Barrier-Free Canada website for more information: <http://barrierfreecanada.org/home/>.

At this time, Manitoba is the only province to have equivalent legislation to the AODA which is entitled *Accessibility for Manitobans Act* (AMA). Again, it would not be a surprise to see further provincial and territorial disability legislation in the future. In particular, there is discussion of disability legislation or reforms in Nova Scotia, British Columbia, Saskatchewan and Newfoundland. **Read about Nova Scotia's Accessibility Legislation** here: <http://novascotia.ca/coms/accessibility/> **and British Columbia's Accessibility 2024 Legislation:** <http://www2.gov.bc.ca/gov/content/governments/about-the-bc-government/accessibility>.

5.2.3 Undue hardship

Your employer can refuse an accommodation request when it would cause undue hardship the business. Undue hardship is described as the limit past which your employer does not have the obligation to accommodate you. There is no set formula for deciding what constitutes undue hardship.

If your employer chooses to deny an accommodation request, he has the responsibility of proving that the accommodation would have caused undue hardship.

The following are some factors that human rights tribunals will look at when determining if there is undue hardship:

- The financial cost (and maintaining a productive workplace)
- The disruption of a collective agreement
- The risk of problems with other employees
- The size of the business and interchangeability of the workplace
- The health and safety risks attached to the accommodation

The term “undue hardship” means that some amount of hardship is acceptable. It is generally accepted in law that an accommodation may place a financial burden on the employer. The cost must be more than trivial in order to be classified as undue.

Your employer, however, is not expected to put in jeopardy the survival of the business in order to accommodate you. Furthermore, there is no obligation to drastically change the workplace or create a new position (with unnecessary job duties) in order to accommodate you.

Your employer’s duty to accommodate may also be different in cases of a permanent disability versus cases of a temporary disability. In many instances, a long term accommodation is more likely to reach undue hardship than a short term accommodation. Long term accommodations are also more likely to have a larger impact on smaller employers.

5.2.4 **Bona fide** occupational requirement

A *bona fide* occupational requirement is a defense for a refusal to accommodate. Your employer can refuse to accommodate you when there is a valid reason to do so due to a necessary measure put in place to carry out the duties of the specific job for efficiency, economical or safety purposes. In addition, the refusal must be done honestly and in good faith. Essentially, your employer needs to demonstrate:

- (1) That the perceived discriminatory measure was adopted for purposes rationally connected to the fulfillment of the work in question;
- (2) That your employer sincerely believed that the measure was necessary for the fulfillment of the work in question; and
- (3) That the measure is, in fact, reasonably necessary to fulfill the work in question as it would be impossible to accommodate you without imposing undue hardship on himself.

To illustrate this concept, the following are a few examples of what could be considered a *bona fide* occupational requirement:

- Not employing an epileptic person for a driving position
- Visual acuity standards for police work
- Fitness assessment for paramedic work
- Etc.

While these are examples in which a *bona fide* occupational requirement may arise, there is always a chance that the employer is obligated to accommodate the employee in another position.

While this test was decided based on the *Ontario Human Rights Code*, it has been accepted by federal case law as well.

5.3 RIGHTS AND OBLIGATIONS

All parties in the employment relationship have the responsibility to participate in finding a solution in order to accommodate the employee.

5.3.1 Employee

As an employee, you have the obligation to inform your employer of any accommodations you may need due to a disability. Specifically, you must inform your employer of the nature of the disability and of any and all functional limitations as well as potential issues that may arise due to your disability (see section on disclosure).

Functional limitations are described as limitations you may have that are caused by your disability which impede on your ability to perform certain tasks.

You may be obligated to cooperate in undergoing assessments in order to support your request because your employer is entitled to receive accurate and relevant information in regards to your disability. Should you refuse to submit to an assessment where the employer is within his rights to request one, it may be found that he has fulfilled his duty to accommodate you.

You must bear in mind that the accommodation must not be perfect but reasonable. Consequently, when your employer and union make a reasonable accommodation proposal, you have the obligation to accept it and facilitate its implementation. Should you choose to refuse an accommodation proposal, you must provide an explanation for the reasons of your refusal and it may be found that the employer has fulfilled his duty.

