

8. Duty to accommodate

Under the *Code*, employers and unions, housing providers and service providers have a legal duty to accommodate the needs of people with disabilities who are adversely affected by a requirement, rule or standard. Accommodation is necessary to ensure that people with disabilities have equal opportunities, access and benefits. Employment, housing, services and facilities should be designed inclusively and must be adapted to accommodate the needs of a person with a disability in a way that promotes integration and full participation.

In the context of employment, the Supreme Court of Canada has described the goals and purposes of accommodation:

... the goal of accommodation is to ensure that an employee who is able to work can do so. In practice, this means that the employer must accommodate the employee in a way that, while not causing the employer undue hardship, will ensure that the employee can work. The purpose of the duty to accommodate is to ensure that persons who are otherwise fit to work are not unfairly excluded where working conditions can be adjusted without undue hardship.

...

The test is not whether it was impossible for the employer to accommodate the employee's characteristics. The employer does not have a duty to change working conditions in a fundamental way, but does have a duty, if it can do so without undue hardship, to arrange the employee's workplace or duties to enable the employee to do his or her work.^[120]

Requirements under the *Convention on the Rights of Persons with Disabilities* provide that States Parties, including Canada, must take steps to make sure that people with disabilities are provided with accommodation (for example, to ensure equal access to justice, education and employment).^[121]

The duty to accommodate has both a substantive and a procedural component. The procedure to assess an accommodation (the process) is as important as the substantive content of the accommodation (the accommodation provided).^[122] In a case involving the accommodation of a mental health disability in the workplace, the court said: "a failure to give any thought or consideration to the issue of accommodation, including what, if any, steps could be taken constitutes a failure to satisfy the 'procedural' duty to accommodate."^[123]

In Ontario, it is clear that a failure in the procedural duty to accommodate can lead to a finding of a breach of the *Code* even if there was no substantive accommodation that could have been provided short of undue hardship. Failure to perform either component of the duty is a failure to carry out the duty to accommodate.^[124]

Moreover, an organization will not be able to argue persuasively that providing accommodation would cause undue hardship if it has not taken steps to explore accommodation solutions, and otherwise fulfil the procedural component of the duty to accommodate.^[125]

Example: In one case, a human rights tribunal upheld a claim of discrimination against a housing co-op when it failed to investigate what was required to accommodate a woman and her children who were experiencing asthma due to mould allergies in their apartment unit. Instead of accepting that the woman had a legitimate problem, the co-op was adversarial and treated her as if she was a "loony tune." The co-op also did not respond to her legitimate request to be moved to another unit. Instead, it chose not to communicate with her after it suggested that her family move out, except to send a threatening letter from the co-op's lawyers.^[126]

8.1 Principles of accommodation

The duty to accommodate is informed by three principles: respect for dignity, individualization, as well as integration and full participation.

8.1.1 Respect for dignity

The *Convention on the Rights of Persons with Disabilities* states "...discrimination against any person on the basis of disability is a violation of the inherent dignity and worth of the human person."^[127]

The duty to accommodate people with disabilities means accommodation must be provided in the way that most respects the dignity of the person, if doing so does not cause undue hardship. Human dignity encompasses individual self-respect, self-worth and inherent worth as a human being. It includes physical and psychological integrity and empowerment. It is harmed when people are marginalized, stigmatized, ignored or devalued. Privacy, confidentiality, comfort, individuality and self-esteem are all important factors.

Respect and support for a person's autonomy is also crucial. It reflects a person's right to self-determination, to be treated without paternalism, and means subjecting people to minimal interference in their choices. Consideration needs to be given to how accommodation is provided and the person's own participation in the process.

Respect for dignity includes being considered as a whole person, not merely in relation to one's disability. It includes respecting and valuing the perspectives of people with disabilities, particularly when people speak about their own experiences.

Housing providers, service providers and employers should consider different ways of accommodating people with disabilities along a continuum, ranging from ways that most respect dignity and other human rights values, to those that least respect those values.

Example: An accommodation that shows little respect for the dignity of a person with a disability is an accessible entrance over a loading dock or through a service area or garbage room. People who use mobility devices should have the same opportunity as others to enter a building in a pleasant and convenient manner.

8.1.2 Individualization

There is no set formula for accommodating people identified by *Code* grounds. Each person's needs are unique and must be considered afresh when an accommodation request is made. People sharing the same condition often experience it in very different ways, with different symptoms, limitations and prognoses. In terms of accommodation, what might work for one person may not work for another.^[128]

Example: The Supreme Court of Canada found that a workplace attendance standard that defined a maximum period for employee absences was *prima facie* discriminatory in part because it did not take into account the individualized nature of the accommodation process.^[129]

Accommodations may need to be re-visited over time to make sure that they continue to meet a person's needs appropriately.

8.1.3 Integration and full participation

Accommodations should be developed and implemented with a view to maximizing a person's integration and full participation. Achieving integration and full participation requires barrier-free and inclusive design, as well as removing existing barriers. Where barriers continue to exist because it is impossible to remove them at a given point in time, then accommodations should be provided, up to the point of undue hardship.

Example: A children's swimming program at a community centre assigns an additional instructor to a class that includes a boy who has autism, at his parents' request. This allows the boy to get the extra support he needs to access the service within the regular program.

Employment, housing, services and facilities should be built, and must be adapted, to accommodate the needs of a person with a disability in a way that promotes their integration and full participation.

It is well-established in human rights law that equality may sometimes require different treatment that does not offend the person's dignity. In some circumstances, the best way to ensure the equality of people with disabilities may be to provide separate or specialized services. However, it should be kept in mind that segregated treatment in services, employment or housing for people with disabilities is less dignified and is unacceptable, unless it can be shown that integrated treatment would pose undue hardship or that segregation is the only way to achieve equality.^[130]

8.2 Inclusive design

Ensuring integration and full participation means designing society and structures for inclusiveness. Inclusive or "universal" design^[131] emphasizes barrier-free environments and equal participation of persons with disabilities with varying levels of ability. It is a preferred approach to removing barriers or making "one-off" accommodations, which assume that existing structures may only need slight modifications to make them acceptable.

The right to equality can be breached by a failure to address the needs of disadvantaged groups. As the Supreme Court of Canada has observed:

[T]he principle that discrimination can accrue from a failure to take positive steps to ensure that disadvantaged groups benefit equally from services offered to the general public is widely accepted in the human rights field.^[132]

Effective inclusive design will minimize the need for people to ask for individualized accommodation. As the Law Commission of Ontario has said:

The concept of universal design, which requires those who develop or provide laws, policies, programs or services to take into account diversity from the outset, is connected to the principle of autonomy and independence in that, when properly implemented, universal design removes from persons with disabilities the burden of navigating onerous accommodation processes and negotiating the accommodations and supports that they need in order to live autonomously and independently. In this way, the principle of autonomy and independence is closely linked to that of participation and inclusion.^[133]

The Supreme Court has noted the need to “fine-tune” society so that structures and assumptions do not exclude persons with disabilities from taking part in society.^[134] It has affirmed that standards should be designed to reflect all members of society, to the extent that this is reasonably possible.^[135] Housing providers, service providers, employers and others need to build in conceptions of equality to standards or requirements.^[136] This proactive approach is more effective because it emphasizes accessibility and inclusion from the start.

Organizations, including government, should use the principles of inclusive design when they are developing and building policies, programs, procedures, standards, requirements and facilities.

Example: A municipal community centre installs visual fire alarms in all of its buildings to ensure that people who are deaf, deafened or hard of hearing are able to identify emergency situations.

