



DUTY TO ACCOMMODATE

A PSAC guide for
Local Representatives

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DUTY TO ACCOMMODATE: A GUIDE FOR LOCAL REPRESENTATIVES

The Public Service Alliance of Canada is committed to ensuring that workplaces are equitable and fair. This means that we view human rights in the workplace as an essential element in our mandate to represent our members.

The duty to accommodate is an essential principle in our approach to human rights. Due to a Supreme Court of Canada decision (*British Columbia (PSERC) v. British Columbia Government and Services Employees' Union*, also known as "Meiorin") in September 1999, this concept has been radically changed in a very positive way.

Previously, the duty to accommodate meant the right of a group or individual to have a specific situation modified in a manner that did not change the basic elements of the situation, but did allow the group or individual to fully operate within that situation. In the workplace, reasonable accommodation involved specific legal rights and responsibilities and was a reactive response to individual or group discrimination. Employers, and Unions, were legally required to take reasonable actions to eliminate the effects of employment practices or rules that discriminated against individuals or groups on the basis of a prohibited ground, such as race, sex, age, disability, sexual orientation and so on.

The *Meiorin* decision is the point of reference or benchmark for any duty to accommodate analysis. The *Meiorin* decision broadened that definition to place a positive obligation on employers to design workplace standards and requirements so that they do not discriminate (i.e., the employer must take proactive action to ensure these standards and requirements are not discriminatory). In fact, the decision states:

*Employers designing workplace standards owe an obligation to be aware of both the differences between individuals, and differences that characterize groups of individuals. **They must build conceptions of equality into workplace standards.** By enacting human rights statutes and providing that they are applicable to the workplace, the legislatures have determined that the standards governing the performance of work **should be designed** to reflect all members of society, in so far as this is reasonably possible. The standard itself is required to provide for individual accommodation, if reasonably possible. (para 68 emphasis added)*

The duty to accommodate is usually thought of in relation to disability, but it relates to all grounds of discrimination found under human rights legislation, including culture, religion, family status and so on.¹

The Guide is set up as a Question and Answer document. Laws change at a rapid pace and this document will be updated from time to time. If you have questions that are not answered in this document, contact your Local or Component for further information. Questions you feel should be addressed in the Guide should be forwarded to the PSAC Human Rights Office (see contact address at end).

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¹ While this Guide addresses reasonable accommodation in the workplace, it should be noted that our Union also has a requirement to ensure that there are no artificial barriers that prevent our members from fully participating in Union activity.

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Q-1 What is the Duty to Accommodate?

The fundamental nature of the duty to accommodate requires employers to make every reasonable effort, short of undue hardship, to accommodate workers or service users who fall under a ground of discrimination within human rights legislation.

In the workplace, the duty to accommodate is the legal requirement for employers to **proactively** eliminate employment standards, practices, policies, requirements, procedures or rules that discriminate against individuals or groups on the basis of a prohibited ground, such as race, sex, disability, age, family status, and so on.

The employer must take all steps short of undue hardship to eliminate discrimination related to human rights grounds. For example, policies, procedures, requirements, standards and practices must be designed to ensure that those who have a lower level of visual acuity, or those who require a private area in which to conduct prayers, or those who require modified work hours for family care responsibilities, do not encounter barriers in the first place. If a policy, procedure, requirement, standard or practice is already in place then these must be revoked or replaced by one that is not discriminatory, unless it is found to be a Bona fide Occupational Requirement (BFOR - see Q-7 below). (Note that this does not apply to discrimination arising from special programs designed to redress historical inequality.)

Given the case law to date, if the Union did not contribute to the discrimination, the employer must look for all other ways to accommodate the worker before expecting the Union to alter or waive application of the collective agreement. However, the Union is always required to cooperate and be flexible in the reasonable accommodation of a worker. (See Q-4 below).

Q-2 What is the New Approach to the Duty to Accommodate?

As noted throughout this publication, the *Meiorin* decision has radically changed the way in which we will deal with accommodation. As noted in the previous issue of this publication, there has been debate about how useful the old, individualized reasonable accommodation was. While it allowed individuals the ability to fully participate at work, participation was individualized, i.e., the problem is of a particular individual, rather than one of society, namely to ensure inclusion. Rather than forcing employers to solve individual problems, some argued that employers should be compelled to set their workplaces up in such a way that these problems do not exist in the first place, in much

the same way that wheelchair ramps are now expected, rather than added as an after-thought when someone requires one.

That debate is over and the latter perspective is now the law.

A disability activist, who is a lawyer and blind, tells the story of being in court one day in the middle of a case when chaos broke out. When he asked his assistant what had happened, he was informed that the power had gone out and there were no lights. Court was adjourned until the following day. As he remarked to a colleague “You sighted people ask for so much! You want every room in every building wired for lighting and you just can’t function without it. Do you know how much that costs?”

We realize that even if we were to find ourselves in a world designed to accommodate all needs, there would still be individual accommodations required. The *Meiorin* decision, however, has taken us a giant step forward towards an inclusive workplace. The one related decision that has come down since (*Grismer*, 1999, Supreme Court of Canada), has reinforced this new vision of the duty to accommodate.

Q-3 Who has the right to be reasonably accommodated?

The duty to accommodate is usually thought of in terms of disability, but it relates to a broad range of individual differences among workers.

Individuals or groups who are protected under human rights legislation have the right to accommodation. While the federal, provincial and territorial human rights legislation cite varying prohibited grounds, it is best to check the legislation that applies to your workplace. The following grounds exist in most Acts and Codes:

- Race or colour;
- Religion or creed;
- Age;
- Sex or gender;
- Marital Status;
- Physical\Non-physical disability;
- Sexual orientation;
- National or ethnic origin;
- Family status;
- Ancestry or place of origin and
- Addictions such as alcohol or drugs.

Some jurisdictions such as the North West Territories have included gender identity and social condition as a prohibited ground of discrimination.

Under the *Employment Equity Act* and Regulations, employers are required to be proactive in identifying and eliminating employment barriers against persons in designated groups that result from employer's employment systems, policies and practices. In addition, the employer is required to implement positive policies and practices and make reasonable accommodations in order to ensure that persons in designated groups achieve a degree of representation in each occupational group in the employers' workforce. The designated groups include women, visible minorities or racialized people, people with disabilities and Aboriginal Peoples.

The *Meiorin* decision serves to extend this proactive requirement to all prohibited grounds.

Q-4 Is the employer the only one who has a duty to accommodate workers in the workplace?

The burden to accommodate rests on the employer because it has ultimate control over the workplace. It must investigate all possible accommodations, and consult the union and employee. Thus, while the employer has the principal duty to accommodate workers, the Union also has a duty to accommodate.

Non-discrimination and/or duty to accommodate clauses are found in almost all collective agreements. As a result, a worker's right to be accommodated is a collective agreement right.

Where the Union has negotiated an arrangement or a collective agreement provision that has a discriminatory impact, it has a joint responsibility with the employer to proactively eliminate that discrimination. However, even if the Union was not involved in negotiating or implementing a discriminatory provision, it must cooperate with the efforts of the employer to accommodate the worker. If the employer does not take this responsibility seriously, the Union should insist that the employer take the necessary action. In most cases, the Union should support accommodation measures because collective agreement provisions can and should be interpreted and applied in a way that avoids a discriminatory impact. However, the union does not have to support an employer's accommodation measures if it can demonstrate that there is a **substantial** interference of collective agreement rights.

