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THE DUTY TO ACCOMMODATE

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THE DUTY TO ACCOMMODATE

When an employee is injured or disabled, the employer has certain duties to assist the employee in their return to work. This paper will discuss the obligations to injured or disabled employees under the BC *Human Rights Code* and the BC *Workers Compensation Act,* as well as some proposed amendments to the BC *Occupational Health and Safety Regulations* regarding bullying and harassment, and psychological health and safety.

I. THE BC HUMAN RIGHTS CODE

The BC *Human Rights Code* (the "*Code*") requires employers to accommodate employees with a mental or physical disability – this duty arises whether or not the employee's disability occurred in the course of their employment.

The employer's duty to accommodate under the *Code* is comprised of a procedural component and a substantive component. The procedural component looks at the employer's process to search for and consider options for accommodation and whether the employer took reasonable steps to assess whether accommodation is possible. Meanwhile, the substantive component of the duty looks at the outcome of those efforts.

However, the duty to accommodate is not open-ended, rather, the employer is only required to provide "reasonable" accommodation "up to undue hardship".

In determining what constitutes reasonable accommodation, or accommodation up to undue hardship, the Human Rights Tribunal (the "Tribunal") will consider various factors including: the size of the employer's operation the financial cost of the accommodation and the employer's financial capacity the degree to which accommodation departs from the employer's normal operations the degree to which roles, positions, and worksites can be modified safety considerations and impacts on other employees.

The point of undue hardship is reached when reasonable means of accommodation are exhausted and only unreasonable or impractical options for accommodation remain.

Furthermore, employees also have responsibilities in facilitating the employer's search for reasonable accommodation. In particular, employees are required to cooperate in the accommodation process by bringing relevant information, including medical information, to the employer's attention. Employees are also only entitled to reasonable accommodation – they cannot expect or demand perfect accommodation or their preferred accommodation, and refusing to accept reasonable accommodation may result in an employee's complaint of discrimination failing.

The recent decision of *Thandi v. BC Ministry of Public Safety and Solicitor General, Corrections Branch, North Fraser Pretrial Centre,* 2025 BCHRT 294 ("*Thandi"*) is an example of a case in which the employer failed to meet their duty to accommodate on both the procedural and substantive aspects.

In *Thandi,* the employee is a Correctional Officer at one of the employer's maximum security corrections centres. In 2016, the employee was involved in a series of car accidents outside of work and suffered injuries to her neck, back, shoulder and hips. She went on long term disability leave until 2018 when the insurance provider determined that she was no longer disabled from working in any occupation and was fit to undertake light to sedentary duties. The employee's doctor provided the employer with a graduated return to work ("GRTW") plan that involved sedentary duties with light physical demands, and gradually increasing weekly hours over the course of four months at which point the plan would be reassessed. The employee's restrictions and limitations included only lifting heavy weights on occasion and limited inmate contact.

However, the employer had concerns about the GRTW plan. In particular, the employer was concerned that as a Corrections Officer, the employee is classified as an emergency responder but given the employee's limitations and restrictions, she would not be able to protect herself, her co-workers or inmates in the event of emergency. Accordingly, the employer determined that they were unable to accommodate the employee due to her limitations and restrictions.

Given the determination that accommodation was not possible, the employer provided the employee with three options: she could resign, retire, or participate in a nine-month rehabilitation program to search for possible placement in other vacant jobs. The employee did not respond to the employer on these options.

The Human Rights Tribunal found that the employer failed to meet its duty to accommodate, both procedurally and in substance. While the Tribunal accepted that the employer's requirement of inmate contact was rationally connected to the performance of the Corrections Officer position, the Tribunal found that the employer's approach to the accommodation process was flawed in a number of aspects.

First, the employer set an unreasonable benchmark for deciding whether they could accommodate by taking an "all or nothing approach" – the employee had to be able to perform the full, regular and emergency response duties of a Corrections Officer in order to be eligible for accommodation.

Second, the employer wrongly equated an uncertain timeline with indefinite accommodation, which was not the case, as the employee's doctor stated that her limitations and restrictions were temporary. However, even with uncertain timelines, the Tribunal noted that the employer could have explored fixed-term or temporary accommodation options with clear dates and deadlines to reassess the accommodation. The Tribunal found no evidence that the employer considered these options.

Third, the employer failed to give the employee the opportunity to provide additional or clarifying information before making the decision to not accommodate. The employer could have requested the employee provide a functional capacity evaluation or further clarification on her limitations and restrictions. The Tribunal found that the employer's failure to do so was contrary to its duty to seek all relevant information in evaluating whether accommodation was possible.