In obtaining your accommodation, circumstance may arise where you become obligated to accept a lower rate of pay, retraining or temporary work.

When an accommodation is put into place, it is your responsibility to inform your employer should there be changes in your functional limitations or if the accommodation is not working as the parties intended. If you do not do so, there is no way to find a better solution and your employer will likely not be held liable.

If you feel you are being discriminated against in the workplace, and you bring forth a claim on this basis, it will be your responsibility to demonstrate before a human rights tribunal that you were, in fact, a victim of discrimination based on a prohibited ground.

5.3.2 Employer

While the employee's participation in the accommodation process is necessary, as the employer, you are the one who is responsible for finding a suitable way to accommodate your employee.

Among other things, you have the obligation to:

- Accept an accommodation request in good faith
- Actively search for an acceptable accommodation in a timely manner
- Maintain confidentiality
- Explain clearly to your employee why you cannot provide the accommodation, if such is the case

While you have the right to request **relevant information about your employee's disability**, you should limit requests for information to what is relevant in assessing your **employee's accommodation needs, you have the right to request a functional abilities assessment** in order to properly discharge yourself of your obligations. This may be less evident when it comes to mental health disabilities or substance addictions. As an employer, you have the right to have the employee examined by your own medical professional in order to assess their accommodation needs and also to examine the amount of hardship that might be placed on you in accommodating your employee.

When you have a reasonable and legitimate concern in respects to medical evidence provided to you by a disabled employee, you have the right to request further and better evidence in order to make an informed decision.

If an employee brings forth a human rights complaint of discrimination based on a prohibited ground and it is found to have a basis in law, it is your responsibility to demonstrate that either (1) the accommodation placed an undue hardship on you; or (2) there was a *bona fide occupational requirement* which allowed you to refuse to accommodate the employee.

Finally, in general, as an employer, you now have a positive obligation to eliminate discriminatory barriers, policies or behavior in the workplace by implementing accommodation in policies and practices up to the point of undue hardship.

5.3.3 Union

It is established in law that a union has the same obligation as an employer to actively find a reasonable accommodation for a disabled employee. If this is not done, the union may also be held liable in a discrimination complaint.

6 LOSING YOUR JOB

6.1 WHEN CAN AN EMPLOYER TERMINATE YOUR EMPLOYMENT?

6.1.1 General principles

If you are a non-unionized employee, your employer may terminate your indefinite employment at any moment by giving you reasonable notice or payment in lieu of **notice. Generally speaking, “reasonable notice” is calculated based on a series of** factors that represent the amount of time it would take you to find a new – but similar – position in a new workplace. A payment in lieu of notice is an alternative in the form of a payment representing your salary for the reasonable notice period.

If the employer has just cause to terminate your employment, he does not have the duty to give reasonable notice. The following are examples of circumstances where your **employer could potentially terminate your employment for “just cause”**:

- Insubordination
- Incompetence
- Dishonesty
- Harassment
- Break of a fiduciary obligation
- Criminal accusations

In any case, to terminate your employment for “just cause”, your employer must meet a very high burden of proof.

6.1.2 Human Rights and Frustration of Employment Contract

Your employer has an obligation to act in good faith when terminating your employment. This means that he cannot do so based on a prohibited ground of discrimination as mentioned in previous sections. However, there are exceptions to this general rule.

For example, your employer has the right to terminate your employment where the employment contract has been frustrated. This occurs when the employee is unable to perform the essential duties of the employment contract even when he or she is being accommodated by the employer to the point of undue hardship. This does not necessarily mean that you, as an employee, are at fault (i.e. having a permanent disability) but is often linked to the effect of your incapacity to execute the employment **contract on the employer’s productivity.**

To be more specific, current case law establishes that in order for your employer to terminate your employment, there must be evidence showing that:

- (1) You are unable to meet the job requirements;
- (2) Medical evidence shows that there is no likely chance of improvement in the future;
- (3) No further accommodation was possible without imposing undue hardship.

It is also apparent in case law that employees with permanent or long-term disabilities (such as chronic pain illnesses or mental health disabilities which often lead to recurring and excessive absenteeism) – especially those who do not require a one-time accommodation – are the most at risk of having their employment terminated due to contact frustration.