Example: Voters and candidates with disabilities have the right to accommodation during elections.^[137] Leading up to a provincial by-election, the election office procures only accessible facilities for polling stations.^[138] Accessibility standards^[139] are specified in facility rental agreements and accessible voting equipment and services are available so that people with disabilities can vote independently on election day. Local riding associations follow similar accessibility standards when selecting locations for all-candidate debates and all parties agree to share the costs of sign language interpreters and captioning to make sure voters and candidates with hearing disabilities can participate equally.^[140]

New barriers should never be created when designing new structures or revising old ones.^[141] Organizations that knowingly create new barriers for people with disabilities, or take steps that perpetuate existing barriers, may violate the *Code*. Design plans should incorporate current accessibility standards such as the Principles of Universal Design.^[142] This type of planning decreases the need to remove barriers and provide accommodations at a later date.

Example: The entrance to a convenience store included four steps up to the front door, the store’s only public entrance. As a result, people who use wheelchairs, scooters, strollers and people who have other types of mobility disabilities could not access the store. Despite a major renovation to the building that included significant changes to its store-front, the owner neglected to install a ramp or an automatic door-opener to make the premises physically accessible to everyone.

Example: A television production company implements a scent-free policy throughout its workplace. Wherever possible, it avoids the use of chemical agents and makes conscious efforts to seek out less toxic materials in its business operations. It conducts training on environmental sensitivities for its managers and staff, and informs its clients about its policy.

The *Accessibility for Ontarians with Disabilities Act*^[143] provides a mechanism for developing, implementing and enforcing accessibility standards with the goal of a fully accessible province by 2025. Standards have already been passed into regulation for customer service, employment, information and communication, transportation and public spaces. Changes have also been made to the accessibility provisions of the *Building Code Regulation*.^[144] Under the *AODA*, government public and private sector employers, service providers and landlords are required to comply with accessibility standards in varying degrees over time relative to an organization’s size and sector. If accessibility standards under the *AODA* fall short of requirements under the *Code* in a given situation, the requirements of the *Code* will prevail.^[145]

Along with the expectation to prevent barriers at the design stage through inclusive design, organizations should be aware of systemic barriers in systems and structures that already exist. They should actively identify and seek to remove these existing barriers.

Example: A school board reviews its website to identify possible barriers for people with disabilities. It unlocks several design elements so that people with low vision can increase the font size on their desktops and “pinch” or zoom in closer on their mobile devices. It adds descriptive text tags to logos and images for users with very limited or no vision. It also modifies the presentation of the website’s content to ensure high colour contrast and clear “focus order.” This allows people with low vision and people who use assistive technologies to more easily access the information and navigate through content.

Organizations will likely find that inclusive design choices and barrier removal make good business sense and will benefit large numbers of people. Features installed to ensure that services or residences are accessible to people with disabilities also have the potential to meet people’s needs as they age, and allow people to “age in place.”^[146] Offering a range of alternative communication methods when providing services will benefit many people with different needs, including people with speech and language disabilities, and people who identify as deaf, deafened or hard of hearing.^[147]

8.3 Appropriate accommodation

In addition to designing inclusively and removing barriers, organizations must respond to individual requests for accommodation. The duty to accommodate requires that the most appropriate accommodation be determined and provided, unless this causes undue

hardship. Accommodation is considered appropriate if it results in equal opportunity to enjoy the same level of benefits and privileges experienced by others or if it is proposed or adopted for the purpose of achieving equal opportunity, and meets the individual’s disability-related needs. The most appropriate accommodation is one that most:

- respects dignity
- responds to a person’s individualized needs
- allows for integration and full participation.

Accommodation is a process and is a matter of degree, rather than an all-or-nothing proposition, and can be seen as a continuum. The highest point in the continuum of accommodation must be achieved, short of undue hardship.^[148] At one end of this continuum is full accommodation that most respects the person’s dignity and promotes confidentiality. Alternative accommodation (which would be less than “ideal”) might be next on the continuum when the most appropriate accommodation is not feasible. An alternative (or “next-best”) accommodation may be implemented in the interim while the most appropriate accommodation is being phased in or put in place at a later date when resources have been put aside.

Determining the “most appropriate” accommodation is a separate analysis from determining whether the accommodation would result in undue hardship. If a particular accommodation measure would cause undue hardship, the next-best accommodation must be sought.

At the same time, human rights case law makes it clear that the purpose of the *Code* is to accommodate a person’s needs, not their preferences.^[149] If there is a choice between two accommodations that respond equally to the person’s needs in a dignified way, then the accommodation provider is entitled to select the one that is less expensive or less disruptive to the organization.^[150]

8.3.1 Essential duties and requirements

Section 17 of the *Code* says that the right to be free from discrimination is not infringed if the person with a disability is incapable of performing or fulfilling the essential duties or requirements attending the exercise of the right.

In employment, essential duties are the “vital” or “indispensable” aspects of someone’s job. In housing, the essential duties or requirements of being a tenant may include paying rent, maintaining one’s unit so it does not violate health and safety laws, and allowing other people to reasonably enjoy their premises. In the case of services, the “essential duties or requirements” of using a service will vary depending on the circumstances.

Section 17 means that someone cannot be judged incapable of performing the essential duties of a job, or the essential requirements of being a tenant or taking part in a service, unless it can be shown that the person’s needs cannot be accommodated

without undue hardship. An organization should not conclude that a person is unable to perform the essential duties without actually giving the person an opportunity to demonstrate their ability.

Example: A doctor enrolled in a residency program required accommodation of his ADHD and other disabilities to complete his rotations within various teaching hospitals and community practices. A human rights tribunal found that he was discriminated against by the university offering the program when the university decided, based on an “impressionistic conclusion”, that providing the accommodation would fundamentally alter the program or lower its professional standards. There must be a substantive factual foundation to support a conclusion that a person cannot meet an essential requirement of a program.^[151]

Example: After coming back from a disability-related leave, a man returned to modified duties. Even though his doctor cleared him to go back to work full-time, his employer placed him in a lower, part-time position at a lower pay rate. He was eventually terminated from his employment. The HRTO found that the employer failed to meet both its procedural and substantive duty to accommodate. The employer violated the *Code* when it based its decision to place the employee in a lower-paying position on its belief about the applicant’s ability to perform in the workplace, and continued to refuse to provide full-time work, even though this was supported by the employee’s doctor. The employer relied on its “non-expert opinion” and “stereotypes.” It incorrectly relied on assumptions that the employee could not withstand the pressures of his job, and that his performance would be unreliable because of his past medical condition.^[152]

It is not enough for the organization to assume that a person cannot perform an essential requirement of a job, tenancy, service, *etc.* Rather, there must be an objective determination of that fact.^[153] To this end, an individualized assessment will be necessary.^[154]

The duty to accommodate does not require exempting a person from performing the essential duties of the job,^[155] requirements of the service, *etc.* In the context of employment, the duty to accommodate does not require an employer to fundamentally change the working conditions of employees, assign the essential duties of an employee with a disability to other employees or change the essential duties and requirements of a position.^[156] In these cases, a next-best solution, such as alternative work, may need to be found.