It should be noted that the worker has an obligation to cooperate and facilitate the accommodation process including providing information that will assist in determining what accommodation is required and, if possible, identifying appropriate accommodation. The worker must accept “reasonable” accommodation, even if it is not ideally what the worker wanted. If the worker refuses to accept a proposed accommodation then she or he should provide a reasonable explanation for this refusal. For example, if an employer provides a work opportunity that involves substantially similar working conditions and earning opportunities in a manner that does not involve significant adversity to the employee and the worker has no reasonable explanation to refuse it, then the employer may have fulfilled its obligation of reasonable accommodation. Conversely, while an employee has an obligation to cooperate, she or he is not required to accept a proposed accommodation that is unreasonable (i.e. an accommodation proposal that threatens the employee’s general health and well-being).

Q-5 What gives us a legislative right to accommodation?

As noted above, the right to reasonable accommodation stems from the various pieces of legislation that apply to the workplace in question.

For example, PSAC members who work in the federal jurisdiction (federal public service, Canada Post, transportation sector, etc.) fall under the *Canadian Human Rights Act*. This legislation was amended in June 1998 to include a specific requirement on employers to reasonably accommodate individual workers up to the point of undue hardship (section 15(2)). With the *Meiorin* decision, the interpretation of the *CHRA* is broadened, clarifying that the employer must proactively eliminate discrimination in its policies and practices.

Provincial and territorial human rights acts or codes vary in their accommodation provisions. However, the *Meiorin* decision creates a “unified approach” to accommodation issues, which, along with the employer’s duty to be proactive and systemic in eliminating discrimination, applies to all human rights legislation in Canada.

The Supreme Court of Canada has held that all human rights legislation is quasi-constitutional (i.e., nearly constitutional) in that it expresses fundamental Canadian values and important public policies. Thus, if there is a conflict between other legislation and human rights legislation, the *Human Rights Act* is paramount (i.e. “trumps” the ordinary legislation). In light of this, Acts, such as *Workers’ Compensation Acts* or the re-employment provisions of the *Public Service Employment Act*, which purport to accommodate employees with disabilities, may not go far enough to fulfill the

accommodation requirements of human rights legislation. The last word is always the human rights legislation.

It should be noted that all human rights legislation must be consistent with the *Canadian Charter of Rights and Freedom*, which is part of the Canadian Constitution (1982). Under the *Charter*, section 15, the equality provision, is the minimum standard for all human rights legislation in Canada.

Labour legislation in Canada has provisions that enable collective agreements to be interpreted and applied consistently with human rights legislation and jurisprudence. Thus, specific language in collective agreements may vary but, in essence, all unionized workers are protected from discrimination and harassment based on a prohibited ground under their collective agreements.

As mentioned earlier, the *Employment Equity Act* states that employment equity plans must include positive policies and practices for the accommodation of those belonging to the designated groups.

Most provincial/territorial workers' compensation acts include provisions on modified work, return to work and the worker's re-employment rights. Since this legislation varies from one province to another, you should check with your respective provincial/territorial Workers' Compensation Board.

Federal public service workers have similar coverage under the *Public Service Employment Regulations (PSEER)*. The provisions found in section 7 of the Regulations establish a time-limited priority for workers who develop disabilities in order to facilitate their reintegration and return to work (see Appendix A). The entitlement is only available to persons who are indeterminate employees when they develop a disability. The type of disability is irrelevant and it does not matter whether the disability was incurred at the work place or away from the work place, or whether the employee became disabled while on duty.

Additional coverage is also found in the *Canada Labour Code*, Part III, Division XIII.1, section 239.1. It provides wage protection and return-to-work provisions for workers injured on the job. Keep in mind that this legislation only applies to particular federal employers such as Canada Post Corporation, the Royal Canadian Mint and so on (see Appendix B).

Note that legislation comes under review regularly and, thus, may be changed.

Q-6 When does the duty to accommodate a worker arise?

Meiorin has set out a positive obligation on the employer to design the workplace so that equality and accommodation are built in to all policies and practices. As the decision states:

Employers designing workplace standards owe an obligation to be aware of both the differences between individuals, and differences that characterize groups of individuals. They must build conceptions of equality into workplace standards. By enacting human rights statutes and providing that they are applicable to the workplace, the legislatures have determined that the standards governing the performance of work should be designed to reflect all members of society, in so far as this is reasonably possible. (para 68)

As a practical matter, workers do have an obligation to advise the employer of the accommodations they may require.

Once a worker establishes a *prima facie* case that she or he falls within a prohibited ground under human rights legislation (such as disability, religion or family status) then the burden shifts to the employer to prove that every reasonable effort was made to accommodate the worker.

In other words, the worker must show that he or she has a disability or has a religious practice or has family responsibilities that require accommodation. Without the accommodation, there are barriers for the worker who is unable to fully participate and/or to have access to benefits and opportunities that other have in the workplace. The employer is obligated to remove the barriers through accommodation of the worker.

Q-7 What is a Bona Fide Occupational Requirement (BFOR)?

Following revisions to the **CHRA** (*Canadian Human Rights Act*) (section 15.2) in 1998, the employer is obligated to accommodate to the point of undue hardship **before** a *Bona Fide Occupational Requirement* (BFOR) defence can be established by the employer.

Other human rights legislation may or may not specifically refer to BFOR (or similar language). Nonetheless, the *Meiorin* decision extends this requirement to all jurisdictions.

A BFOR is the **essential tasks** required to perform a job. Where an employer can establish a particular BFOR, they can exclude certain workers, under certain circumstances, from a job. BFORs are not preferences; they are essential to the job.

Thus, while an employer may prefer workers to have a high school diploma for certain jobs or require them to lift a certain weight by hand, it is not a BFOR unless the employer can demonstrate that the job cannot be done without that qualification. Preferences such as this may have the effect of screening out certain groups of applicants or forcing existing workers out of the workplace unnecessarily.

The *Meiorin* decision sets out three steps that help determine whether a *prima facie* discriminatory standard is a BFOR:

1. Did the employer adopt the standard for a purpose rationally connected to the performance of the job?
2. Did the employer adopt the particular standard in an honest and good faith belief that it was necessary to the fulfillment of that legitimate work-related purpose?
3. Is the standard reasonably necessary to the accomplishment of that legitimate work-related purpose? (Remember that to show the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer.)

In *Meiorin*, the Court suggested the following as important questions to be asked in relation to Step 3:

- Has the employer investigated alternative approaches that do not have a discriminatory effect, such as individual testing against a more individually sensitive standard?
- If alternative standards were investigated and found to be capable of fulfilling the employer's purpose, why were they not implemented?
- Is it necessary to have all employees meet the single standard for the employer to accomplish its legitimate purpose or could standard reflective of group or individual differences and capabilities be established?
- Is there a way to do the job that is less discriminatory while still accomplishing the employer's legitimate purpose?

- Is the standard properly designed to ensure that the desired qualification is met without placing an undue burden on those to whom the standard applies?
- Have other parties who are obliged to assist in the search for possible accommodation fulfilled their roles?

Although the Supreme Court of Canada outlined the above test to determine if a prima facie discriminatory standard in a policy was a BFOR, this analysis is considered whenever an employee requests accommodation.

Q-8 How do we identify the essential elements or duties of a job?

It is important in identifying BFORs to differentiate between tasks or skills that **appear** to be essential, as opposed to those that **are** essential.