In a unionized setting, the governing principles may be a bit different. Your collective agreement will generally provide you with the information needed surrounding a termination. In addition, you should speak to your union representative to see what options may be available to you!

In any of the above situations, your employer has the obligation to inform you if you are at risk of losing your employment. If your employer does not do so, your termination may be nullified.

6.2 WHAT ARE THE EMPLOYEE'S RIGHTS AFTER LOSING THEIR EMPLOYMENT?

As mentioned, if you believe that the termination of your employment was done on a discriminatory basis, you have the rights to file a complaint with the Human Rights Commission that is governing in your jurisdiction.

7 FILING A COMPLAINT WITH THE CANADIAN HUMAN RIGHTS COMMISSION

7.1 OVERVIEW

First and foremost, filing a complaint at the Canadian Human Rights Commission should be your last resort. You should insure that you have exhausted all other possible avenues before filing a human rights complaint. For example, have you spoken to your employer or union representative about possible solutions to your human rights issue?

The reason filing a complaint should be your last resort is that the process can be very demanding, long in duration and can also be very costly. In many cases, the outcome may not be worth the time, effort and money. For this reason, you should pursue complaints that are meritorious. You should seek legal advice in order to find out if your case has merit. You can contact the Human Rights Legal Support Centre for help (<http://www.hrlsc.on.ca/en/home>).

7.2 THE PROCESS

7.2.1 Filing a complaint

Before filing a formal complaint, you should insure that you are able to complain. Your complaint must be (1) against your employer or a service provider, (2) based on a discriminatory practice, and (3) related to a ground of discrimination found in the *Canadian Human Rights Code* (see the Complaint Assessment Tool: <http://www.chrc-ccdp.gc.ca/eng/content/complaint-assessment-tool>).

As mentioned above, you must also ensure that you are a federally regulated employee to file a complaint at the Canadian Human Rights Commission (see section: What type of employee are you?).

Finally, you only have 1 year (12 months) from the moment of the alleged discriminatory action to file your complaint.

Your complaint must be mailed to:

Canadian Human Rights Commission
344 Slater Street, 8th floor
Ottawa, Ontario K1A 1E1

or faxed to (613) 996-9661. Please note that you cannot send your complaint form electronically!

7.2.2 **After you've filed your complaint**

Once you file a complaint against your employer, they will be informed by the Commission. It is illegal for your employer to retaliate against you in the workplace for filing a human rights complaint.

The Commission will then decide if they will deal with your complaint. There are certain reasons the Commission may choose not to deal with your complaint. For example, if they do not have jurisdiction, if your issue is not linked to a protected grounds of discrimination, etc. (see <http://www.chrc-ccdp.gc.ca/eng/content/what-can-i-expect>).

If the Commission pursues your complaint, you and your employer may be offered to mediate your issue. This is a voluntary step. If this avenue is attempted and successful, or not attempted at all, your complaint will then be investigated by the Commission.

Following the investigation, the Commission will render a decision. They will either dismiss your complaint, send you to conciliation or refer it to the Canadian Human Rights Tribunal. Conciliation is similar to mediation and is another attempt to solve the issue before referring it to the Tribunal.

7.2.3 **The Tribunal's decision**

There is a chance that your matter is referred to the Canadian Human Rights Tribunal. The Tribunal will render a decision on the merit of your case. They will either find that there was no discrimination and dismiss your complaint OR find that there was discrimination. In the latter case, the Tribunal may impose a corrective measure.

7.3 WHAT SHOULD YOU EXPECT?

7.3.1 Corrective measures

In terms of monetary compensation, the Tribunal can award you total compensation for your losses, as well as a maximum of \$20 000 for pain and suffering and \$20 000 for willful discrimination. They can also order that your employer give you your job back or that your employer create and implement human rights policies in the workplace.

7.3.2 Others implications

It is very important to bear in mind that this is a very long process and if your case is referred to the Tribunal, it can take several years to be heard.

Furthermore, filing a complaint does not cost any money up front but if you choose to seek independent legal advice to pursue your complaint, it can become very costly.

