FSSS CSN

The ABCs

of the duty to accommodate

**Handbook on the duty to accommodate
when an employee has or develops a disability
that prevents him or her from
performing some or all of his or her duties**

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This handbooks has been produced by the
Fédération de la santé et des services sociaux – CSN

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Foreword

Our unions have raised a number of technical and legal issues related to the duty to accommodate, notably when an employee has or develops a disability that prevents him or her from performing some or all of his or her duties.

The principle of the duty to accommodate is not set out explicitly in the Québec Charter of Human Rights and Freedoms; instead, it has been developed by the courts over the years. The duty stems from the prohibition of discrimination on grounds listed in the Charter, such as a handicap. It therefore obliges employers and unions to look for acceptable solutions that protect an employee with a disability.

The duty to accommodate has become an inescapable part of labour relations. The union has an important role to play in implementing it: it must make sure that an employee who needs accommodation gets it, while ensuring that other employees' rights are not unfairly affected. The union also has a role to play in educating employees and helping them realize that that different treatment for one employee isn't a privilege or favour if it is warranted by a real difference. The duty to accommodate is now part of a union's duty to represent its members.

In recent years, the class of office personnel and administrative technicians and professionals has been the particular focus of requests to take in employees with disabilities. In this context, the FSSS-CSN has decided to work on preparing this handbook and developing training so that its unions are better equipped to deal with their duty to accommodate, in both the public and private sectors.

Preface

This handbook discusses accommodation when an employee has or develops a disability that prevents him or her from performing some or all of his or her duties. The duty to accommodate also applies in the case of workers injured on the job, but in such cases it is necessary to take into account the *Act respecting industrial accidents and occupational diseases* and the *Act respecting occupational health and safety,* as well as articles in the collective agreement on injured workers.

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A- General principles

1- What is the duty to accommodate?

The duty to accommodate is the employer's obligation to take into account individuals and their differences in conditions for obtaining employment. This is a way of ensuring the right to equality and guaranteeing that standards or criteria of access are not discriminatory and take into account workers who can't meet them. This doesn't mean that employment standards are lowered or diluted. Instead, it is a matter of ensuring that they meet the standards for determining whether they are **bona fide occupational requirements (BFOR).**

The duty to accommodate must always be assessed in context, on a case-by-case basis. It depends on the individual to be accommodated, the grounds or reason for the distinction, the institution or business, etc. What is clear is that the accommodation must be reasonable i.e., **without undue hardship** for either the employer or the union. The employer must adapt or relax an employment standard when required **so as not to needlessly exclude some people from the workplace.**

The duty to accommodate only applies when there is **discrimination**. We will come back to the definition of discrimination later.

2- What is a bona fide occupational requirement (BFOR)?

There are three accepted criteria for determining whether an occupational requirement is *bona fide*:

- the requirement must be rationally **connected to the performance of the job in question**;
- it must have been adopted in the honest belief that it was **necessary to perform the work;**
- the requirement must be reasonably necessary, i.e., that **it is impossible to accommodate employees who don't meet it**.

An occupational requirement is not a bone fide requirement unless it takes the possibility of accommodation into account.

3. Where does the duty to accommodate originate?

The duty to accommodate is not set out explicitly in either the Québec Charter of Human Rights and Freedoms or the Canadian Charter of Rights and Freedoms. Instead, it grew out of case law: it is a concept that developed as a result of decisions rendered by judges or grievance arbitrators that interpreted the Charters.

4. Since when has the duty to accommodate existed?

The Supreme Court first identified the duty to accommodate in 1985, when it ruled that the natural consequence of recognizing a right was a social acceptance of a general duty to honour that right and take reasonable steps to safeguard it. Subsequent decisions further developed the concept of accommodation. These decisions led to an understanding that if equality rights are to be more than empty rhetoric, they must be accompanied by certain forms of coercion.

5. Is this right written into my collective agreement?

The duty to accommodate isn't written into the collective agreement. But the Québec Charter of Human Rights and Freedoms is deemed to be a part of every collective agreement. So we are required to comply with the duty to accommodate. As well, the concept of accommodation sometimes obliges us to question contract language in light of this duty. We have to be vigilant about the rules found in collective agreements, because accommodation cannot be based on a blind application of contract clauses. In this regard, you are invited to consult your union staff representative.