Example: A delivery truck driver’s duties included loading skids of product onto a truck, and unloading them at his destination. He worked for a small operation whose staff consisted of the owner and his wife, a warehouse employee and the delivery truck driver. Due to a back injury, the driver was not able to load and unload the truck, an essential duty of his job. He requested light duties, preferably office work, or relief from loading and unloading the truck. The employer denied this request because there were no light duties available, and he could not hire an additional person to help the driver. The HRTO found that the duty to accommodate does not require an employer to assign the essential duties of an employee with a disability to other employees or to hire another employee to perform them in the employee’s place. An employer is also not required to change the essential duties and requirements of a position so that an employee can meet them.^[157]

8.3.2 Employment-specific accommodation issues

8.3.2.1 Alternative work

There is a duty to accommodate a person in their pre-disability job wherever possible. However, it is recognized that this may not always be feasible. Human rights case law recognizes that employers have a duty to consider temporary and permanent alternative work for people who can no longer remain in their position even with accommodation.^[158] This duty includes diligently investigating positions and proposing job options^[159] that are within the person's functional limitations.^[160]

Accommodation may include job restructuring, job bundling,^[161] reassignment to open positions, or retraining for alternative positions if that would not constitute undue hardship for the employer. Employers should canvass available posts that allow the employee to maximize his or her skills and abilities.^[162]

Temporary alternative work

The term "alternative work" means different work or work that does not necessarily involve similar skills, responsibilities and compensation.^[163] Temporary alternative work may be an appropriate accommodation either in a return to work context, or in a situation where a disability renders an employee temporarily unable to accomplish the pre-disability job. Temporary alternative work can be an appropriate accommodation to assist a person where the nature of the disability and its limitations are temporary or episodic.

Permanent alternative work

When an employee asks to be reinstated in a previous position, the employer must make the appropriate inquiries to assess whether the employee is fully able to carry out the essential functions of the job. The returning employee must be given an opportunity to prove his or her ability to perform the pre-disability job.^[164] Where the employee can no longer perform the pre-disability job, with or without accommodation, the employer should consider permanent alternative work.^[165]

The duty to accommodate may include some workplace reorganization.^[166] For example, it may require employers to consider placing an employee with a disability into a vacant position without requiring that person to compete for the position.^[167] The vacant position must be vacant within a reasonable amount of time, but the employer is not required to "promote" the employee. To the greatest extent possible, the vacant position must be equivalent to the current one. When reassignment takes place, the person must be qualified for the reassigned position.

Example: An employee with a disability returns from a disability leave and is considered for alternative work. There are two other positions available at the company. He is generally qualified for one of these positions, but does not know how to use a computer program that is required to do the essential duties of this job. The employer sends the person on a training course to learn the computer program. The employee is then qualified for the position.

The duty to accommodate does not require the employer to completely alter the essence of the contract of employment, that is, the employee's duty to perform work in exchange for remuneration.^[168] The duty to accommodate does not require an employer to provide "make work" or "to create a job that is not productive or that, in the employer's view, does not need to be done."^[169] Nor is an employer required to employ two employees to do the job of one.^[170] In the final analysis, the employee must be able to perform a useful and productive job for the employer.^[171]

8.3.2.2 Return to work

Accommodating a person who has been absent from work may involve any of the above forms of accommodation but also raises unique issues. People who return to work after an absence related to a *Code* ground are protected by the *Code*.^[172] They generally have the right to return to their original job (the pre-disability job). Both employers and unions must co-operate in accommodating employees who are returning to work. Accommodation is a fundamental and integral part of the right to equal treatment in the return to work context.^[173]

Example: In one case, a woman who had been off for several months for a series of surgeries informed her employer that she planned to return to work. The HRTO found that her employer discriminated against her when it required her to provide a "clean bill of health," tried to require her to sign a letter agreeing to a finite cap on future medical leave, and asked her to complete a retraining period before it would consider whether she could return to work. The HRTO affirmed that the woman was entitled to her previous job. The employer acted in a discriminatory way when it merely offered to consider rehiring her.^[174]

The right of people with disabilities to return to work exists if the worker can fulfil the essential duties of the job after accommodation short of undue hardship.^[175] If a person cannot fulfil the essential duties of the pre-disability job, despite the employer's effort to accommodate short of undue hardship, the employer still has an obligation to canvass alternative work possibilities, as outlined above. Ultimately, as stated above, the person with a disability must be able to perform a useful and productive job for the employer.

Under the *Code*, there is no fixed rule as to how long an employee with a disability may be absent before the duty to accommodate has been met. This will depend on the ability of the employee to perform the essential duties of the job considering the unique circumstances of every absence and the nature of the employee's condition, as well as circumstances in the workplace.^[176] Also important is the predictability of the absence, in terms of when it will end, if it may recur and the frequency of the absence. The employee's prognosis and length of absence are also important considerations. It is more likely that the duty to accommodate will continue with a better prognosis, regardless of the length of absence.

The duty to accommodate does not necessarily guarantee a limitless right to return to work.^[177] On the other hand, a return to work program that relies on arbitrarily selected cut-offs or that requires an inflexible date of return may be challenged as a violation of the *Code*.

Example: In a case that dealt with a modified work program that featured a "90-day" rule that deemed temporary restrictions of more than 90 days to be permanent, the HRTO stated: "A general employment-related human rights principle is that when an employee is temporarily unable to perform a job because of disability, the employer is obliged to keep the employee's job available so that the employee can return to it when the disability improves to the point the employee can return to the job. This is a form of accommodation of the person's disability related needs. The obligation to keep the employee's job available does not extend indefinitely, and is limited by undue hardship involved in keeping the job available, but it generally extends for more than three months."^[178]

Ultimately, the test of undue hardship is the relevant standard for assessing return to work programs.

8.4 The legal test

Section 11 of the *Code* prohibits discrimination that results from requirements, qualifications or factors that may appear neutral but that have an adverse effect on people identified by *Code* grounds. Section 11 allows an organization to show that a requirement, qualification or factor that results in discrimination is nevertheless reasonable and *bona fide* (legitimate). However, to do this, the organization must show that the needs of the person cannot be accommodated without undue hardship.^[179]

The Supreme Court of Canada has set out a framework for examining whether the duty to accommodate has been met.^[180] If *prima facie* discrimination (or discrimination on its face) is found to exist, a respondent must establish on a balance of probabilities that the standard, factor, requirement or rule:

1. was adopted for a purpose or goal that is rationally connected to the function being performed (such as a job, being a tenant, or participating in the service)
2. was adopted in good faith, in the belief that it is necessary for the fulfilment of the purpose or goal, and
3. is reasonably necessary to accomplish its purpose or goal, in the sense that it is impossible to accommodate the claimant without undue hardship.^[181]

As a result of this test, the rule or standard itself must be inclusive of as many people as possible and must accommodate individual differences up to the point of undue hardship. This makes sure that each person is assessed according to their own personal abilities.^[182] The ultimate issue is whether the organization or individual providing accommodation has shown that they have done so up to the point of undue hardship.

The following non-exhaustive factors should be considered during the analysis:^[183]

- whether the accommodation provider investigated alternative approaches that do not have a discriminatory effect
- reasons why viable alternatives were not put in place
- ability to have differing standards that reflect group or individual differences and capabilities
- whether the accommodation provider can meet their legitimate objectives in a less discriminatory way
- whether the standard is properly designed to make sure the desired qualification is met without placing undue burden on the people it applies to
- whether other parties who are obliged to assist in the search for accommodation have fulfilled their roles.

Similarly, as mentioned above, section 17 of the *Code* also creates an obligation to accommodate specifically under the ground of disability.

8.5 Forms of accommodation

Many different methods and techniques will respond to the unique needs of people with disabilities. Accommodations may include modifying or changing an organization's:

- buildings, facilities and services
- policies and processes
- procurement and third-party contracts
- performance standards, conditions and requirements^[184]
- decision-making practices
- work, housing or service culture
- methods of communication.