Should you choose not to seek legal advice, you risk making mistakes and not adequately presenting your case to the adjudicator which can have a detrimental impact on your chances of a successful outcome. While adjudicators do recognize the legal barriers faced by unrepresented parties, they cannot legally go as far as to help you **prove your case. It's important to have relevant and concrete evidence to establish your**

side of the story. It is also important that you familiarize yourself further with the legal process.

Finally, the above information and advice is important in order to be able to face the human rights complaint process with realistic expectations.

8 INFORMATION FOR HUMAN RIGHTS COMMISSIONS IN CANADA

8.1 CANADA (FEDERAL)

Canadian Human Rights Commission
344 Slater Street, 8th Floor
Ottawa, Ontario K1A 1E1

Toll Free: 1 (888) 214-1090
TTY: 1 (888) 643-3304
Fax: (613) 996-9661

Website: <http://www.chrc-ccdp.gc.ca/index.html>
Office hours: Monday to Friday, 8:00 am to 8:00 pm (Eastern Time)

8.2 PROVINCES

Alberta Human Rights Commission

Northern Regional Office
800 - 10405 Jasper Avenue NW
Edmonton, Alberta T5J 4R7

Phone: (780) 427-7661
Toll Free (all offices): 1 (800) 232-7215
Fax: (780) 427-6013
TTY: (780) 427-1597

Office hours: 8:15 am to 4:30 pm

Southern Regional Office
200 J.J. Bowlen Building
620 - 7 Avenue SW
Calgary, Alberta T2P 0Y8

Phone: (403) 297-6571
Toll Free (all offices): 1 (800) 232-7215
Fax: (403) 297-6567
TTY: (403) 297-5639

Office hours: 8:15 am to 4:30 pm

E-mail: humanrights@gov.ab.ca
Website: <http://www.albertahumanrights.ab.ca/>

British Columbia Human Rights Tribunal
1170 - 605 Robson Street
Vancouver, BC V6B 5J3

Phone: (604) 775-2000
Toll Free: 1 (888) 440-8844
Fax: (604) 775-2020
TTY: (604) 775-2021

Office hours: Monday to Friday, 8:30 am to 4:30 pm
Email: BCHumanRightsTribunal@gov.bc.ca
Website: <http://www.bchrt.bc.ca/>

Manitoba Human Rights Commission

Winnipeg Office
700-175 Hargrave Street
Winnipeg, MB R3C 3R8

Phone: (204) 945-3007
Fax: (204) 945-1292

Brandon Office
341-340 Ninth Street
Brandon, MB R7A 6C2

Phone: (204) 726-6261
Fax: (204) 726-6035
Toll Free: 1 (888) 884-8681
TTY: 1 (888) 897-2811

Email: hrc@gov.mb.ca
Website: <http://www.manitobahumanrights.ca/>

New Brunswick Human Rights Commission
Barry House
PO Box 6000
Fredericton, NB E3B 5H1

Phone: (506) 453-2301
Toll Free: 1 (888) 471-2233
Fax: (506) 453-2653
TTY: (506) 453-2911

Office hours: Monday to Friday: 8:15 am to 4:30 pm
Email: hrc.cdp@gnb.ca
Website: <http://www.gnb.ca/hrc-cdp/index-e.asp>

Newfoundland and Labrador Human Rights Commission

The Beothuk Building

21 Crosbie Place
PO Box 8700
St. John's, NL A1B 4J6

Phone: (709) 729-2709
Toll Free: 1 (800) 563-5808
Fax: (709) 729-0790

E-mail: humanrights@gov.nl.ca
Website: <http://www.justice.gov.nl.ca/hrc/index.html>

Nova Scotia Human Rights Commission
Head Office 5657 Spring Garden Road
Park Lane Terrace
Halifax, NS B3J 1H1
3rd Floor, Suite 305

Phone: (902) 424-4111
Toll Free (all offices): 1 (877) 269-7699
Fax: (902) 424-0596
TTY: Services available via 711

E-mail: hrcinquiries@novascotia.ca
Website: <https://humanrights.novascotia.ca/>
Other office locations: Sydney and Digby