In addition to flaws in the procedural aspect of the employer's accommodation process, the Tribunal found that the employer failed its duty to accommodate from a substantive perspective as well.

Specifically, the Tribunal was not persuaded that there were no viable options to accommodate the employee given that there were duties that Corrections Officers regularly perform that require little inmate contact, and which the employer could have temporarily accommodated the employee with. In fact, the employer had previously temporarily accommodated other employees with modified / sedentary duties. The Tribunal found that the employer could have also temporarily relieved the employee of any emergency responsibilities to alleviate concerns regarding the employee's ability to protect herself and others. The Tribunal further found that the employer could have also assigned the employee to temporary positions at other corrections centres or in other placements within the Ministry. However, the Tribunal found there was no evidence that the employer considered these options, or that any of these options would amount to undue hardship.

The employer tried to argue that the employee's failure to respond to the three options that it provided (resign, retire or rehabilitation program) breached the employee's duties to accept reasonable accommodation. However, the Tribunal found that these options were not reasonable given that the information the employer had at the time provided no indication that the employee could not eventually return to her Corrections Officer position full-time, or that there was no reasonable means of accommodating the employee in her Corrections Officer position.

Given the Tribunal's finding that the employer failed to meet its duty to accommodate, the Tribunal ordered the employer to immediately initiate GRTW discussions and awarded the employee $19,700 in lost wages, $3,500 in tax and expense reimbursement, and $18,000 in injury to dignity damages.

On the other end of the spectrum, the case of *Tyler v City of Powell River,* 2025 BCHRT 316 ("*City of Powell River")* is a case where the Tribunal found that the only accommodation that would have been acceptable to the employee in considering their medical requirements would constitute undue hardship on the employer.

In *City of Powell River,* the employee, who has a serious and permanent mental health condition, submitted a complaint to the City alleging that they were being bullied and harassed by one of their co-workers, "AL". Other employees also submitted respectful workplace

complaints to the City regarding AL. Due to the complaints, the City instructed AL to go home. When AL returned to work, the employee became anxious, went home, and never returned to work. The City commenced an investigation into the complaints against AL, and while it was found that AL had bullied other staff members, the investigation found that the employee was not bullied and harassed with respect to the incident that the employee complained about.

The employee filed a claim with WorkSafeBC, alleging mental injury arising out of their experiences with AL, which WorkSafeBC accepted. The City began looking to accommodate the employee's mental disability and medical restrictions which required them to have no contact with AL. The City advised the employee that it had already transferred AL to a different department so that AL and the employee no longer worked in the same department, and that it could also stagger their start times to minimize the chances that they come in contact; however, the City was unable to guarantee that the employee would not come into contact with AL at all.

As the City was unable to guarantee that the employee will have no contact with AL, the employee resigned from their employment on the recommendation of their psychiatrist.

The Tribunal found that the City had met its duty to accommodate the employee to the point of undue hardship. In coming to this conclusion, the Tribunal found that the employee's mental health condition required a singular accommodation as per their doctor's recommendations – that the employee have no contact with AL. However, the Tribunal found that this specific accommodation was not something the City could provide as it would require the City to terminate AL's employment, which was not reasonable or practical in the circumstances.

First, AL had no previous discipline on record and the collective agreement required progressive discipline prior to termination. Second, the City reasonably believed that it had insufficient basis to terminate AL's employment – while his conduct leading to the respectful workplace complaints was inappropriate and harmful, it was not so obviously egregious to terminate his employment without adhering to progressive discipline. Third, even if the City terminated AL's employment, the City reasonably believed that the termination would have been grieved and overturned by an arbitrator.

Accordingly, the Tribunal found that the employee's required accommodation of having no contact with AL, which is only feasible by terminating AL's employment, would have amounted to undue hardship.

II. THE BC WORKERS COMPENSATION ACT

In 2024, the BC *Workers Compensation Act* (the "WCA") was amended to require the employer to maintain the employment of employees who were injured in the course of their employment, and for the parties to cooperate in achieving the timely and safe return to work of those employees.

A. Duty to Cooperate

Section 154.2 sets out the new provision on the duty to cooperate.

In brief, the duty to cooperate requires the employer to cooperate by contacting and maintaining communication with the worker and WorkSafeBC, identifying "suitable work", and by making available the suitable work it has identified. Suitable work is work that is safe, productive and consistent with the worker's functional abilities, medical restrictions and skills.

The worker must also cooperate by contacting and maintaining communication with the employer and WorkSafeBC, assisting with identifying suitable work if requested by the employer, and by not unreasonably refusing suitable work when it has been made available by the employer.