Depending on a person's individual needs, examples of accommodation may include:

Employment

- allowing a flexible work schedule^[185]
- modifying job duties^[186]
- modifying policies
- making changes to the building (for example, installing ramps, hand rails, automatic door openers, wider doorways, *etc.*)
- modifying workstations (making ergonomic changes, supplying a specialized chair, back support, *etc.*)
- providing specialized adaptation or assistive devices for computers, accessible technology
- providing alternative ways of communicating with the employee
- additional training
- allowing short-term and long-term disability leave
- job bundling and unbundling^[187]
- alternative work^[188]

Services

- providing multiple ways of contacting a service including by phone, in person and by regular and electronic mail
- providing extra time to a service user
- providing more breaks to a service user, where appropriate
- making attendance requirements flexible, where possible, if non-attendance can be shown to be linked to a disability
- modifying rules around non-compliance with deadlines, if non-compliance can be shown to be linked to a disability^[189]
- modifying "no pets" policies to allow guide dogs^[190] and other service animals^[191]
- considering someone's disability as a mitigating factor when addressing behaviour that would otherwise warrant imposing sanctions.^[192]

Housing

- helping someone fill out application forms (*e.g.* for social or supportive housing)
- adjusting tenant selection criteria (such as using a guarantor when other information, such as credit history or rental history, is not available^[193])
- modifying deadlines (such as deadlines to report income changes in social and supportive housing)
- modifying ways that information is communicated to tenants
- establishing a list of contact supports to call in emergency situations
- making structural modifications to units (for example, installing ramps, automatic door openers, wider doorways, *etc.*)
- working with outside professionals to address someone's needs, if agreed to by the tenant
- considering someone's disability as a mitigating factor when addressing behaviour that would otherwise warrant imposing sanctions^[194]
- allowing transfers between units.^[195]

Most accommodations are not expensive to provide, and if instituted widely, will benefit more than the person requesting the accommodation.

Example: A tenant in a rental unit develops arthritis. She requests that doorknobs in her suite and in common areas such as the laundry room be changed from round knobs that are difficult to grip to handles that are suitable for people with arthritis. The landlord willingly makes this change as it is not an undue hardship to do so. It will also benefit other tenants with disabilities in the building, as well as people who are aging.

Accommodation should be a non-coercive, co-operative process that all responsible parties take part in. A person's co-workers, as well as other tenants and service users, may have a role to play in helping with an accommodation. In these cases, it may be necessary for others to know that a person requires an accommodation to facilitate the accommodation. However, care must be taken to protect the person's privacy, to not reveal any more information than is necessary, to make sure that they are not "singled out," and that their dignity is respected.^[196]

An accommodation provider should take steps to resolve any tension or conflict that may occur as a result of resentment on the part of others who are expected to help implement an accommodation. In some situations, tension may be linked to a lack of awareness about the nature of the person's disability or needs and the requirements of the *Code*.

Keeping in mind that everyone experiences disability differently, accommodation providers are also required to educate themselves about the nature and impact of disabilities as part of the procedural duty to accommodate.^[197] and to dispel any misperceptions or stereotypes that employees, other tenants or service staff or users may have about people with disabilities^[198] that could lead to inequitable treatment. Resolving these issues must be done in a way that most respects the person's dignity and privacy. One key approach to doing this is to implement anti-harassment, accommodation and sensitivity training. Otherwise, tension and conflict could lead to harassment or a poisoned environment for the person with the disability.

8.6 Duties and responsibilities in the accommodation process

The accommodation process is a shared responsibility. Everyone involved should co-operatively engage in the process, share information and consider potential accommodation solutions. The person with a disability is required to:

- make accommodation needs known to the best of their ability, preferably in writing, so that the person responsible for accommodation can make the requested accommodation^[199]
- answer questions or provide information about relevant restrictions or limitations, including information from health care professionals^[200]
- take part in discussions about possible accommodation solutions
- co-operate with any experts whose assistance is required to manage the accommodation process or when information is needed that is unavailable to the person with a disability
- meet agreed-upon performance standards and requirements, such as job standards, once accommodation is provided^[201]
- work with the accommodation provider on an ongoing basis to manage the accommodation process.

The accommodation provider is required to:

- be alert to the possibility that a person may need an accommodation even if they have not made a specific or formal request^[202]
- accept the person's request for accommodation in good faith, unless there are legitimate reasons for acting otherwise
- get expert opinion or advice where needed (but not as a routine matter)
- take an active role in ensuring that alternative approaches and possible accommodation solutions are investigated,^[203] and canvass various forms of possible accommodation and alternative solutions^[204]
- keep a record of the accommodation request and action taken
- communicate regularly and effectively with the person, providing updates on the status of the accommodation and planned next steps^[205]
- maintain confidentiality
- limit requests for information to those reasonably related to the nature of the limitation or restriction, to be able to respond to the accommodation request
- consult with the person to determine the most appropriate accommodation
- implement accommodations in a timely way,^[206] to the point of undue hardship
- bear the cost of any required medical information or documentation (for example, the accommodation provider should pay for doctors' notes, assessments, letters setting out accommodation needs, *etc.*)^[207]
- bear the cost of required accommodation.

Although the person seeking accommodation has a duty to assist in securing appropriate accommodation that will meet their needs, they are not responsible for originating a solution^[208] or leading the accommodation process. They are also not required to discuss their disability-related needs with anyone other than the people directly involved in the accommodation process.^[209] It is ultimately the accommodation provider's responsibility to implement solutions, with the co-operation of the person seeking accommodation. After accommodation is provided, the person receiving the accommodation is expected to fulfil the essential duties or requirements of the job, tenancy, or taking part in a service.

Contracting with a disability management company does not absolve an employer of responsibilities or liability if the accommodation process is not managed properly.^[210]

In employment, unions and professional associations are required to take an active role as partners in the accommodation process, share joint responsibility with the employer to facilitate accommodation, and support accommodation measures regardless of collective agreements, unless to do so would create undue hardship.^[211]

If the accommodation is required to allow the person to be able to take part in the organization without impediment due to disability, the organization must arrange and cover the cost of the accommodation needed,^[212] unless this would cause undue hardship.

Where a person requires assistance for their disability beyond what is required to access housing, employment or services equally, such as an assistive device for daily living, the organization would not generally be required to arrange or pay for it, but is expected to allow the person to access this type of accommodation without impediment.

Accommodating someone with a disability may be hindered by a lack of appropriate disability support services in the community to identify someone's disability-related needs and limitations, or to assist with an accommodation. Waiting lists for specialists' assessments, for example, can be extremely long. In these cases, accommodation providers should use the best information they have available to make the accommodation, or provide interim accommodation, taking into consideration how the person identifies their own needs, pending the assessment.

8.6.1 Duty to inquire about accommodation needs

In general, the duty to accommodate a disability exists for needs that are known or ought to be known. Organizations and persons responsible for accommodation are not, as a rule, expected to accommodate disabilities they are unaware of. However, in some circumstances, the nature of certain disabilities may leave people unable to identify that they have a disability, or that they have accommodation needs.^[213]

Example: A forklift operator is prescribed medication to treat seizures. Shortly afterward he begins to experience memory lapses, including while on the job, and at one point has difficulty recalling the established protocol for the safe operation of his machinery. His manager notices his uncharacteristic behaviour. Rather than taking disciplinary action, the manager sets up a meeting and asks the employee if there have been any recent changes in his life that could be affecting his behaviour. The employee is able to correlate his memory problems to when he began to take his anti-seizure medication. In consultation with his doctor, he switches to a new medicine and the problem resolves itself.

Accommodation providers must attempt to help a person who is clearly unwell or perceived to have a disability by inquiring further to see if the person has needs related to a disability and offering assistance and accommodation.^[214] Even if an employer has not been formally advised of a disability, the perception of such a disability will engage the protection of the *Code*.

Example: The HRTO found that an employer discriminated against a male employee with a visual impairment when it failed to inquire into whether he needed accommodation even after it became aware that he was experiencing difficulties on the job due to his disability. Even though the man did not formally request accommodation, the HRTO stated "...the procedural duty to accommodate indicates that an employer cannot passively wait for an employee to request accommodation where it is aware of facts that indicate that the employee may be having difficulties because of disability; there is a duty to take the initiative to inquire in these circumstances."^[215]

Where an organization is aware, or reasonably ought to be aware, that there may be a relationship between a disability and someone's job performance, or their abilities to fulfil their duties as a tenant or service user, the organization has a "duty to inquire" into that possible relationship before making a decision that would affect the person adversely.^[216] This includes providing a meaningful opportunity to the employee, tenant or service user to identify a disability and request accommodation. A severe change in a person's behaviour could signal that the situation warrants further examination.