Ontario Human Rights Commission
180 Dundas Street West, 9th Floor
Toronto, ON M7A 2R9

Phone: (416) 326-9511
Toll Free: 1 (800) 387-9080
TTY (Local): (416) 326-0603
TTY (Toll Free): 1 (800) 308-5561

E-mail: info@ohrc.on.ca
Website: <http://www.ohrc.on.ca/>

Also see Human Rights Legal Support Centre
180 Dundas Street West, 8th Floor
Toronto, ON M7A 0A1

Phone: (416) 597-4900
Toll Free: 1 (866) 625-5179
TTY: (416) 597-4903
TTY Toll Free: 1 (866) 612-8627

Website: www.hrlsc.on.ca

Quebec

Commission des droits de la personne et des droits de la jeunesse

Quebec Head Office
360, Saint-Jacques St, 2nd floor
Montréal (Québec) H2Y 1P5

Access for disabled persons: 361, Notre-Dame St, West
Phone: (514) 873-5146
Toll Free: 1 (800) 361-6477
Fax: (514) 873-6032

Email: accueil@cdpdj.qc.ca
Website: <http://www.cdpdj.qc.ca/en/Pages/default.aspx>
Office hours: Monday to Friday 8:30 am to noon and 1:00 pm to 4:30 pm

Other office locations: Québec, Saguenay, Saint-Jerome, Sept-Îles, Sherbrooke,
Trois-Rivières, Val-d'Or

Prince Edward Island Human Rights Commission
53 Water Street
PO Box 2000
Charlottetown PE C1A 7N8

Phone: (902) 368-4180
Toll Free: 1 (800) 237-5031
Fax: (902) 368-4236
Email: contact@peihumanrights.ca
Website: <http://www.gov.pe.ca/humanrights/>

Saskatchewan Human Rights Commission

Suite 816, Sturdy Stone Building
122-3rd Avenue North
Saskatoon, SK S7K 2H6

Phone: (306) 933-5952
Toll Free: 1 (800) 667-9249
Fax: (306) 933-7863

E-mail: shrc@gov.sk.ca
Website: <http://saskatchewanhumanrights.ca/>

8.3 Territories

Northwest Territories Human Rights Commission
Main Floor, Laing Building, 5003 49th street
Yellowknife, NT X1A 2L9

Phone: (867) 669-5575
Toll Free: 1 (888) 669-5575
Fax: (867) 873-0357

E-mail: info@nwthumanrights.ca
Website: <http://nwthumanrights.ca/>

Office hours: Monday to Friday 8:30 am to 5:00 pm

Nunavut Human Rights Tribunal
PO Box 15 Coral Harbour, NU X0C 0C0

Toll-Free Telephone: 1 (866) 413-6478
Toll Free Fax: 1(888) 220-1011

E-mail: nunavuthumanrights@gov.nu.ca
Website: <http://www.nhrt.ca/english/home>

Office hours:

April to October: 8:30 am to 5:00 pm Central Standard Time
November to March: 8:30 am to 5:00 pm Eastern Standard Time
Note: Coral Harbour, NU does not change time

Yukon Human Rights Commission
101-9010 Quartz Road
Whitehorse, YT Y1A 2Z5

Phone: (867) 667-6226
Toll Free: 1 (800) 661-0535

Fax: (867) 667-2662

E-mail: humanrights@yhrc.yk.ca

Website: <http://www.yhrc.yk.ca/>

Office hours: Monday to Friday 8:30 am to 4:30 pm, except on Tuesdays when we are closed to the public from 8:30 to noon.

9 SOURCES CONSULTED

9.1 ARTICLES

Brock University, “Disclosure”, online: <<https://brocku.ca/career-services/bridge-to-success/students/disclosure>>.

Canadian Human Rights Commission & Minister of Public Works and Government Services, “A Place for All: A Guide to Creating an Inclusive Workplace”, online: <http://www.chrc-ccdp.ca/sites/default/files/aplaceforall_1.pdf>.

Government of Canada, “Duty to Accommodate: A General Process for Managers” (November 2011), online: <<http://www.tbs-sct.gc.ca/psm-fpfm/ve/dee/dorf-eng.asp>>.

