

# WSIB Claims Management Continuing Education Training

Prepared for OCA Quarterly Meeting



## Duty to Accommodate

05/12/2016

*Specializing in Construction  
Workplace Safety and  
Insurance Law*

**Industrial Mediation**  
Professional Corporation

# Overview of session

## Duty to Accommodate

1. Case Study Thompson vs 1552754 Ontario Inc.
2. Ontario Human Rights Code - Overview
3. Duty to accommodate WSIB
4. **Duty to Accommodate Non-Work related  
Crafting a Defensible Employee Accommodation  
Policy**

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# Part 1

## Case Study

# Thompson v. 1552754 Ontario Inc.

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- ❑ Medical documentation requested after employee illness
- ❑ Is the employer entitled to request medical clearance after illness?
- ❑ Is it in keeping with the OHR Code?

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# Applications of Decision (Non WSIB)

How does this case study affect us in Construction?

- Labourer works his / her way up to site supervisor
- Requires reading plans
- Tells employer he / she is Dyslexic
- Work around issue
- Complex project
- Supervisor makes mistake costing \$50k
- Supervisor is dismissed
- Supervisor makes complaint to OHRC – discrimination due to a disability

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# Part 2

## Overview of Ontario Human Rights OHR

# Ontario Human Rights Part 1

The *Code* prohibits actions that discriminate against people based on a protected **ground** in a protected **social area**.

## Grounds

- ❑ Age
- ❑ Colour
- ❑ Place of origin
- ❑ **Disability**
- ❑ ...

## Social areas include

- ❑ Accommodation (housing)
- ❑ **Employment**
- ❑ Goods, services...

# What is a disability - OHRC

“Disability” covers a broad range and degree of conditions, some visible and some not visible.

A disability may have been present from birth, caused by an accident, or developed over time. There are physical, mental and learning disabilities, mental disorders, hearing or vision disabilities, epilepsy, drug and alcohol dependencies, environmental sensitivities, and other conditions.

**The *Code* protects people from discrimination because of past, present and perceived disabilities.**

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# Part II of the Code

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## Interpretation and Application

- Harassment (s.10)
- **Duty to Accommodate (s.17)**

Exceptions:

- Special Programs (s.14)
- Special Interest Organizations (s.18)
- Special Employment (s.24)

# Accommodation - OHRC

The *Code* requires an effort, short of undue hardship, to accommodate the needs of persons who are protected by the *Code*.

The principle of accommodation applies to all grounds of the *Code*, but accommodation issues in employment most often relate to the needs of:

- employees with disabilities (disability)
- older workers (age)
- employees with religious needs (creed)
- pregnant women (sex)
- employees with caregiving responsibilities (family status).

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# Ontario Human Rights

## What do they do?

- Three Separate Groups
  - Human Rights Commission
  - Human Rights Legal Support Centre
  - Human Rights Tribunal
    - Deals with claims (generally 1 year from last event)
    - Resolves applications –mediation
    - Hearings

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# Ontario Human Rights

How does it work

Four (4) Key concepts

1. The Code has "Primacy"
2. The Code is "Remedial"
3. The Code looks at "Effect" not "Intent"
4. The Code is "Provincial"

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# Part 3

## Relationship between OHR And WSIB

# Relationship between OHRC and WSIB (PRIMACY)

## OHRC "CODE"

- Defines disability as an injury or disability under the WSIA

- WSIB
- (WR) policies integrated worker's opportunities for successful WR are optimized in a manner consistent with the provisions of the *Workplace Safety and Insurance Act* (the Act) and applicable human rights legislation

# WSIB re-employment v. OHRC

**You may have breached the Code (duty to accommodate) even if WSIB accepts that the work is physical safe and suitable work and declines benefits**

- Under ESRTW policies the WSIB question is “do you have suitable work”
- **This is a different question under the Code, “can you accommodate the worker’s disability to the point of undue hardship?”**

# Satisfying duty to accommodate under the Code

Employers must incorporate consideration to accommodate within RTW program

- Accommodation must be documented
- Accommodation costs noted
- Communicate to WSIB
- Educate front-line staff
- **ALL TO THE EXTEND OF UNDUE HARDSHIP**



# All of this to the point of Undue Hardship

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The real question is:

How hard did the employer try?