For example:

- 1) A job requires that a person is able to move plywood from one area of the storeroom to another. Traditionally, this may have been done by a worker picking up the plywood and manually moving it to the new location. While it may appear that the essential task is to be able to pick up and manually move the object, the actual essential task is to move it. A scissor lift or other device could be used to allow someone to perform the essential task in question.
- 2) In an office, the work might involve computer operation and, thus, the essential task might appear to be the ability to use a keyboard. In fact, the essential task is to operate the computer and some of the more recent voice recognition and response systems would allow a worker without full use of his/her hands to complete this task. While the technology is not always available at this point to enable someone to perform certain tasks in non-traditional ways, it is important to clearly define what the actual task is so that the appropriate accommodation can be identified.
- 3) Workers are required to work in an older building that does not have good air circulation and ventilation. There have been problems with mold. Most workers must work in cubicles. If a worker has or develops an environmental related disability and cannot work in that workplace, then there should be a review of the workplace site to determine if changes can be made so that the worker can continue to work at the worksite (i.e. new ventilation systems; closed cubicle; no-scent policy, scent-free

products are used at the workplace, etc.). After exhausting the accommodations available at the worksite, alternative worksites may need to be considered.

- 4) At a workplace, workers may be required to work on a rotation shifts every two weeks because the workplace operates 24 hours a day. For some workers with family responsibilities such as childcare, rotational shift work and/or strict hours of work may not be a viable option due to the worker's specific circumstances. Therefore, employers need to take into account flexible hours of work and the ability of workers to do shift work.
- 5) Workers may be required to wear a specific uniform, which includes a specific type of head attire. The uniform has been the traditional uniform since the inception of the organization and is now a recognized symbol by the public. However, some workers, due to their religious beliefs, may not be able to abide by the uniform (i.e. they are required to wear certain head attire which does not allow them to wear the required head attire). There are alternative ways to ensure that the uniform tradition is upheld (i.e. specialized head attire that still meets the key components of the uniform). In addition, if there is little health and safety risk to others then the degree of risk for the individual may be examined.

Q-9 What is Undue Hardship?

Employers are obligated to reasonably accommodate workers up to the point of undue hardship. The undue hardship threshold is high. This principle has been largely defined through jurisprudence (decisions by various Courts and Tribunals in human rights matters) and implies the excessive and substantial disruption or interference with the employer's operation. Undue hardship does not mean minor inconvenience or interference. Basically, accommodation measures must be taken unless it is impossible to do so without imposing undue hardship.

Two major issues have been identified as important in defining undue hardship, namely:

- If the **financial costs** associated with the accommodation would be prohibitive to the point that it would alter the essential nature of the organization or substantially affect the viability of the enterprise. Note, however, that outside sources of funding will be considered in this determination.

- If **health and safety** considerations are not met; in particular where the degree of risk, which remains after accommodation has been made, is so significant that it outweighs the benefits of the accommodation. Public safety and the health and safety of co-workers are considerations in this regard. However, when safety standards are developed or applied, employers must accept that some moderate level of risk might be reasonably necessary in order to ensure the success of the accommodation.

As well, several other related factors may be raised depending on case law and the particular jurisdiction. It is important to be aware of the specific definition given to undue hardship in the legislation within your particular jurisdiction and to hold the employer to that definition, rather than allowing additional factors to be considered.

The point of undue hardship will obviously vary depending on the size of the employer's operation, but the burden must be substantial and not trivial in order to be undue hardship. Subjective belief, impressionistic evidence of increased expenses and speculation by the employer about future costs are not allowed.

As well, there must be consideration given to the question of who is the employer in determining undue hardship. For example, an employer may insist that the department in which the accommodation is required cannot carry the cost of the accommodation. This may be the case, but it is the employer (i.e., the whole company) that is responsible and the question is whether it would be an undue hardship on this larger body. Departments in the Federal Public Service often rely on this argument, but the fact is that the Treasury Board is the employer and, as such, has broad resources to draw upon in accommodation situations.

The determination of undue hardship is a fluid and complex area. It is important to become familiar with the legislation under which the particular situation falls and to seek assistance from your Component Office or your PSAC Regional Office, if you require assistance.

Q-10 Who is responsible for proving Undue Hardship?

Once the worker has established *prima facie* that he or she falls under a prohibited ground under human rights legislation (i.e. disability, religion, family status, etc.), the employer must establish undue hardship.

Q-11 What are the responsibilities of the employer in accommodating a worker?

The responsibilities of the employer include:

- to proactively “build conceptions of equality into workplace standards”;
- to design workplace requirements and standards so that, from the outset, they do not discriminate;
- to identify and remove any workplace discrimination and barriers found in its policies, practices, standards and procedure. Workplace standards, such as lifting requirements or work schedules that unintentionally distinguish among employees on a protected human rights ground (*i.e.*, disability, gender, religion, etc.) may be struck down or modified. Employers must build liberal conceptions of equality into workplace practices;
- to ensure that equal opportunity is provided to employees and potential employees to enjoy benefits, opportunities and privileges as all other employees;
- to ensure that discrimination is not allowed on the part of both employer and co-workers;
- to inform employees and applicants of their right to accommodation and its duty to accommodate policy and procedures;
- to ensure all managers and supervisors are aware, understand and abide by their obligations to accommodate;
- to demonstrate a willingness and commitment to accommodate;
- to consult and solicit information concerning their workers’ disability-related employment needs from workers, union representatives and medical and accommodation specialists;
- to identify the need for medical information, assessment and accommodation if not possible by the worker themselves;
- to review, follow-up and assess accommodation of workers on an on-going basis;
- to be creative and flexible;
- to maintain confidentiality and respect privacy and dignity of the workers who are being accommodated;
- to address the issue with the worker and the Union;
- to respect the collective agreement in terms of accommodation; and
- to consult and work with the Union and the workers to eliminate discrimination and to educate on the duty to accommodate.

As well, employers have related responsibilities that will affect the success of accommodation initiatives, specifically:

- the responsibility to provide a workplace free from harassment,
- the return to work processes under labour codes, workers' compensation, disability insurance and other related legislation; and
- for employers falling under federal jurisdiction, the obligation to comply with the *Employment Equity Act* and Regulations, which includes the requirement to consult and collaborate with bargaining agents in order to achieve equality in the workplace. Note; the *Employment Equity Act* provides for both. It does not define "collaborate", but is read as being stronger than "consult".

Q-12 What are the responsibilities of the worker being accommodated?

The worker requiring accommodation has the following responsibilities:

- to identify and communicate the need for accommodation, if possible;
- to inform the employer of any changes to the accommodation needs;
- to collaborate with the employer and the union to find the most appropriate accommodation, if possible;
- to communicate with the Union and the employer;
- to offer reasonable explanation for refusal to accept the proposed accommodation, where possible. Note: the employee is not entitled to insist on their ideal or perfect accommodation; if the employer proposal is a reasonable accommodation then the employer has discharged its obligation; and
- to supply job relevant medical information (non-diagnostic information only, such as the functional limitations and residual capabilities, i.e., "the worker can lift between 1 and 25 lb." or "the worker can sit for up to 2 hours at a time").

While the worker has a requirement to be cooperative and assist in identifying and implementing an appropriate accommodation, the final bullet above is very important. There is no legal requirement to reveal a diagnosis and, in some cases, the worker may wish to keep the diagnosis private due to current social stigmas, (i.e. substance addictions, psychiatric illness, etc.). See Q-16 on Medical Information.

Q-13 What are the responsibilities of the Union as a worker representative?