6. Are there different kinds of accommodation?

Yes, you can say that there are different kinds of accommodation. The kind of accommodation varies, depending on three main factors: the person to be accommodated, the grounds for an accommodation (race, colour, sex, handicap, etc.) and the business concerned (its situation, size, resources, etc.). In fact, the specific accommodation always varies from one case to the next.

7. What is meant by discrimination?

The grounds for discrimination are those set out in Section 10 of the Québec Charter of Human Rights and Freedoms: race, colour, sex, pregnancy, sexual orientation, civil status, age, religion, political convictions, language, ethnic or national origin, social condition, a handicap or the use of any means to palliate a handicap.

To establish that discrimination exists, three conditions must necessarily be met:

a) there is a *distinction, exclusion or preference;*

b) the *distinction, exclusion or preference* is based on one of the prohibited grounds set out in Section 10 of the Charter;

c) the *effect of the distinction, exclusion or preference is to nullify or impair the right to equality in the recognition and exercising of a person's right or freedom.*

Discrimination is prohibited both in hiring and in the course of employment.

8. What is a handicap?

A handicap is one of the grounds for discrimination prohibited by the Charter. A handicap may be a physical or psychological health problem or functional limitations that may affect a person's ability to work. The handicap doesn't have to be permanent. The concept also includes all kinds of addictions: alcohol, drugs, gaming, etc. Note that the physical ability to perform a task is primarily a medical issue.

In this document, we are basically considering the duty to accommodate in cases of functional limitations due to a handicap. These are the cases encountered most often in workplaces. But the principles remain the same, regardless of the grounds for discrimination resulting in a need to accommodate an employee.

9. What constitutes undue hardship?

Undue hardship defines the limits of reasonable accommodation. In other words, it is the point at which an accommodation becomes unreasonable. Undue hardship applies to both the union and the employer. The duty to accommodate must not replace discrimination against the complainant with discrimination against other employees.

Because of the individualized nature of the duty to accommodate and the diversity of circumstances that may be involved, rigid rules should be avoided. Undue hardship may take as many forms as there are circumstances. But it is clear that undue hardship involves more than a minor inconvenience. It has to be something that has a real effect on the rights of other workers, one that is important, not insignificant.

Be careful: undue hardship can take as many forms as there are circumstances!

10. What can constitute undue hardship for an employer?

The main undue hardships that an employer can invoke are costs, infringements of other employees' rights and the smooth operations of the business or institution.

11. What can constitute undue hardship for a union?

The main undue hardships that a union can invoke are dangers to the safety of other employees, heavier workloads for others or failure to abide by seniority.

12. What about contract clauses?

Contract language that is not consistent with the duty to accommodate could be ruled invalid by a grievance arbitrator. Furthermore, a clause may be valid but have a discriminatory effect on some people, In such a case, the clause might have to be discarded or made more flexible if this does not result in undue hardship for the parties. You should avoid applying clauses blindly or automatically and explore the possibility of an accommodation.

Each case of accommodation actually has to be analysed individually and contract clauses must be tested to see that they meet the duty to accommodate. We suggest that you pay special attention to clauses on the automatic termination of the employment relationship, the length of time allowed to take up a position, a probationary employee's right to grieve, etc.

B- Practical aspects

1. What is the employer's role?

The employer must be proactive and innovative about accommodation. He must take practical steps to accommodate or else prove that his attempts have been fruitless and that any other solution would cause undue hardship. He must engage in an active, concrete search for measures.

The employer must make a substantial effort to discharge his duty to accommodate. He must carry out a rigorous process, free of assumptions or judgments made without a thorough examination. It must not be a pretence: it must be a serious exploration of the possibilities. The employer has to think of everything. He must always keep in mind that each case is unique.

As well, the employer cannot ignore the union in deciding how to accommodate an employee. Since the union is the sole bargaining agent vis-à-vis the employer, **any accommodation process must be tripartite** – including the employer, the union and the employee concerned.

2. What is the union's specific role?

The union cannot behave like a bystander. Discrimination in the workplace is everyone's business!

The union must not hinder the employer's efforts to accommodate an employee. On the contrary, it must be an integral part of the process, documenting the case, exploring the employee's skills, taking stock of and assessing the possibilities for accommodation, etc.