Where a person exhibits inappropriate behaviour due to a disability, employers, housing providers and service providers have a duty to assess each person individually before imposing measures that may affect the person negatively. Such measures might include prematurely starting eviction proceedings, revoking subsidies, withdrawing services or imposing discipline in employment. Before sanctioning a person for misconduct or "unacceptable behaviour," an organization must first consider whether the actions of the person are caused by a disability, especially where the organization is aware or perceives that the person has a disability.^[217] The person's disability must be considered in determining what, if any, sanctions are appropriate, unless this causes undue hardship.

Example: A boy in Grade 2 regularly interrupts his classmates and disrupts the teacher's lessons. When repeated reminders do not improve the problem, the teacher considers her options. Before escalating the situation, she contacts his parents to make further inquiries. Together, they arrange for an educational assessment which reveals that the boy has autism spectrum disorder. They are then able to take steps to put the appropriate supports in place to help him succeed at school.

Where the behaviour is not related to a disability, sanctions or discipline will generally apply, as usual.^[218]

Accommodation providers should always inform employees, service users and tenants that a disability-related assessment (such as a medical assessment) or accommodation can be provided as an option to address job performance issues or issues relating to fulfilling one's duties as a tenant or a service user.

In employment, for example, an accommodation provider may be able to ask for medical documentation to confirm fitness to work, if there is sufficient objective evidence that there are legitimate reasons to be concerned.

Once disability-related needs are known, the legal onus shifts to those with the duty to accommodate.^[219] For example, support or referral through employee assistance programs (EAPs) could be the solution for an underlying disability.

8.7 Medical information to be provided

The provision of medical information by people with disabilities – the type, the scope and to whom – has implications for the privacy of employees, tenants and service users.^[220] At the same time, organizations must have enough information to allow them to meet their duty to accommodate.

As stated above, the person seeking accommodation is generally required to advise the accommodation provider that they have a disability, and the accommodation provider is required to take requests for accommodation in good faith.^[221] A person with a disability does not have to meet an onerous standard for initially communicating that a disability exists to trigger the organization's duty to accommodate. Organizations should limit requests for information to those reasonably related to the nature of the limitation or restriction, to assess needs and make the accommodation.

The type of information that accommodation seekers may generally be expected to provide to support an accommodation includes:

- that the person has a disability
- the limitations or needs associated with the disability
- whether the person can perform the essential duties or requirements of the job^[222], of being a tenant, or of being a service user, with or without accommodation
- the type of accommodation(s) that may be needed to allow the person to fulfill the essential duties or requirements of the job, of being a tenant, or of being a service user, etc.
- in employment, regular updates about when the person expects to come back to work, if they are on leave.

Example: A tenant tells his landlord that he has been hospitalized due to a disability and cannot make his rent payment on time. Knowing that the person is in hospital, the landlord does not require confirmation that the tenant has a disability, but asks for information to indicate that his need is temporary in nature, and that he will be able to pay his rent once released in a few weeks' time. The person provides this information, and the landlord makes an allowance for the late payment.

Example: In one case, a housing co-op sought to evict an occupant for failing to perform the two hours of volunteer work each month required by the co-op's by-law, despite the fact that she had provided a doctor's note that she was incapable of performing the volunteer work for medical reasons. Even with the note, the co-op sought further medical details of her condition, which she refused to provide. The Ontario Divisional Court stated that the co-op had a duty to respect the rights of its occupants under the Ontario *Human Rights Code* and to accommodate the needs of an occupant with a disability, to the point of undue hardship.^[223]

Where there is a reasonable basis to question the legitimacy of a person's request for accommodation or the adequacy of the information provided, the accommodation provider may request confirmation or additional information from a qualified health care professional to get the needed information.

Where more information about a person's disability is needed, the information requested must be the least intrusive of the person's privacy while still giving the accommodation provider enough information to make the accommodation.

In the rare case where an accommodation provider can show that it legitimately needs more information about the person's disability to make the accommodation (as opposed to just the needs related to the disability), it could ask for the nature of the person's illness, condition or disability^[224] (for example, is it a mental health disability, a physical disability, a learning disability?), as opposed to a medical diagnosis.

Organizations are not expected to diagnose illness or "second-guess" the health status of a person with a disability. An accommodation provider is not entitled to substitute its own opinion for that of medical documentation provided by a doctor.^[225] Similarly, an organization must not ask for more confidential medical information than necessary because it doubts the person's disclosure of their disability based on its own impressionistic view of what a specific disability should "look like."^[226]

Example: An employee tells his manager that he has Crohn's Disease and requests time off work to recover from an upcoming surgery related to his condition. Although the employee provides medical documentation from his family doctor stating that he has a disability for which he will require 4 – 6 weeks off to recover from surgery, his manager questions the legitimacy of the request, saying "I have no one to replace you, and besides, my uncle has had Crohn's Disease for years and he has never had to have surgery." He insists on the employee providing confirmation from his surgeon as well before he will consider providing the requested accommodation. This could be a violation of the employee's rights under the *Code*.

Generally, the accommodation provider does not have the right to know a person's confidential medical information, such as the cause of the disability, diagnosis, symptoms or treatment^[227] unless these clearly relate to the accommodation being sought, or the person's needs are complex, challenging or unclear and more information is needed.^[228] In rare situations where a person's accommodation needs are complex, challenging or unclear, the person may be asked to co-operate by providing more information, up to and including a diagnosis.^[229] In such situations, the accommodation provider must be able to clearly justify why the information is needed.

However, wherever possible, an accommodation provider must make genuine efforts to provide needed accommodations without requiring a person to disclose a diagnosis, or otherwise provide medical information that is not absolutely necessary.

Example: A woman living with HIV provides medical verification that she has a disability to her university's office for students with disabilities. The office helps her to set up a schedule that avoids early morning classes, due to the insomnia and fatigue she experiences as a side effect of her medication. Neither the office nor the woman's professors need to know the exact nature of her disability to make this accommodation.

Where someone's needs are unclear, they may be asked to attend an independent medical examination (IME). However, there must be an objective basis for concluding that the initial medical evidence provided is inaccurate

or inadequate. The IME should not be used to “second-guess” a person’s request for accommodation.^[230] Requests for medical examinations must be warranted, take into account a person’s particular disability-related needs, and respect individual privacy to the greatest extent possible.^[231]

Example: A woman is employed as a railroad engineer, which is a “safety sensitive” position. After being hospitalized for a serious concussion resulting from a car accident, she is cleared by her doctor to go back to work. However, upon returning, she is evaluated and her supervisor notices that she cannot focus well, her reaction time is slow, and she makes repeated mistakes. In this case, the employer may be justified in asking the employee to attend an independent medical examination.^[232]

No one can be made to attend an independent medical examination, but failure to respond to reasonable requests may delay the accommodation until such information is provided, and may ultimately frustrate the accommodation process.

Mere assertions of symptoms, such as statements that the person experiences “stress,” “pain” or “feels unwell” – things that many people commonly experience – may not be enough to establish a disability within the meaning and protection of human rights legislation.^[233] If choosing to disclose such information in writing, individuals and doctors should make it clear that these symptoms relate to a disability.

Example: A man provides a doctor’s note to his employer stating that he has been feeling “under the weather” and needs a leave of absence. The employer is entitled to ask for more information to ascertain whether his condition is linked to a disability. If it is, the employer may ask about the person’s restrictions, the expected date of return to work, and whether or not the person could still be present at work with an accommodation.