The responsibilities of the Union representative include:

- to insist that the employer fulfills its proactive duty to design workplace requirements and standards so that, from the outset, they do not discriminate;
- to model a problem-solving approach to accommodation;
- to represent the needs of the worker for accommodation;
- to collaborate with the worker and the employer in accommodating the worker;
- respond to employer accommodation proposals;
- to follow-up after the accommodation is implemented to assess whether it is working and to help address any associated issues that may surface; and
- to ensure that the collective agreement does not discriminate during the collective bargaining process and during the life of the collective agreement,

As well, the Union may play a role in the following ways:

- providing and ensuring the employer provides education about equity issues and the duty to accommodate;
- providing its own educational courses on human rights and duty to accommodated;
- ensuring that training is provided to union activists who advocate for members requiring accommodation;
- seeking to ensure that the worker's rights (human rights) are respected;
- seeking to ensure the health and safety of co-workers is not compromised;
- balancing the need of the individual worker for accommodation and the interests of the bargaining unit members as a whole,
- complying with the consultation and collaboration provisions under the *Employment Equity Act*; and
- involving health and safety officials as required.

Q-14 Who needs to be involved in workplace accommodation other than the worker being accommodated, the Union and the employer?

Co-workers need to be involved to the point that they understand what the duty to accommodate is and why it is valuable for the whole workplace. It is not helpful if other

workers feel that a co-worker is receiving “special treatment”. The duty to accommodate must be approached in a problem-solving mode, involving everyone who will be affected, at least through education. But it is important to remember that others may not be entitled to know about specific workers disabilities due to confidentiality and privacy issues.

As well, accommodation may involve professionals to assess the workplace, the job in question or the worker requiring accommodation.

Q-15 What would be an ideal process for the accommodation of a worker in the workplace?

1. The employer and bargaining agent jointly conduct a thorough review of all standards, requirements, procedures and policies to ensure that they are not discriminatory. If they are discriminatory, they are modified as necessary. An important part of this proactive review is ensuring that flexibility and a willingness to accommodate individual needs are built in to all workplace standards and practices.
2. A work-related issue that was not identified in #1 is raised by a worker, the union or the employer.
3. The employer reviews the specific issue with regard to the questions raised in Q-7 and makes the changes possible without individual information about the worker in question.
4. If the employer is not able to rectify the matter with a systemic approach, the worker provides the employer with as much information as possible about the required accommodation or the situation, or the employer raises the issue with the worker in the context of enquiring whether accommodation is required.
5. The Union is advised that an individual accommodation is necessary. Please note that a worker is entitled to confidentiality and privacy with respect to their disability and accommodation needs. Therefore, a worker should be informed that they should involve their union for support and assistance throughout the accommodation process.
6. The worker, employer and Union representative meet to determine how best to proceed (e.g., accommodation is obvious and will be implemented); professional assessment of some variety is necessary; or collective agreement is involved and the

Union and employer examine accommodation measures that result in no or minimal adverse impact on the workers while still implementing reasonable accommodation for the worker who requires accommodation).

7. The workplace and co-workers are prepared in advance for the implementation of the accommodation, including co-worker education. Again, privacy of the person being accommodated must be respected and therefore should be consulted on how to educate co-workers.
8. Accommodation is implemented for a trial period.
9. Accommodation is evaluated and appropriate adjustments made.
10. Accommodation is finalized and formalized, as necessary, including, in cases of variable disabilities, the need for ongoing modification.

A key element to ensuring the success of an accommodation is the thorough and on-going involvement of the individual being accommodated. Especially in the area of disability, there is sometimes a tendency to decide what is best for the individual worker without their involvement, when, in fact, the individual in question knows their own situation better than anyone else. It is not helpful for the employer and Union to try to accommodate a worker between the two of them. Where decisions are made without the permission or knowledge of a worker, it can result in that worker feeling excluded from a process that will affect them on a daily basis. It might also prevent other members from stepping forward for fear they will begin a process over which they have no control.

There are no set rules when assessing accommodation measures. However, the objective is to have no or minimum adverse impact (i.e. financial, classification, re-location, etc.) on the worker requiring accommodation. The following is a guideline when considering how and what can be proposed as accommodation measures:

- Examination of whether the worker can perform his or her existing job as it is (i.e. same classification, location and wages).
- If not, then examine whether he or she can perform his or her job with modifications, physical changes or “re-bundled” duties.
- If not, then examine if he or she can perform another job in its existing form.
- If not, then examine whether he or she can perform another job with modifications, physical changes or “re-bundled” duties. (This may involve re-training.)

It should be noted that when assessing accommodation measures, the employer should examine its entire organization. For example, if no accommodation measures are available within the workplace location/ department then accommodation measures outside of the workplace location/department should be considered.

Q-16 What medical information is required during an accommodation process?

In many situations involving disability, the employer may request medical information to assess what suitable accommodation measures are required. In other situations, medical information is unnecessary since the accommodation may be obvious.

In cases where medical information is necessary to support a request for accommodation, medical information that must be provided should only consist of what is necessary in order to assess accommodation in the workplace, i.e. limitations and restrictions. The worker only has to disclose medical information which is relevant to the disability being accommodated and does not have to provide access to his/her entire medical file. Diagnosis is not required in virtually all cases.

The first source (and the best source) of medical information is the worker's own treating medical practitioner. Where the employer needs medical information in order to accommodate an employee, the employee should submit a medical certificate from his/her medical practitioner. An employer may request more information if there is some issue or problem with the medical information (e.g. insufficient information, ambiguities or contradictions in the information provided, or the need for a more specialized assessment). Further clarification should be sought from the worker's medical practitioner. If a specialist is needed, the employee can go to a specialist of his or her choosing. In some cases, an independent medical exam may be reasonable. An independent medical exam is one where both parties agree on a medical practitioner.

Although in some cases an independent assessment may be required (e.g. unable to get answers from the worker's medical practitioner), it should be noted that an employer cannot insist or automatically require that a worker go to the employer's own medical assessor (i.e. Health Canada) for a medical assessment unless there is specific language in the relevant collective agreement. Jurisprudence establishes that an employer cannot discipline a worker who refuses to submit to an employer's own medical assessor.

However, it should be noted that a refusal to provide medical information or to go for a medical assessment may result in some negative consequences (i.e. remaining on leave without pay, not being accommodated back into the workplace, etc.)

Some employers have policies that outline the requirement for medical assessment processes (i.e. the Occupational Health Evaluation Standard is applicable to federal public service workers under the Treasury Board Secretariat). However, these policies should be consistent with the requirements under human rights and privacy legislation and jurisprudence.

At any time during the accommodation process, a union representative can be contacted for assistance.

Q-17 How is the right to reasonable accommodation enforced?

There are several routes workers can take in enforcing their right to be reasonably accommodated.

For many members, a grievance is a possibility and may be based on specific or general "No Discrimination" language in the collective agreement.

Public Service Labour Relations Act (PSLRA) employers must accept these grievances. At the same time, while the workers' rights are protected by filing a grievance, it is often productive to enter into a problem-solving mode with the employee and the union on a without prejudice basis. The union should attempt to initiate discussions through this more informal route.

It is important to note that there are time limits to file grievances so a grievance should be filed immediately. If complaints are not filed in a timely manner, there is no guarantee that the grievance will be accepted by the employer. If you are in doubt about whether there is a valid human rights grievance, then you should still file it to protect time limits and ensure that you cover appropriate remedies (i.e. "at least make whole", "pain and suffering", etc). Keep in mind, "if you feel it, file it".