The union has a duty to learn about and develop its understanding of the concept of accommodation. It is responsible for implementing the accommodation, because the application of the Charter of Rights is its responsibility. All the charters and

public policy statutes are deemed to be part of the collective agreement. If there is a dispute, the union should file a grievance.

The union should raise employees' awareness of the concept of accommodation. It should inform them and explain that equal treatment for everyone actually has discriminatory effects.

We have already indicated that when it comes to accommodation, the union cannot insist on strict compliance with the collective agreement. It does, however, have the right to disagree with a measure that would adversely affect the rights of other employees. If the measure has a significant negative impact on others' rights, it constitutes an undue hardship.

The union can also negotiate clauses on accommodation in the collective agreement, but they will never cover all eventualities. Each case has to be analysed individually. This is why we recommend that you consult your union staff representative.

3. What happens when there's no union?

If there is no union, an employee who is discriminated against on one of the grounds prohibited by the Charter has to negotiate directly with the employer. Apart from that, the employer has the same obligations, and the same criteria are used to judge whether he discharges his obligations properly. In the event of a disagreement, the employee can file a complaint with the Commission des droits de la personne et des droits de la jeunesse du Québec (CDPDJQ – Québec commission on human and youth rights).

4. What is the role of the person with a handicap?

An employee who needs an accommodation because of a handicap has to make it known to the employer and the union, explaining the reasons for her or his request.

The employee must be flexible and co-operate in the search for solutions. She or he must be ready to make certain concessions, such as changes in hours of work, duties or position.

5. Where to start when an accommodation is necessary, and what are the steps to follow?

When an employee needs to be accommodated, the possibility of an accommodation in her or his own position should always been assessed. Is it possible to modify the work environment to adjust to her or his handicap? If this solution is not enough, then her or his duties should be modified.

To do this, the first step is to determine whether the duties the employee is unable to perform are essential or secondary duties. If they are secondary, the next step is to determine whether they can be assigned to other employees without undue hardship for the others.

If the duties that the person can't perform are essential to the position, it then has to be determined whether there is a vacant position in the same job title that can be assigned to the employee. If there is a vacant position but the employee is unable to perform secondary aspects of it, the employer then has to look at whether the secondary duties can be assigned to other employees so that the employee being accommodated can effectively fill the vacant position without causing undue hardship.

If there is no vacant position in the unit, or if the employee is unable to perform the essential duties, the employer will have to gradually widen the scope of the search and examine the possibility of accommodating the employee in another bargaining

unit if this does not cause undue hardship to the employees in the other unit concerned.

6. In the accommodation process, what are the criteria that should guide us?

In seeking to identify accommodation measures, the measure sought should always be the one that is least disruptive for other employees and that is the least detrimental to the collective agreement. If an accommodation that complies with the collective agreement exists, if should be preferred to one that strays from the collective agreement.

There are other limits to be observed: the employee doesn't have the right to bump another person or cause another person to be dismissed. The employer doesn't have an obligation to create a position to accommodate an employee.

7. Should an employee be accommodated in another bargaining unit?

Case law on this is still rare. So far, there has not been any decision by a tribunal in Québec, but there are some in the rest of Canada. They seem to say that the duty to accommodate crosses bargaining unit boundaries.

Once all the possibilities of accommodating an employee in her or his original bargaining unit have been exhausted, the employer must assess the possibilities of accommodating her or him in another bargaining unit, if it is possible to do so without undue hardship for employees in the host bargaining unit. It can never be said too often: each case of accommodation is an individual case. There are no ready-made solutions when it comes to accommodation.

8. What are the rights that must be upheld when the accommodation crosses into another bargaining unit?

It's not easy to answer the question, because each case has to be assessed in light of the limit to any reasonable accommodation, i.e., undue hardship.

As a general policy, though, in the case of an accommodation in another bargaining unit, we recommend that the employee be put on the recall list, with her or his full seniority. We think that, generally speaking, that this accommodation measure should be deemed appropriate by the courts.