However, where these types of assertions exist alongside other indicators that the person is experiencing health problems, and where an employer, housing provider or service provider perceives that a person may have a disability, the *Code’s* protection will be triggered.

Where a person provides disability-related information that an accommodation provider deems “insufficient” to enable it to provide accommodation, the accommodation provider cannot use its own failure to ask for additional information to deny the accommodation or to otherwise subject a person to negative treatment (for example, termination of employment, denial of service, etc.).^[234]

If the person does not agree to provide additional medical information, and the accommodation provider can show that this information is needed, it may be the case that the person seeking accommodation could be found to not have taken part in the accommodation process and the accommodation provider would likely be relieved of further responsibility.^[235]

In some cases, there may be conflicting information provided by two medical experts. For example, a person’s own doctor or specialist may outline different accommodation needs than an independent medical examiner’s report. Deciding which report to follow will depend on the facts of the particular situation and certain factors, such as which expert has more relevant experience, the degree of interaction with the person, and the methods used for the assessment(s), among others.^[236]

8.8 Confidentiality

Documentation supporting the need for a particular accommodation should be provided only to the people who need to be aware of the information. For example, in employment, it may be preferable in some circumstances for information to be provided to the company’s health department or human resources staff rather than directly to a supervisor, to further protect confidentiality.

Example: A woman with the beginning stages of multiple sclerosis provides medical documentation to her human resources department and asks for accommodation. The human resources department agrees to help facilitate a flexible schedule, rest periods to manage periods of fatigue, and time off to attend medical appointments. It may not be necessary for the woman to discuss her medical situation in detail with anyone else (e.g. her manager or supervisor) since the HR department has the required information to ensure that she has the accommodations she needs to remain productive at work.

A person’s medical information should be kept separately from their personnel file, or any file associated with their tenancy or use of a service.

In cases where there are compelling circumstances affecting the health and safety of an individual, it may be necessary to disclose information about a person’s health to others. This should be done in accordance with privacy laws. More information about privacy laws and how they apply to public and private housing providers, employers and service providers can be found at the Office of the Information and Privacy Commissioner of Ontario and the Office of the Privacy Commissioner of Canada.^[237]

^[220] *Hydro-Québec v. Syndicat des employé-e-s de techniques professionnelles et de bureau d’Hydro-Québec, section locale 2000* (SCFP-FTQ), 2008 SCC 43 (CanLII) [*Hydro-Québec*] at paras. 14 and 16.

^[221] *CRPD*, *supra* note 6 at Article 13(1), Article 24(2)(c), and Article 27(1)(i), respectively. “Reasonable accommodation” is covered under Article 5 generally.

^[222] See *Meiorin*, *supra* note 66 at paras. 65-66 and *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, 1999 CanLII 646, [1999] 3 S.C.R. 868, at paras. 22 and 42-45 [*Grismer*]. In *Gourley v. Hamilton Health Sciences* 2010 HRTO 2168 (CanLII) [*Gourley*], the adjudicator stated (at para. 8): “The substantive component of the analysis considers the reasonableness of the accommodation offered or the respondent’s reasons for not providing accommodation. It is the respondent who bears the onus of demonstrating what considerations, assessments, and steps were undertaken to accommodate the employee to the point of undue hardship...” See also *Lee v. Kawartha Pine Ridge District School Board*, 2014 HRTO 1212 (CanLII) [*Lee*]; *McCarthy v. Caesar’s Plumbing and Heating Ltd.*, 2014 HRTO 1795; *Philomen v. Jessar Eglinton Ltd. (c.o.b. Aaron’s Sales and Lease to Ownership)*, 2014 HRTO 1794.

^[223] *ADGA*, *supra* note 6 at para. 107.

^[224] In *Lane*, *supra* note 6, the HRTO held at para. 150 that a failure to meet the procedural dimensions of the duty to accommodate is a form of discrimination in itself because it “denies the affected person the benefit of what the law requires: a recognition of the obligation not to discriminate and to act in such a way as to ensure that discrimination does not take place.” The HRTO’s decision was confirmed on appeal: *ADGA*, *supra* note 6. See also *Lee*, *supra* note 122.

^[225] *Gaisiner v. Method Integration Inc.*, 2014 HRTO 1718 (CanLII) [*Gaisiner*] at para. 149.

^[226] *Redmond*, *supra* note 50.

^[227] From the Preamble (h) to the *CRPD*, *supra* note 6.

^[228] In *Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241 [*Eaton*], the Supreme Court of Canada recognized the unique nature of disability and emphasized the need for individualized accommodation because the ground of disability “means vastly different things depending upon the individual and the context” (at para. 69).

^[229] *McGill University Health Centre (Montreal General Hospital) v. Syndicat des employés de l’Hôpital général de Montréal*, 2007 SCC 4 (CanLII), [2007] 1 SCR 161, 2007 [*McGill*]. Along the same lines, the HRTO found that an employment policy that mandates a set return to work plan for people with disabilities may be discriminatory if the particular circumstances of a person making an accommodation request are not considered: *Dulinas*, *supra* note 44.

^[230] In *Eaton*, *supra* note 128, the Supreme Court of Canada stated that “integration should be recognized as the norm of general application because of the benefits it generally provides” (at para. 69). However, the Court found that in Emily Eaton’s circumstances, segregated accommodation was in her best interests. The Court was of the view that this was one of those unusual cases where segregation was a more appropriate accommodation.

^[231] The *CRPD*, *supra* note 6 states at Article 2, “‘Universal design’ means the design of products, environments, programmes and services to be usable by all people, to the greatest extent possible, without the need for adaptation or specialized design. ‘Universal design’ shall not exclude assistive devices for particular groups of persons with disabilities where this is needed.”

^[232] *Eldridge*, *supra* note 1 para. 78.

^[233] LCO “Framework,” *supra* note 35 at 79.

^[234] *Eaton*, *supra* note 128 at para. 67.

^[235] *Meiorin*, *supra* note 66 at para. 68.

^[236] *Ibid.*

^[237] Letter from former Chief Commissioner Barbara Hall to Navanethem Pillay, High Commissioner for Human Rights, regarding the United Nations’ study on participation of persons with disabilities in political and public life (October 2011). Online: www.ohrc.on.ca/en/re-ohchr-thematic-study-participation-persons-disabilities-political-and-public-life

^[238] Under section 13.1 (1) of Ontario’s *Election Act*, the returning officer shall ensure that each polling place is accessible to electors with disabilities. *Election Act*, R.S.O. 1990, c. E.6, online: www.ontario.ca/laws/statute/90e06. In *Hughes v. Elections Canada*, 2010 CHRT 4 (CanLII), the Canadian Human Rights Tribunal found in favour of a voter with a disability who filed a complaint after experiencing physical barriers at his polling station.

^[239] Elections Ontario, accessible voting, online: www.elections.on.ca/en/voting-in-ontario/how--when-and-where-to-vote/when-and-where-to-vote/accessible-voting.html.

[140] *Count Us In: Removing Barriers to Political Participation – Accessible All Candidates Meetings Quick Reference Guide*. Ontario Government (2007) online: www.mcsc.gov.on.ca/documents/en/mcsc/publications/accessibility/Quickreferenceguidetoaccessibleallcandidatesmeetin.pdf. See also, letter from former Chief Commissioner Barbara Hall to the Executive of all political parties registered in Ontario regarding elections accessibility (March 2011) online: www.ohrc.on.ca/en/elections-accessibility-letter-executive-all-political-parties-registered-ontario.