Accommodation issues are often ongoing, but grievances generally need to be filed within a time period defined by the collective agreement. If you do not file in a timely manner then you could have issue with the scope of time covered in the grievance and the scope of any remedy.

A complaint may be made to the human rights commission under the relevant human rights legislation on the basis of discrimination on a prohibited ground. There are also time limits to file human rights complaints so you should contact the human rights commission at the same time you are filing your grievance, in order to ensure that you meet both time limits.

Complaints may also be made under Workers' Compensation legislation. If a formal process is required to encourage the employer to reasonably accommodate a worker, contact your Component Office or PSAC Regional Office for assistance in determining the best route.

As well, compliance with the *Employment Equity Act* rests with the Canadian Human Rights Commission, through employment equity audits.

Q-18 What is the Dignity of Risk?

The Dignity of Risk refers to the right of an individual to assume a higher risk to themselves than might normally be considered acceptable in a workplace. This concept extends only as far as it does not cause serious risk to co-workers or the general public. As well, it must be reasonable. Thus, types of risk legally tolerated at the workplace or within society as a whole will also be considered. In some cases, higher risk might result in increased liability for the employer and, thus, higher costs. In these cases, the ability to assume risk would also be limited. For example, a person may not wear a hard hat due to religious requirements for specific head attire. The higher risk is to that specific individual and not others.

Q-19 What are some of the important cases that deal with the duty to accommodate?

CASE

ISSUE(S) ADDRESSED

Meiorin and Grismer

Meiorin (1999)
(*British Columbia (PSERC) v. British Columbia Government and Services Employees' Union*)

Supreme Court of Canada imposes positive obligation on employers to accommodate workers. In this specific case, a female fire fighter was found to be discriminated against when the employer instituted a standardized fitness test that did not adequately take into account the differences between men and women.

Note: also radically changes specific points of accommodation law set out in earlier cases, e.g. accommodation to the point of undue hardship must be made before a BFOR can be established.

Grismer (1999)
(*Grismer v. British Columbia (A.G.)*)

Supreme Court of Canada reaffirms its decision in ***Meiorin*** applying it to a disability case. Emphasizes that individualized vs. standardized testing must be used.

Post-Meiorin Cases

O’Leary v. Treasury Board (Dept. of Indian Affairs and Northern Development) (PSLRB 2007)

A grievor was found to be unfit to return to work in an isolated post after developing a disability. The employer did not offer any position other than at the isolated post. As a result the grievor was unemployed for most of the time since lodging the grievance. The arbitrator found that the obligation to accommodate an employee due to a medical condition was employer-wide and not limited to a region of a department. This case is currently being judicially reviewed by Treasury Board.

Mellon vs. HRDC CHRT 2006)

Term Employee’s contract was not renewed due to her disability was found to be discriminatory by the Canadian Human Rights Tribunal.

Hoyt vs. Canadian National Railway (CHRT 2006)

Discrimination on the basis of family status found when the employer did not accommodate the worker’s family care responsibilities.

Johnstone (2007)

The Federal Court of Canada confirmed that family status discrimination should not be relegated as a secondary or less compelling status of discrimination. Subsequently, the Federal Court of Appeal did not rule on the test but confirmed that the Human Rights Commission should re-examine the legal test applied when determining *prima facie* discrimination on the basis of family status.

Flannery and Barr vs TB (National Defence) PSLRB 2006)

This case applies *Meiorin* principles. The adjudicator concluded that an eight-minute standard for firefighters is not reasonably necessary to accomplish operational efficiency – as a result, he ordered the employer to cease using the eight-minute standard as a condition of employment for firefighters at the Department of National Defence.

<i>Desormeaux vs. Ottawa-Carleton Regional Transit Commission (Fed. Ct. App. 2005)</i>	The Court upheld the CHRC's finding that the Commission would not suffer undue hardship by continuing to employ the worker despite her disability and resulting absenteeism, because there were other jobs she could do that would lessen the impact of her absenteeism
<i>Parry Sound (District) Social Services Administration Board v OPSEU, Local 324 (S.C.C. 2006)</i>	This decision has the effect of automatically incorporating human rights legislation into every collective agreement between unions and employers. Even if a collective agreement does not expressly prevent the parties from violating a particular statutory right (i.e. human rights), such a violation will amount to a violation of the collective agreement. Human rights and other employment-related statutes establish a floor or a minimum which an employer and union cannot contract out of or beneath.
<i>Attorney General of Canada vs. Nancy Green and CHRC (2000)</i>	Employers should ensure any employment tests used properly assess skills being tested and that accommodations for testing be put in place. Accommodation for training must be put in place as well.
<i>Grover v National Research Council (2007)</i>	The federal court upheld the adjudicator's decision, ruling that "the employer cannot order an employee to submit to a medical examination by a doctor chosen by the employer unless there is some express contractual obligation or statutory authority." (This decision was subsequently upheld by the Federal Court of Appeal.)

*Marois
(2004)*

While this decision does not deal specifically with the duty to accommodate, it does deal with the issue of medical information, in this case in support of a maternity-related re-assignment. In this decision, the Public Service Staff Relations Board ruled that Health Canada physicians are not independent from the employer (the Government of Canada) and as such a Health Canada medical report does not constitute an “independent medical opinion”.

Bingley(2004)

The Canadian Industrial Relations Board has held that the union had not adequately represented an employee in a duty to accommodate case. In duty to accommodate cases, the Board expects a higher standard of representation from the union.

*407 ETR Concession
Co. (2007)*

An Ontario arbitrator reinstated three grievors after they were discharged for refusing to use a biometric scanning system due to their religious beliefs, ruling that the Company could have gone further in accommodating the grievors.

Pre-Meiorin

Note that the following decisions are still valid in some respects, but are superseded by **Meiorin** in other respects.

Schut (1998)

- Federal Court - Trial Division said that materials required for job competitions must be provided to the applicant in accessible format.

*Koeppel v MDN
(1997)*

- Canadian Human Rights Tribunal underlines the need to identify essential job duties in order to properly accommodate.

- CSR de Chambly (1994) • Supreme Court of Canada applies reasonable accommodation in case involving Jewish teachers requesting paid religious leave.
- Dekoning (1993) • Public Service Staff Relations Board overrules a rejection on probation as unacceptable discrimination based on disability.
- Renaud (1992) • Supreme Court of Canada rules that Union and employer both liable to ensure accommodation and sets out the duty of the worker seeking accommodation.
- Central Alberta Dairy (1990) • Supreme Court of Canada rules that, even where there is no explicitly legislated duty to accommodate, such a duty exists (re “adverse effect” discrimination only). This case is now largely superseded by **Meiorin**.
- Boucher (1988) • Canadian Human Rights Tribunal defines reasonable accommodation in a situation involving a Correctional Officer (CO) who, due to stress related to a hostage-taking, was unable to perform former duties. Ordered to place CO in Driver position requiring limited contact with inmates.
- O’Malley v Simpson Sears Ltd (1985) • Supreme Court of Canada rules that employer has a duty to make alternative employment arrangements for a worker whose religious beliefs do not permit her to work a mandatory Friday afternoon shift. Also, SSC rules that human rights law is to be broadly interpreted and it is not necessary to prove “intent” in order to find a breach of human rights.
- Etobicoke (1982) • A Supreme Court of Canada decision that established that no one can by agreement “contract out of” (waive/give up or vary) human rights legislation (e.g. employers, unions, individuals). Also established a BFOR test, now replaced by **Meiorin** test.