9. Can an accommodation constitute a breach of the collective agreement?

Yes, an accommodation can constitute a breach of the collective agreement. But this should only be done as a last resort, when all other possibilities of accommodation have been rigorously examined. When there is more than one alternative, the one chosen should be the one that does not violate the collective agreement, even if it is more expensive for the employer. In this regard, however, the concept of undue hardship should not be forgotten.

The accommodation chosen should always be the one that causes the least harm to other employees' rights – both rights under the collective agreement and rights under the Charters and laws. Undue hardship may notably result from a failure to abide by seniority, a significant increase in other employees' duties, health and safety hazards, etc. Any right that might be affected by an accommodation has to be taken into consideration in weighing the *reasonableness* of a proposed accommodation.

10. What about the clause on reserved positions?

Clause 23.35 of the National Provisions on working conditions in the public health and social services sector provides for the possibility of reserved positions. A

reserved position is one that is awarded to an employee who for medical reasons becomes incapable of performing some or all of the duties involved in her or his position. In such a case, the employee does not suffer any reduction in pay and the position is awarded without being posted.

It should be pointed out that a reserved position can't be awarded without an agreement between the employer and the union. Although a reserved position can be an accommodation, neither the union nor the employer is in any way obliged to agree to this solution, because awarding a reserved position goes above and beyond the duty to accommodate.

11. Does the employee always have to be able to meet the requirements of the position?

The duty to accommodate doesn't exempt an employee from having to meet the normal requirements of the job to fill a position. The same qualifications and experience usually required to fill the position still apply in the case of an accommodation. The employee could, however, be relieved of some secondary duties.

Accommodation usually means adapting a rule or requirement, not dropping it entirely, so as to take into account the specific needs of certain minorities.

12. What forms of recourse are possible?

If the employee or the union is not satisfied with the outcome of the accommodation process, or if the employer hasn't wanted to apply it, the recourse is to file a grievance. It is obvious, though, that the duty to accommodate doesn't really lend itself to legal procedures. Hearings are often lengthy and expensive and rarely solve the problem entirely.

Even if an arbitrator were to uphold the grievance, he or she would send the parties back to do their homework. So it's better to use pre-mediation arbitration: it will be faster, more effective and won't engender costs.

13. Can a union be held accountable for an accommodation?

Yes, a union can be held accountable on a matter of accommodation. The union shares with the employer the duty to implement the accommodation. Both the employer and the union can also be held liable if they jointly devise discriminatory working conditions. The union has a duty, particularly in negotiations to renew the collective agreement, to make all necessary efforts to negotiate working conditions that are free from all discrimination.

C- To find out more

1. Bibliography

Christian Brunelle, *Discrimination et obligation d'accommodement en milieu de travail syndiqué*, éditions Yvon Blais, 2001.

Charter of human rights and freedoms, *Législation, jurisprudence et doctrine*, collection Alter Ego, édition Wilson et Lafleur, 21st edition, *2008*.

Pineau Anne*, Le bulletin d'informations juridiques - L'accommodement juridique en milieu de travail*, CSN's Legal Services department, June 2007.
Available on the FSSS web site: www.fsss.qc.ca

2. Case law

In chronological order:

Ontario Human Rights Commission v. Simpsons-Sears, 1985.

Renaud decision, Central Okanagan School District No. 23 v. Renaud, 1992.

Meiorin decision, British Columbia (Public Service Employee Relations Commission) v. BCGSEU, 1999.

Grismer decision, British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights), 1999.

City of Montréal decision, Québec (Commission des droits de la personne et de la jeunesse) v. Ville de Montréal, 2000.

Parry Sound (district) decision, District of Parry Sound Social Services Administration Board v. OPSEU, Local 324, 2003.

MUHC decision, McGill University Health Centre v. Syndicat des employés de l'Hôpital général de Montréal, 2007.

Côté v. Syndicat des travailleuses et travailleurs du Centre de santé et des services sociaux de la région de Thetford (CSN). Application for judicial review, 2008.

Hydro-Québec v. Syndicat des employé-es de techniques professionnelles et de bureau d'Hydro-Québec, Local 2000 (CUPE-FTQ), 2008.

3. Web sites

Commission des droits de la personne et des droits de la jeunesse
www.cdpdj.qc.ca

Canadian Human Rights Commission / Preventing Discrimination / Tools and Resources
www.chrc-ccdp.ca