[141] In *VIA Rail*, *supra* note 6, the Supreme Court of Canada stated at para. 186: "...while human rights principles include an acknowledgment that not every barrier can be eliminated, they also include a duty to prevent new ones, or at least, not knowingly to perpetuate old ones where preventable." Organizations, including government, should design their programs, services and facilities inclusively with the needs of people with disabilities in mind. In *Jodhan*, *supra* note 69, a case decided under the *Canadian Charter of Rights and Freedoms*, the Federal Court of Appeal found that inaccessible federal government websites violated the equality rights of a woman with a vision disability.

[142] See <http://universaldesign.ie/What-is-Universal-Design/The-7-Principles/>

[143] *AODA*, *supra* note 6.

[144] The Ontario *Building Code Act*, 1992, S.O. 1992, c. 23 governs the construction of new buildings and the renovation and maintenance of existing buildings.

[145] Similarly, organizations cannot rely only on the requirements of the Ontario *Building Code*, but must consider their obligations under the *Human Rights Code*. The *Human Rights Code* prevails over the *Building Code* and organizations may be vulnerable to a human rights claim if their premises fall short of the requirements of the *Human Rights Code*. Relying on relevant building codes has been clearly rejected as a defence to a complaint of discrimination under the *Human Rights Code*: see, for example, *Quesnel v. London Educational Health Centre* (1995), 28 C.H.R.R. D/474 [*Quesnel*].

[146] Information taken from a written submission made to the OHRC by the Advocacy Centre for the Elderly (April 2015).

[147] A large number of people become hard of hearing as they age. In a written submission to the OHRC in April 2015, the Canadian Hard of Hearing Association stated, "Forty percent of Canadians over the age of 50 are hard of hearing. With an aging Baby Boomer population, the proportion of Canadians with hearing loss will increase rapidly over the next several decades."

[148] *Quesnel*, *supra* note 145 at para. 16.

[149] *Graham v. Underground Miata Network*, 2013 HRTO 1457 (CanLII) at para. 31.

[150] The duty to accommodate does not require an employer to promote an employee to a higher-level position he or she would not otherwise have been entitled to: *Ellis v. General Motors of Canada Ltd.*, 2011 HRTO 1453 (CanLII). The duty to accommodate also does not require "an employer to place an employee in the position that the employee considers ideal...": *Seguin v. Xstrata Nickel*, 2012 HRTO 15 (CanLII) at para. 11.

[151] *Kelly v. University of British Columbia*, 2012 BCHRT 32 (CanLII); upheld on merits on judicial review in *University of British Columbia v. Kelly*, 2015 BCSC 1731 (CanLII).

[152] *Dulitinas*, *supra* note 44. Along the same lines, see *Ilevbare*, *supra* note 44, in which the HRTO states at para. 52: "The termination of a disabled employee's employment, in the midst of a medical leave of absence, is *prima facie* discriminatory and likewise demands an explanation." This suggests that *prima facie* discrimination will be found where an employee is terminated while on medical leave, and the onus will be on the employer to provide a non-discriminatory reason for the termination.

[153] *Grismer*, *supra* note 122; *Cameron v. Nel-gor Nursing Home* (1984), 5 C.H.R.R. D/2170 at D/2192 (Ont. Bd. of Inq.). See also *Crabtree v. 671632 Ontario Ltd. (c.o.b. Econoprint (Stoney Creek))*, [1996] O.H.R.B.I.D. No. 37 (QL) (Ont. Bd. Inq.); *Gaisiner*, *supra* note 125.

[154] *Gaisiner*, *ibid.*

[155] *Pourasadi v. Bentley Leathers Inc.*, 2015 HRTO 138 (interim decision) (CanLII) [*Pourasadi*]; *Brown v. Children's Aid Society of Toronto*, 2012 HRTO 1025 (CanLII) [*Brown*]; *Briffa v. Costco Wholesale Canada Ltd.*, 2012 HRTO 1970 (CanLII) [*Briffa*]; *Yeats v. Commissionaires Great Lakes*, 2010 HRTO 906 (CanLII) [*Yeats*]; *Perron v. Revera Long Term Care Inc.*, 2014 HRTO 766 (CanLII) [*Perron*].

[156] *Yeats*, *ibid.*; *Briffa*, *ibid.*; *Perron*, *ibid.*

[157] *Arumugam v. Venture Industrial Supplies Inc.* (No. 5), (2013), CHRR Doc. 13-2276, 2013 HRTO 1776. See also: *Hydro-Québec*, *supra* note 120; *Briffa*, *ibid.*; *Yeats*, *ibid.*; and *Brown*, *supra* note 155. Ultimately, an accommodated employee must be able to perform useful and productive work for his or her employer: *Vanegas v. Liverton Hotels International Inc.*, 2011 HRTO 715 (CanLII) [*Vanegas*].

[158] See, for example, *Metsala v. Falconbridge*, (2001), 39 C.H.R.R. D/153 (Ont. Bd. Inq.) [*Metsala*]; *ADGA*, *supra* note 6 at para. 107; *Hamilton-Wentworth District School Board v. Fair*, 2016 ONCA 421 (CanLII) [*Fair*]; *MacLeod v. Lambton County*, 2014 HRTO 1330 (CanLII) [*MacLeod*]; *Lee*, *supra* note 122. In *Ontario Liquor Board Employees' Union v. Ontario (Liquor Control Board of Ontario) (Di Caro)*, 2005 CanLII 55204 [*DiCaro*], the arbitrator stated "...the duty to accommodate has evolved and expanded to such an extent that today the law requires an employer to look far beyond the disabled employee's own position as a means of accommodation."

[159] In *Hodkin v. SCM Supply Chain Management Inc.*, 2013 HRTO 923 (CanLII) [*Hodkin*], it was stated at para. 52: "The accommodation process requires communication and collaboration between the employer and the employee in order to conduct an exhaustive search for positions or tasks that match what the applicant is capable of doing despite his restrictions."

[160] This is consistent with the Supreme Court of Canada's decision in *Hydro-Québec*, *supra* note 120.

[161] See *Carter v. Chrysler Canada Inc.*, 2014 HRTO 845 (CanLII) [*Carter*]; *MacLeod*, *supra* note 158 at para. 219; *Vanegas*, *supra* note 157; *DiCaro*, *supra* note 158; *Ontario Liquor Control Boards Employees' Union v. Ontario (Liquor Control Board of Ontario) (Sanfilippo)*, 2005 CanLII 55184 [*Sanfilippo*].

[162] See *Ontario Public Service Employees Union v. Ontario (Ministry of Community and Correctional Services) (Hyland Grievance)*, [2014] O.G.S.B.A. No. 1.

[163] Note that in *Ramasawakshing v. Brampton (City)*, 2015 HRTO 1047 (interim decision) (CanLII), the HRTO stated at para. 9: "[T]he fact that a new position attracts a lesser rate of pay [than the pre-injury job] is not discriminatory." The HRTO stated its agreement with and adopted the reasoning of *Nearing v. Toronto (City)*, 2010 HRTO 1351 (CanLII) and *Koroli v. Automodule Corp.*, 2011 HRTO 774 (CanLII), both of which refer to the Ontario Court of Appeal's decision in *Ontario Nurses' Association v. Orillia Soldiers' Memorial Hospital*, [1999] CanLII 3687 (ON CA).

[164] In *Chamberlin v. 599273 Ontario Ltd cob Stirling Honda* (1989), 11 C.H.R.R. D/110 (Ont. Bd. of Inq.), the Board of Inquiry found that the employer should have given the complainant the opportunity to prove he could still perform his old job.

[165] Employers should also be aware of their responsibility to provide suitable work to satisfy the obligation to re-employ workers who sustain a work-related injury: see the *WSIA*, *supra* note 29, ss. 40 and 41.