Q-20 What do you need to know about Return to Work Programs?

Return to Work Programs are **meant to facilitate a worker's return** to their pre-leave employment, when the worker is ready to return to work and with an appropriate transition period.

The **mandate of return to work** process should be to ensure that tasks and duties assigned in an individual Return to Work Program are meaningful and productive and have value for the worker. The Return to Work should have a rehabilitative focus. If pre-leave employment is not an option then a hierarchy of return to work options should be respected: same job; modified job; different job-same workplace; similar job-different workplace; different job-different workplace.)

Return to Work Programs should be seen as **transitional** and for a fixed duration. Permanent measures to support a worker who is permanently disabled are best framed as accommodation measures, as opposed to return to work measures. Most organizations that have benefit plans also have some form of disability insurance with a focus on rehabilitation.

Why does it exist?

Return to Work Programs **initially came out of** union collective bargaining strategies. Human rights legislation ensured that workers with permanent disabilities were not discriminated against. Duty to accommodate provisions in human rights legislation further enshrined the rights for returning workers. Workers' Compensation legislation also contains specific mention of Return to Work obligations (so far, this is the case in NB, NS, Ontario, PEI and Québec) and the requirement for the employer to protect the worker's job for a specific time period. In the Federal Public Service, specific Departmental responsibility around return to work exists through Health Canada's Occupational Health Services.

Who is covered?

The RTW Program should include employees with **permanent disabilities as well as temporary disabilities.**

Disability insurance applies to workers who have completed six months of employment.

Qualifying conditions exist for workers' compensation cases.

When does a return to work situation arise?

Typically, return to work situation arise from:

- the return of a worker who has been receiving workers' compensation;
- the return of a worker who has been on disability insurance;
- the return of someone who has been injured or who has become disabled, but who has not qualified for income replacement programs (workers' compensation or disability insurance);
- long term leave situations.

How does it Work?

Return to Work Programs should **lay out the steps** that need to be taken to support the returning worker.

Return to Work discussions should ensure that the **root causes of the absence** from the workplace are identified and eliminated. Return to Work Programs should not create a revolving door response to unsafe working conditions.

Individual assessments are key to Return to Work Programs. These programs should not be seen as one size fits all measure but should respond to the needs of the individual's return to work situation. In addition, work related and non work related disabilities should be treated in a similar manner.

Job task analysis ensures that the job duties and tasks are assessed (using job related criteria) and compared with the functional limitations of the returning worker. Typically, job task analysis will assess physical requirements of job duties (tools used, postures required, endurance...) and will involve observing workers performing job duties. In cases of psychiatric disabilities, factors such as communication, exposure to conflict, the nature of their contacts with others would also need to be assessed. The returning worker should be an active participant in the job analysis and evaluation.

Timeframes spelled out in the Return to Work Plan should not be arbitrary but should respect the needs of the returning worker. Having timeframes associated to key activities ensures accountability for their implementation.

Medical assessments should be completed by the medical practitioner who is best placed to understand the medical condition of the returning worker - her/his treating physician. Physicians may be able to provide a diagnosis and treatment - but not be able to provide a functional analysis. Additional expertise may be required.

There is an **increased focus on medical assessments** in cases of return to work of workers with disabilities and it is important to understand the difference between a medical prognosis and a functional limitation. (see Q-16 on medical information required)

Return to Work Programs must not lead to a watering down of **collective agreement rights**. On the other hand, collective agreements cannot stand in the way of the duty to accommodate. The program should be consistent with the collective agreement:

- layoff and recall provisions for the injured worker should be the same as if he or she was not injured;
- wages of the injured employee should be the same as if he or she had not been injured.

Confidentiality rights of returning workers should be protected. Information sought should directly relate to the Return to Work Program and only be used for this purpose. Workers' Compensation or other income replacement programs may require signing off on a release of information. The returning worker is not required to disclose a medical diagnosis (unless they choose to do so). However, information about functional limitations needs to be clear.

Return to Work Programs are likely to **touch on issues** that the union is trying to pursue elsewhere. Union representatives should be drawing a link with work or discussions at other important tables such as Joint Health and Safety Committees; Employment Equity Committees; Duty to Accommodate Committees.

Early assistance can make a difference in the successful re-integration of a returning worker. As an example, some data indicates only a 50% chance that a worker will return after a six month absence. At the same time, too early a return may jeopardize the rehabilitation of the returning worker or worsen the medical condition.

Recourse rights in return to work situations can be exercised via:

- Disability Insurance Appeals (not before neutral third party);
- Workers Compensation Appeals Tribunals;

- Grievances (when human rights violation is involved);
- Human Rights complaint.

The support by co-workers is critical to a successful return to work situation, particularly when the situations involve job tasks modifications or job rebundling.

Q-21 In what way does the duty to accommodate apply to PSAC members in receipt of disability insurance benefits?

Available statistical data indicate that the incidence of claims filed by employees for disability insurance benefits has increased significantly. Based on historical experience, a large percentage of these claimants will eventually return to the workplace in some capacity. The majority of disability insurance policies which apply to PSAC members contain contractual provisions for rehabilitation assistance. However, the basic principals of the duty to accommodate, as discussed in this publication, certainly apply in these types of situations and can facilitate a successful reintegration back into the workplace.

For further information and assistance members are encouraged to consult PSAC publications and documents located in the “Disability Insurance” section of the PSAC website.

Q-22 What resources are available to assist me in understanding the duty to accommodate?

- Aside from this booklet, you may contact your Component Office or PSAC Regional Office for further information.
- You should examine the relevant legislation and your collective agreement for pertinent information.
- Ask your employer for a copy of their accommodation policy(ies). Employers subject to the *Employment Equity Act* should have consulted and collaborated with their employee representatives on the development and the implementation of such a policy.

If you would like to see any material added to or clarified within this booklet, please contact the Human Rights Office to give us your feedback.

For more information please contact:

PSAC Human Rights Office
Programs Section, Membership Programs Branch
Public Service Alliance of Canada
233 Gilmour Street
Ottawa, Ontario
K2P 0P1

or through e-mail to: programs@psac.com

APPENDIX A

Note that the *Canadian Human Rights Act* is quasi-constitutional in nature and takes precedence over other law.

Public Service Employment Regulations

PRIORITIES

7. (1) An employee who becomes disabled and who, as a result of the disability, is no longer able to carry out the duties of their position is entitled to appointment in priority to all persons, other than those referred to in section 40 and subsections 41(1) to (4) of the Act, to any position in the public service for which the Commission is satisfied that the employee meets the essential qualifications referred to in paragraph 30(2)(a) of the Act.

Entitlement period

- (2) The entitlement period begins on the day on which a competent authority certifies that the employee is ready to return to work, if that day is within five years after the day on which they became disabled, and ends on the earliest of
- (a) the day that is two years after the day of certification,
 - (b) the day on which the employee is appointed or deployed to a position in the public service for an indeterminate period, and
 - (c) the day on which the employee declines an appointment or deployment to a position in the public service for an indeterminate period without good and sufficient reason.

Entitlement continues

- (3) The entitlement under subsection (1) continues even if, as a result of the person's disability, they cease to be an employee.\

Interpretation

- (4) For the purpose of this section, an employee is considered to be disabled if they qualify for disability compensation under
- (a) the *Canada Pension Plan*;
 - (b) *An Act Respecting the Québec Pension Plan*, R.S.Q., c. R-9, as amended from time to time;
 - (c) the *Public Service Superannuation Act*;
 - (d) the *Government Employees Compensation Act*; or
 - (e) a public service group disability insurance plan.