In *WCAT Decision No. A2501175*, 2026 CanLii 34148, the Workers' Compensation Appeal Tribunal ("WCAT") found that the worker failed to cooperate with the employer in finding suitable work that the worker can safely return to following a workplace injury.

In this case, the worker suffered a concussion when he struck his head while working as a truck driver. The employer contacted the worker, offering him light duties at its head office in a different province however, the employee did not think the offer was suitable for him. Accordingly, the employer revised its offer of light duties to take place in its office in Delta, B.C. The employer also requested the worker to complete an occupational fitness assessment form.

The worker did not respond to the employer's revised offer of light duties, or the employer's request for his doctor to complete the occupational fitness assessment. Instead, the worker provided the employer with a medical note diagnosing him with severe concussion and restricting him from operating any vehicles or machinery, from work involving screens and computers, and from extended periods of concentration. The medical note made no mention of the occupational fitness assessment form or the employer's offer of revised duties.

The worker later advised WorkSafeBC that he was not comfortable with the employer's revised offer of light duties in Delta because he lived on Vancouver Island and the offer would require him to travel and find housing. The worker also advised WorkSafeBC that he was not capable of any type of work.

WorkSafeBC then discovered that the worker had recently renewed his Class 1 Alberta Driver's license, which required him to provide a medical examination for fitness clearing him to operate commercial vehicles. Given all of the circumstances, WorkSafeBC formed the opinion that the worker failed to cooperate such that he was no longer entitled to wage-loss benefits. WorkSafeBC's decision was reviewed and appealed to the WCAT, who ultimately agreed that the worker failed to comply with his duty to cooperate.

In coming to this decision, WCAT found that the worker failed to obtain medical assistance in a timely manner, failed to communicate with the employer in a timely manner regarding his

concerns with the proposed light duties or about travelling to Delta, and failed to provide the occupational fitness assessment form to his doctor despite multiple requests from the employer.

The WCAT did not accept the worker's argument that he was delayed due to difficulty in obtaining medical care. While difficulty in obtaining medical care may be a consideration in assessing an employee's cooperation, in this case, the medical records showed that the worker was able to access medical care on a regular basis.

The WCAT also did not accept the worker's argument that the employer's offer of light duties was so unreasonable that it did not require him to provide a response. While unreasonable offers may reduce the worker's duty to cooperate, in this case, the worker did not provide sufficient reasons for why the employer's offer was unreasonable – the worker had no family responsibilities or medical reasons restricting his ability to travel to Delta; furthermore, the employer had also offered to assist the worker with transportation.

Accordingly, the WCAT found that the worker failed to comply with his duty to cooperate and suspended his wage-loss benefits.

It should be noted that the duty to cooperate is concerned with whether the parties took all reasonable steps to ensure that potential modified duties are fully explored and discussed. It is not concerned with the suitability and appropriateness of the light duties. Where the light duties are suitable, safe and appropriate, the worker has a duty to accept those duties.

B. Duty to Maintain Employment

Section 154.3 sets out the new provision on the duty to maintain employment.

In general, the duty to maintain employment only applies if the worker has been employed continuously for at least 12 months and the employer regularly employs 20 or more workers. The duty is ongoing until the second anniversary of the date of injury.

In brief, the duty to maintain employment requires the employer to return the worker to their pre-injury work if the worker is fit to do so, or to provide "alternative work". Alternative work is work that is different from, but comparable to, the worker's pre-injury work in terms of duties, responsibilities, skills and qualification, location, bargaining unit status, hours of work, and compensation.

If the worker is not fit to return to their pre-injury work, the employer must provide the worker with suitable work.

The employer's obligations to maintain employment also requires the employer to take all reasonable and practical steps to accommodate the worker up to undue hardship by modifying duties and responsibilities or the working environment to allow the worker to return to their pre-injury work or to perform suitable work that fits within their limitations and restrictions.

However, the accommodation does not have to be the worker's preferred accommodation, and the accommodation is only up to undue hardship. In determining what constitutes undue hardship, WorkSafeBC may consider factors such as, but not limited to, safety risks, financial ability to accommodate, disruption to operations, interchangeability of the workforce, size of the employer's operation, and impact on other workers.

In *WCAT Decision No. A2402488,* 2025 CanLII 74922, the worker injured his ribcage after falling while trying to move a switch in the workplace. The employer offered the worker modified duties which involved sedentary computer-based e-learning on safety and job-related training, which the worker did not accept.

The WCAT held that the employer's offer of modified duties was not suitable because it was not productive work. In determining whether work is productive, WCAT commented that factors such as how the work will benefit the employer, whether the work is token or demeaning, whether the work is something the employer would pay someone to do, and if the work was training, whether the employer would pay the worker to undertake the training.