Howard A. Levitt, “The Law of Dismissal in Canada, Third Edition” (December 2003) Canada Law Book.

James D’Andrea, “Illness and Disability in the Workplace: How to Navigate Through the Legal Minefield” (May 2005), Canada Law Book.

Michael Lynk, “The Duty to Accommodate in the Canadian Workplace: Leading Principles and Recent Case” (2008), online: <<http://ofl.ca/wp-content/uploads/2008.06.21-Report-DutytoAccommodate.pdf>>.

Phyllis Gordon, “A Federal Disability Act: Opportunities and Challenges. A Paper Commissioned by the Council of Canadians with Disabilities and the Canadian Association for Community Living” (2006), online: <<http://www.ccdonline.ca/en/socialpolicy/fda/1006 - II>>.

Richard B. Johnson, “Your Legal Rights and Responsibilities around Disclosure” *Transition Magazine* (Spring 2016).

9.2 WEBSITES

Barrier-Free Canada. Online: <<http://barrierfreecanada.org/home/>>.

Canadian Human Rights Commission. Online: <<http://www.chrc-ccdp.gc.ca/index.html>>.

Human Rights Legal Support Centre. Online: <<http://www.hrlsc.on.ca/en/home>>.

Accessibility Ontario. Online: <<http://www.accessontario.com/>>.

AODA Alliance. Online: <<http://www.aodaalliance.org/>>.

9.3 CASE LAW

Andrews v Law Society of British Columbia, [1989] 1 SCR 143.

British Columbia (Public Service Employee Relations Commission) v BCGEU, [1999] 3 SCR 3 (Meiorin).

British Columbia (Superintendent of Motor Vehicles) v British Columbia (Council of Human Rights), [1999] 3 SCR 868 (Grismer)

Byers Transport Ltd v Teamsters, Local 213 (2002), 68 CLAS 316.

Canadian Pacific Ltd and BMW (1996), 57 LAC (4th) 129 (MG Picher).

Central Alberta Dairy Pool v Alberta (Human Rights Commission), [1990] 2 SCR 489.

GSW Heating Products Co and USWA (1996), 56 AC (4th) 249 (Barrett).

Guibord v. The Queen (1996), 97 CLLC 230-019 (FCTD).

Holmes v Attorney General of Canada (1997), 130 FTR 251.

Hydro-Québec v Syndicat des employées de techniques professionnelles et de bureau d'Hydro-Québec. Section locale 2000 (SCFP-FTQ), 2008 SCC 43, [2008] 2 SCR 561.

O'Malley v Simpson-Sears, [1985] 2 SCR 536.

Ontario (Human Rights Commission) v Etobicoke (Borough), [1982] 1 SCR 202.

Re Alcan Smelters and Chemicals Ltd (1996), 55 LAC (4th) 261 (Hope).

Re Calgary District Hospital Group (1995), 41 LAC (4th) 319.

Re Greater Niagara General Hospital (1995), 50 L.A.C. (4th) 34.

Renaud v Central Okanagan School District No. 23, [1992] 2 SCR 970.

Society of Ontario Hydro Professional & Administrative Employees v Ontario Hydro, [1993] 3 SCR 327.

TCC Bottling Ltd and RWDSU, Local 1065 (1993), 32 LAC (4th) 73 (Christie).

9.4 LEGISLATION

Accessibility for Ontarians with Disabilities Act, SO 2005, c 11.

Canada Labour Code, RSC 1985, c L-2.

Canadian Human Rights Act, RSC 1985, c H-6.

Constitution Act, 1982, 30 & 31 Victoria, c 3 (UK), s. 91, 92.

Employment Equity Act, SC 1995, c 44.

This exposition on the duty to accommodate was completed by Samantha Dubord as part of a Human Rights/Social Justice Internship with the National Educational Association of Disabled Students offered by Raven, Cameron, Ballantyne & Yazbeck LLP. Raven, Cameron, Ballantyne & Yazbeck LLP is a firm located in Ottawa, Ontario, specializing particularly in labour, employment and human rights law. Samantha will be completing her articles with the firm beginning in July 2017.