APPENDIX B

Note that the *Canadian Human Rights Act* is quasi-constitutional in nature and takes precedence over other law.

Canada Labour Code, Part III

- 239.1 (1) Subject to subsection (4) and to the regulations made under this Division, no employer shall dismiss, suspend, lay off, demote or discipline an employee because of absence from work due to work-related illness or injury.
- (2) Every employer shall subscribe to a plan that provides an employee who is absent from work due to work-related illness or injury with wage replacement, payable at an equivalent rate to that provided for under the applicable workers' compensation legislation in the employee's province of permanent residence.
 - (3) Subject to the regulations, the employer shall, where reasonably practicable, return an employee to work after the employee's absence is due to work-related illness or injury.
 - (4) An employer may assign to a different position, with different terms and conditions of employment, any employee who, after an absence due to work-related illness or injury, is unable to perform the work performed by the employee prior to the absence.
 - (5) The pension, health and disability benefits and the seniority of an employee who is absent from work due to work-related illness or injury shall accumulate during the entire period of the absence.
 - (6) Where contributions are required from an employee in order for the employee to be entitled to a benefit referred to in subsection (5), the employee is responsible for and must, within a reasonable time, pay those contributions for the period of any absence due to work-related illness or injury unless, at the beginning of the absence or within a reasonable time thereafter, the employee notified the employer of the employee's intention to discontinue contributions during that period.
 - (7) An employer who pays contributions in respect of a benefit referred to in subsection (5) shall continue to pay those contributions during an employee's

absence due to work-related illness or injury in at least the same proportion as if the employee were not absent, unless the employee does not pay the employee's contributions, if any, within a reasonable time.

- (8) For the purposes of calculating the pension, health and disability benefits of an employee in respect of whom contributions have not been paid as required by subsections (6) and (7), the benefits shall not accumulate during the absence, and employment on the employee's return to work shall be deemed to be continuous with employment before the employee's absence.
- (9) For the purposes of calculating benefits, other than benefits referred to in subsection (5), of an employee who is absent from work due to work-related illness or injury, employment on the employee's return to work shall be deemed to be continuous with employment before the employee's absence.
- (10) The Governor in Council may make regulations for carrying out the purposes of this Division and, without restricting the generality of the foregoing, may make regulations
 - a) for determining the duration of the employer's obligation under subsection (3);
 - b) providing terms and conditions applicable to the employer under subsections (1) and (3) in the event of any termination of employment, lay-off or discontinuance of a function in an industrial establishment; and
 - c) providing for any other terms and conditions respecting the application of subsection (3).

APPENDIX C

ACCOMMODATION: CAUTIONARY TIPS

- ✓ Accommodation obligations do not infer additional rights on the employer with respect to employee information and employee privacy rights.
- ✓ There is no requirement to provide a diagnosis of a disability.
- ✓ Physicians have expertise in diagnosis and in treatment. They do not automatically have expertise on workplace assessments or assessments of functional limitations.
- ✓ In cases of psychiatric disabilities or substance addiction related disabilities, where individuals are often likely to deny they have a problem, let alone a disability; there is a higher onus on the employer and the union. The additional responsibility stems from the fact that the individual are likely to not indicate their accommodation needs, nor that they have these disabilities. Employers and unions are expected to take some steps to inquire about the possibility of a psychiatric disability or a substance abuse disability, in order to comply with their accommodation obligations. Claiming that “one did not know about the disability” in these types of situations, will not absolve organizations or individuals of their responsibilities. Having said that, individuals in these circumstances continue to bear significant responsibility to seek help and to accept it when inquiries are made.
- ✓ Religious accommodation must afford individuals who have sincere religious beliefs to have their religious needs accommodated to the point of undue hardship. Universally recognized lists of “accepted” religions don’t exist. The key is to ensure that the entitlement to religious observance is not limited to the dominant group (e.g. Christmas and Good Friday). A case by case assessment is going to be critical in ensuring that religious beliefs and values are accommodated to the point of undue hardship. Religious accommodation may include prayer breaks, accommodation of religious dress, and leave entitlement for religious observance.
- ✓ Accommodation is to be achieved in the manner that most respects the dignity of the individual who requires accommodation. Dignity is best respected when the individual who requires accommodation participates in the accommodation process and its outcomes.

- ✓ The duty to accommodate is owed to both current employees and applicants.
- ✓ Initial accommodation analysis should focus on the employee's current job. Accommodation is not about avoiding barriers (by transferring employee to another job) - It's about dealing with barriers!
- ✓ There are no hierarchies of different forms of accommodation. Therefore, family, religious, disability and other forms of accommodation should be assessed on a case-by-case basis.
- ✓ Unions can be held liable for discriminatory collective agreement provisions and for blocking employer accommodation attempts.

APPENDIX D

CHECKLIST FOR ACCOMMODATION ON THE BASIS OF DISABILITY

Is there a disability?

- Medical Evidence (obtain release for medical information)
- Medical History

What is the extent of the disability?

- Physical demands analysis to be provided to the physician or other experts
- Medical evidence concerning the nature and restriction of restrictions
- Ensure medical evidence links restrictions and accommodation to job requirements
- Follow-up if medical evidence is inadequate or inaccurate
- Voluntary written consent of employee to release medical information relevant to the accommodation (not a release of all medical information that does not pertain to the accommodation needs)

Can the employee's own job be modified short of undue hardship?

- Work and workplace redesign and reconfiguration of tasks
- Alternative schedules and hours
- Reassignment and other available jobs
- Use of equipment, assistive devices
- Temporary rehabilitative assignments

Has a thorough review of other "available" positions or modified duties been conducted?

- Inside the bargaining unit
- Outside the bargaining unit

Has the cooperation of the employee been secured?

- Information about the extent of restrictions and the nature of accommodation needed
- Job modification suggestions
- Written consent to release medical information (relevant for the accommodation)

Has the cooperation of the union been secured?

- Assessment of the contractual restrictions
- Proposals of contractual modifications
- Consideration of impact on rights of others
- Consideration of confidentiality and privacy rights

What is the level of undue hardship?

- Cost
- Health and Safety

(See human rights legislation to determine if other factors are included in assessing undue hardship such as size of employer's operation, outside source of funding, impact on other employees or collective agreement obligations).

Are the means of accommodation consistent with the dignity requirement?

- Are there other methods of accommodation available, which would better promote dignity without imposing undue hardship?