The WCAT found the e-learning was not productive work because the worker had previously completed some of the e-learning modules which the worker had found were generic and not tailored to his job. As such, the WCAT found that the modified duties were token, merely symbolic and limited in their practical value such that it was reasonable for the worker to not accept the offer of modified duties.

III. PROPOSED AMENDMENTS TO THE BC OCCUPATIONAL HEALTH AND SAFETY REGULATIONS

This past year, WorkSafeBC invited stakeholders and the public to provide feedback on proposed changes to the BC *Occupational Health and Safety Regulations* (the "Regulations").

The proposed amendments have two parts. The first part relates to workplace harassment and violence, and the second part relates to "psychological hazards". Below is a summary of the proposed amendments:

- Harassment and Violence
    - An expanded definition of "harassment" to expressly include unwanted workplace harassment of a sexual nature;
    - Clarification that an employer or supervisor's actions to manage the workplace and which are made in good faith are not considered harassment;
    - Requirement for employers to develop a harassment prevention program that includes:

- Written policies and procedures to address harassment;
- Education and training to employees on harassment and how to deal with workplace harassment;
- The recording of incidents of harassment; and
- Implementing measures to eliminate or minimize the risk of harassment.

- Requirement for employers to develop a violence prevention program that includes:
  - Identifying hazards that could expose workers to violence;
  - Education and training to employees on workplace violence;
  - The recording of incidents of violence; and
  - Implementing measures to eliminate or minimize the risk of violence.

- Psychosocial Hazards
  - Introduce new definition of "psychosocial hazard" to mean a workplace or work-related hazard that could expose the worker to the risk of psychological injury, including a hazard that arises from:
    - Traumatic circumstances and events occurring in the course of employment;
    - The design and management of work;
    - The physical workplace environment; and
    - The equipment in the workplace.
  - Requirement for employers to identify, assess, and control psychosocial hazards, and to annually review measures to control those hazards;
  - Requirement for employers to consult with workers and the applicable workplace representative regarding the development of the psychosocial hazards policies; and
  - Requirement for employers to educate, train and provide information to workers on psychosocial hazards in the workplace.

In our opinion, the proposed amendments with respect to harassment and violence do not create a significant change compared to the employer's current obligations. Rather, it appears to mostly codify and consolidate what has been inferred under the *WCA* or *Regulations,* expressed in WorkSafeBC's various policies and guidelines, or set out in the jurisprudence.

Currently, employers are required to develop and implement a bullying and harassment prevention program pursuant to s. 21 of the *WCA*, which requires employers to ensure the health and safety of its workers. WorkSafeBC's policies require the program to include procedures on how to report, investigate and address workplace bullying and harassment, and also require employers to train employees on the program and to annually review the program.

Similarly, under s. 4.27-4.29 of the *Regulations,* employers are currently required to develop and implement a violence prevention program that includes identifying hazards that contribute to the risk of violence, eliminating or minimizing the risk of workplace violence, and training employees on the program. However, a common criticism with the current provisions includes the fact that they only apply to violence by a third-party (and not violence by another worker). The amendment appears to address this issue such that the employer's violence prevention program must apply to any type of workplace violence, whether it comes from a third-party or another worker.

Additionally, WorkSafeBC's current policies and guidelines also already provide that an employer's or supervisor's actions in managing the workplace, such as feedback, discipline, work assignments, etc., are not bullying or harassment so long as it is made in good faith. Accordingly, the clarification in the proposed amendments simply codifies what was previously set out in WorkSafeBC's policies, which are not necessarily binding on courts or tribunals.

However, the proposed amendments regarding psychological health and safety are more significant. While employers have always had a duty to protect the psychological health of workers, the new definition of psychosocial hazard appears to be quite broad and includes matters that the employer may not be able to reasonably or practically control.

For example, the new definition of "psychosocial hazard" includes hazards arising from the design and management of work. This may mean that things such as high workloads, tight deadlines, certain management styles, and the assignment of work may be considered a psychosocial hazard such that the employer is required to implement controls to manage those hazards. This may restrict the employer's ability to manage its operations and the workplace.

Further clarity is required from WorkSafeBC regarding the definition of psychosocial hazard, the practicality of requiring employers to control certain hazards that would fall within that definition, and the relationship between the employer's obligations to control certain psychosocial hazards and the employer's ability to manage and direct the workplace.

It should be noted that public consultation on these proposed changes has been paused until further notice due to the provincial elections. WorkSafeBC has not provided an update on the status of the public consultation, including whether the pause has been lifted.

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