- The employer bears a very high and heavy onus in establishing that they have accommodated to the point of undue hardship.
- Employers must be prepared to make **fundamental** changes to positions AND the workplace

# Undue Hardship - OHRC

## Factors to consider

- OHRC have three prescribed considerations
  1. Cost
  2. Outside source of funding
  3. Health and safety requirements

**Determination is case specific – merits**

# 1. COST – Undue Hardship

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- Quantifiable
  - Is it real
- Shown to be related to the accommodation
- Cost would be so significant that it would alter the nature of the business or
  - So substantial that it would significantly affect its viability

## 2. Outside Source of Funding

- Did the employer have available means to cover the cost through other accommodation funds?
  - What about WSIB?
    - Assistive devices
  - What about outside funding via Ontario Skills and Development
- Could the accommodation cost be phased in over time?

# 3. Health and Safety

- Legal duty to take every precaution reasonable
  - Conflict between the duty to accommodate and safety
    - In essence it's a risk v. accommodation
  
- Undertake a Hazard Analysis
  - Breakdown of job demands
  - Assess severity of risk to i/w and co-workers
  
- If risk is very significant – argument for undue hardship

# Part 4.

## Duty to Accommodate Non-Work related Crafting a Defensible Employee Accommodation Policy

# Crafting a Defensible Accommodation Policy

## Policy Structure and Components

1. Purpose
2. Scope
3. Definitions
4. Guiding Principles
5. 4 Step Accommodation Overview
6. Responsibilities
7. Legal sources and related documents

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# 1. Purpose

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## Items to include

- Protect from discrimination
- A process to address accommodation
- Dignity and respect
- Fair and consistent
- Type of accommodation
  - Temporary or permanent accommodation
  - To fulfill essential duties of position



## 2. Scope

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- Who is this policy for?
  
- Distinct and exclude
  - WSIB RTW
  - Accessibility Standards
  - Attendance
  - Performance

## 3. Definitions

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- ❑ Define Accommodation
- ❑ Define Disability
- ❑ Define Undue Hardship

# 4. Guiding Principles

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1. Partnership
  - Requires active participation
  - Union?
2. Individualization
  - Tailored and unique
3. Confidentiality
  1. Privacy Laws consideration
  2. What about 3<sup>rd</sup> party involvement

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# 5. Accommodation Overview

## Step 1. Recognize Need for Accommodation

- How does employee make a request
- Who is it given to – chain of command
- Don't breach confidentiality and privacy laws

## Step 2. Gather Relevant Information

- Reasonable time frame
- Get INFORMED CONSENT

# 5. Accommodation Overview (cont...)

## Step 3. Formalize an Individual Plan

- Focus on the issue “Appropriate” accommodation
- Main sections to include:
  1. Meeting and Participants
  2. Case Information and Goals
  3. What is being disclosed - Functional / Cognitive controls
  4. Opportunities / Obstacles and Solutions
  5. Wages
  6. Duration of plan
  7. Follow-up
  8. Copies to... 05/12/201616 September, 2011

# 5. Accommodation Overview (cont...)

## □ Step 4. Implementation

- Who is involved
- Disclosure of information
  - How will the information be communicated and to whom
  - Training of personnel
  - Review of existing accommodation plan changes
    - Change in work location
    - Change of wages
    - Change in job
    - Subject to company restructuring
    - Subject to employer deeming accommodation are not longer appropriate

# 6. Responsibilities

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## Employees

- ❑ Communicate the need
- ❑ Co-operate in process
- ❑ To provide “appropriate” information

## 6. Responsibilities

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### Employer

- Provide timeframe for response
  - Commensurate with complexity
- Provide reasonable accommodation
- Communicate plans in format
- Train appropriate staff



# 7. Related Documentation

- Request Accommodation Form
- Accommodation Plan Form
- Reference
  - Accessibilities standards
  - WSIB RTW policy
  - OHSA and employer safety program
  - Workplace Harassment Policy
    - Sexual harassment – September 8, 2016
  - Employment standards

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# How to mitigate your risk

## Create an accommodation policy

- Administrative not Disciplinary
- Exclude disability-related absences
- Set-up a reporting procedure and timeline
- Guard privacy
- Comply with collective agreement
- Train staff – Frontline supervisors

- Thank you very much for your time today
  
- Follow-up questions / comments? Please contact Greg Sathmary via e-mail at:
  - [gsathmary@industrialmediation.com](mailto:gsathmary@industrialmediation.com)

Or

- 613-260-0600 Toll Free 1-800-660-3554