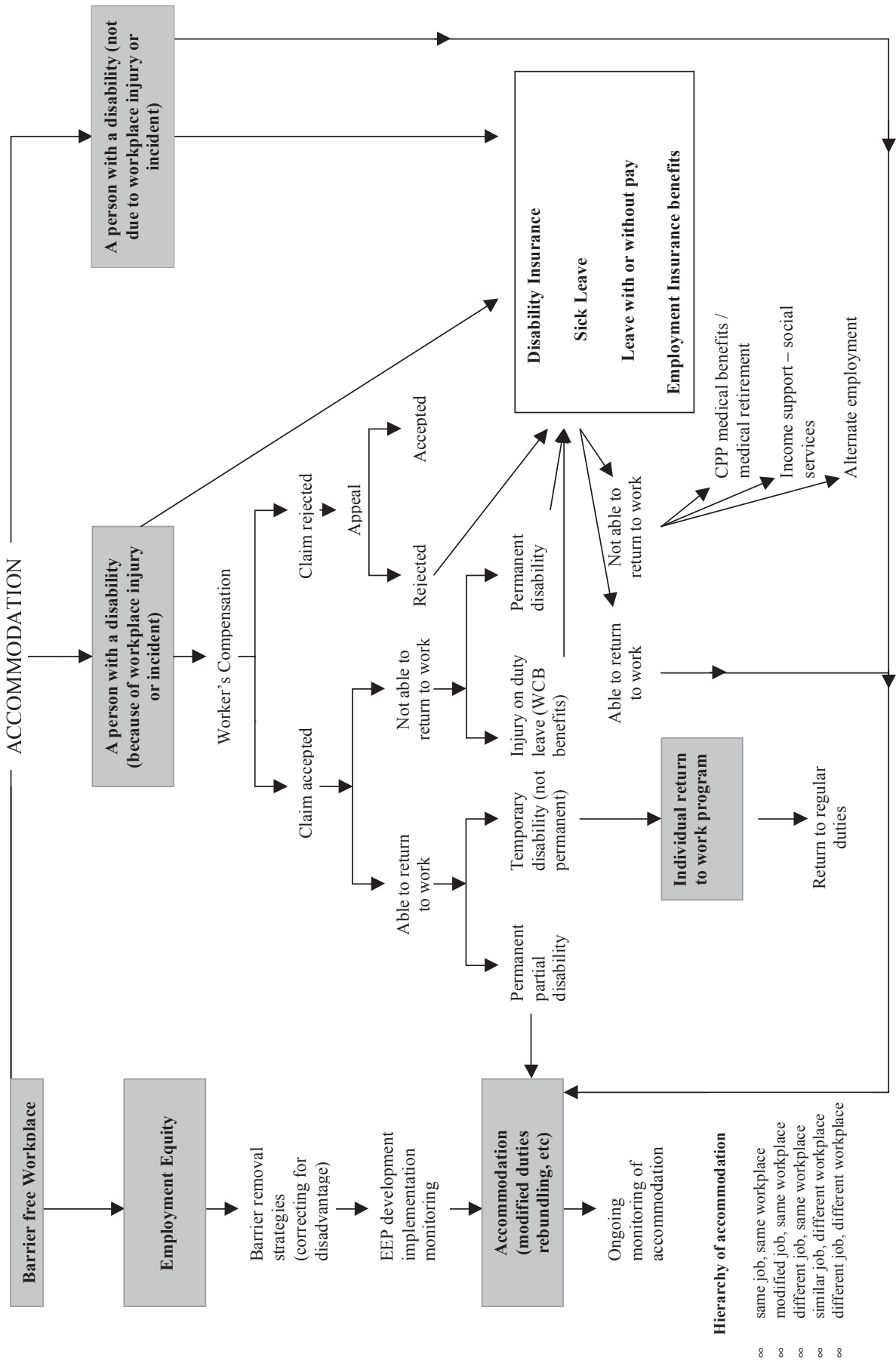
Is there a process for ongoing review of the effectiveness of accommodation?

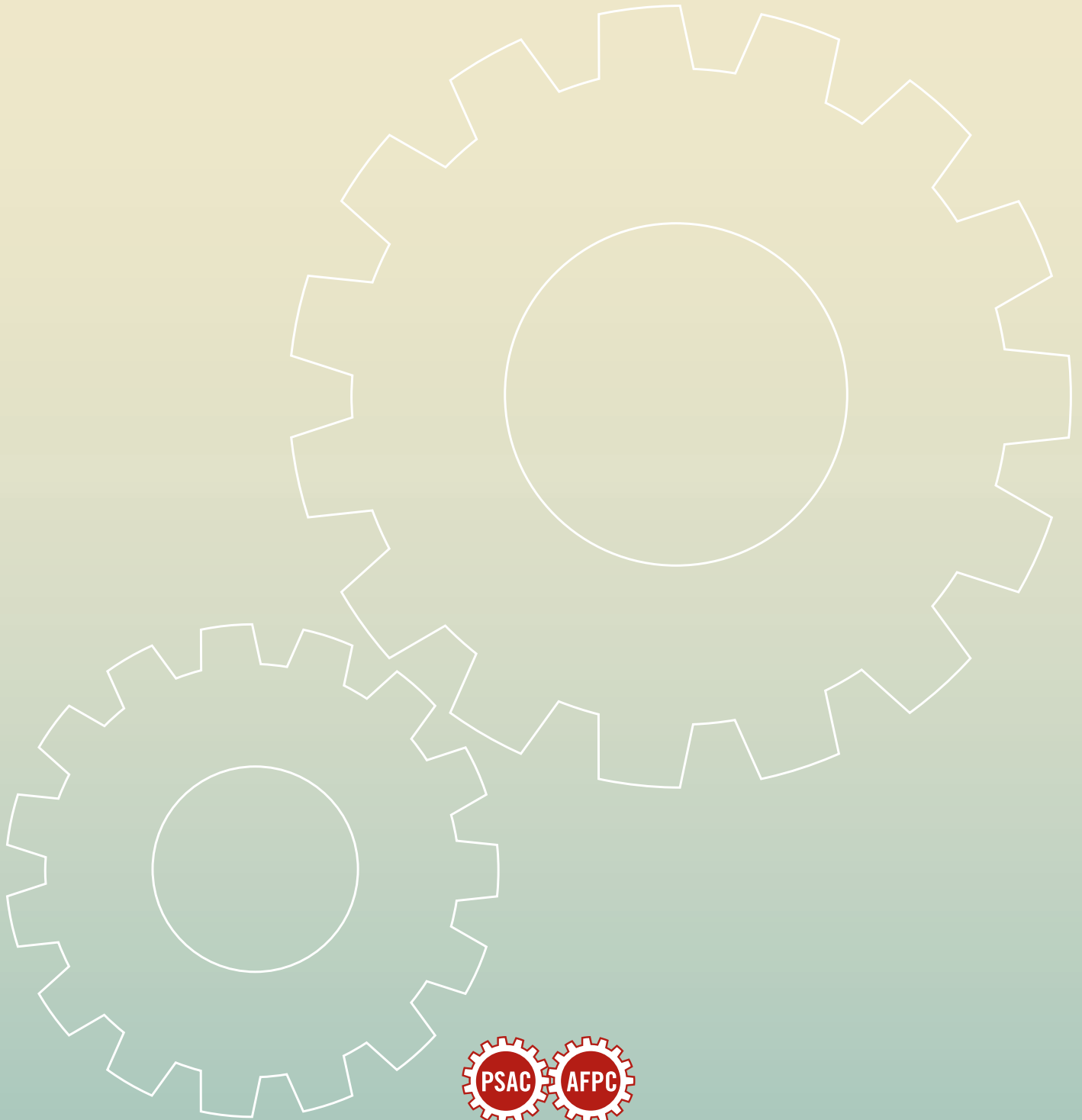
- any changes in circumstances which would impact the availability of accommodation
- regular and consistent monitoring is important
- input from employee, employer, medical professionals and union

Is there documentation of each stage of the process?

- Personnel Records (i.e. absenteeism record)
- Information from the employee
- Medical information
- Notes of interviews and telephone calls
- Record of accommodation discussions with the union, employee and employer
- Record of alternative or modified duties and positions available
- Record of modified duties, alternatives considered and scope of modifications
- Record of all costs, safety risks with alternatives
- Record of why accommodation and alternatives were accepted or rejected

APPENDIX E - Accommodation Path Diagram





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