[166] See, for example, *Re Community Lifecare Inc. and Ontario Nurses' Association*, (2011), 101 L.A.C. 4th 87, in which an arbitrator found that an employer had failed to accommodate an employee who had developed a bad back when it failed to consider what modified light duty work it might be able to provide on a permanent basis.

[167] *Metsala*, *supra* note 158. The HRTO has identified several "best practices" related to this process. For example, in at least two cases the HRTO commented favourably on an employer's practice of canvassing vacant positions that match an employee's disability-related needs and qualifications and then "holding" or "protecting" those positions to make sure that they are not first filled by someone who does not require accommodation: see *Harnden v. The Ottawa Hospital*, 2011 HRTO 1258 (CanLII) and *Gourley*, *supra* note 122. Other cases have confirmed that direct placement in an alternative position, without being required to succeed in a job competition, may be required: *Fair*, *supra* note 158. See also *MacLeod*, *supra* note 158. For possible exceptions in specific circumstances, see: *Buttar v. Halton Regional Police Services Board*, 2013 HRTO 1578 (CanLII) [*Buttar*] and *Formosa*, *supra* note 12.

[168] *Hydro-Québec*, *supra* note 120 at para. 15.

[169] *Gahagan v. James Campbell Inc.*, 2014 HRTO 14 (CanLII) at para. 27 [recon dismissed 2014 HRTO 339]; see also, *Saucier v. Smart Lazer Grafix*, 2009 HRTO 1053 (CanLII).

[170] The *Code* does not require an employer to schedule a second employee during time that an employee would normally be working alone where there is a need to perform duties that the employee is incapable of performing due to a disability: *Pourasadi*, *supra* note 155; *Perron*, *supra* note 155; *Lee*, *supra* note 122; *Re Hamilton Health Sciences and ONA (Pringle)*, 2013 CarswellOnt 8640, 115 C.L.A.S. 97, 232 L.A.C. (4th) 334; *Canadian Union of Public Employees, Local No. 1487 v. Scarborough Hospital*, [2009] O.L.A.A. No. 650.

[171] *Vanegas*, *supra* note 157.

[172] *Fair*, *supra* note 158. Employers should also be aware of the rights and obligations pertaining to return to work set out by Ontario's Workplace Safety and Insurance Board that exist concurrently with human rights protections: see

www.wsib.on.ca/WSIBPortal/faces/WSIBManualPage?_afrcGUID=19-02-02&rDef=WSIB_RD_OPM&fGUID=835502100635000524&_afriLoop=1033712479352182&_afriWindowMode=0&_afriWindowId=gmbvs3wk_14#%40%3FGUID%3D19-02-02%26_afriWindowId%3Dgmbvs3wk_14%26_afriLoop%3D1033712479352182%26rDef%3DWSIB_RD_OPM%26_afriWindowMode%3D0%26fGUID%3D835502100635000524%26_adf.ctrl.state%3Dgmbvs3wk_38

[173] See also section 29 of Regulation 191/11, *Integrated Accessibility Standards*, under the AODA, *supra* note 6 which requires employers (other than employers in private/not-for-profit organizations with fewer than 50 employees) to establish a documented process for supporting employees who return to work after being away for disability-related reasons and require accommodation.

[174] *Tombs v. 1303939 Ontario Ltd. (c.o.b. Holiday Inn Express)*, 2015 HRTO 842 (CanLII).

[175] See Section 17 of the *Code*, *supra* note 7.

[176] A policy that mandates a set return-to-work plan for people with disabilities may be discriminatory if the particular circumstances of a person making an accommodation request are not considered: *Dulimas*, *supra* note 44.

[177] See *Darvish-Ghadery*, *supra* note 12 in which the HRTO (at para. 37) cited *Hydro-Québec*, *supra* note 120 and found that since a woman was permanently unfit to return to work, she was “no longer able to fulfill the basic obligations associated with her employment relationship for the foreseeable future” and for that reason the employer’s duty to accommodate had come to an end. The HRTO went on to state at para. 36 that “to continue [the woman] in employment in these circumstances would have resulted in undue hardship.”

[178] *Carter*, *supra* note 161 at para. 145, citing *McGill*, *supra* note 129.

[179] The test for undue hardship is set out fully in section 9 of this Policy.

[180] *Meiorin*, *supra* note 66 at para. 54.

[181] See *Hydro-Québec*, *supra* note 120 for the Supreme Court of Canada’s comments on what the third part of this test means, in a practical sense, in the context of a disability accommodation in the workplace.

[182] *Grismer*, *supra* note 122 at para. 20.

[183] *Meiorin*, *supra* note 66 at para. 65.

[184] The duty to accommodate may require employers and others to consider modifying performance standards or productivity targets: *Meiorin*, *supra* note 66 at para. 65. The term “performance standard” refers broadly to qualitative or quantitative standards that may be imposed on some or all aspects of work, whether they are set by the employer or through collective bargaining. A productivity target is a performance standard that relates specifically to the output of work expected by the employer. Performance standards generally can be distinguished from qualification standards, which are the skills or attributes that one must have to be eligible for a particular job:

Production standards identify the level at which an employee must perform job functions in order to perform successfully. Qualification standards, on the other hand, identify the skills and abilities necessary to perform the functions at the required level.

(Robert L. Burgdorf, *Disability Discrimination in Employment Law* (Washington D.C.: Bureau of National Affairs, 1995) at 241.)

The central issue in determining whether or how performance standards should be modified is whether the standards in question are essential duties or requirements within the meaning of section 17 of the *Code*. If the person is unable to perform the standard, but the standard is not considered an essential part of the job, it can be changed or the function removed from the employee altogether and reassigned. If the standard is essential, the employer is nevertheless required to accommodate the employee under section 17(2) of the *Code*. Keeping in mind the overall objective of the inclusion of employees with disabilities in the workplace, sections 17(1) and (2) of the *Code* together include an obligation on an employer to accommodate a person. This does not preclude the employer from enforcing performance standards that are unrelated to the disability. The employer is entitled to a productive employee and to develop standards and targets that maximize organizational objectives. Organizations should be guided by objective evidence when developing or assessing qualification standards that they consider are essential duties or requirements. If an employer is considering a standard that will be widely adopted, it should consider the job duties of employees in different settings that are or would be subject to the standard and whether there is a link between the standard and the duties of employees: *Lauzon v. Ontario Provincial Police*, 2011 HRTO 1404 (CanLII).

[185] According to Statistics Canada, the most needed accommodation for people with disabilities in the Canadian workplace is modified/reduced hours. And while this is the need most commonly met by employers, modified/reduced hours is also “the reason most frequently cited for difficulty advancing in employment”: Matthew Till, et al., (2015). *Canadian Survey on Disability, 2012: A Profile of the Labour Market Experiences of Adults with Disabilities among Canadians aged 15 years and older, 2012*, Statistics Canada, 2015, at 12 and 17, available online at: www.statcan.gc.ca/pub/89-654-x/89-654-x2015005-eng.htm.

[186] *Hodkin*, *supra* note 159.

[187] See *Vanegas*, *supra* note 157; *DiCaro*, *supra* note 158; *Sanfilippo*, *supra* note 161.

[188] See section 8.3.2 of this Policy on “Employment-specific accommodation issues” for more information on alternative work.

[189] *Allen v. Ottawa (City)*, 2011 HRTO 344 (CanLII) and *Kelly v. CultureLink Settlement Services*, 2010 HRTO 977 (CanLII). Note that delays must be shown to be related to a disability and must be made in good faith: see *Arcuri v. Cambridge Memorial Hospital*, 2010 HRTO 578 (CanLII); *Vallen v. Ford Motor Company of Canada*, 2012 HRTO 932 (CanLII) and *M.C. v. London School of Business*, 2015 HRTO 635 (CanLII). Note also that in relation to adjudicators or in the context of administrative tribunals, the “Doctrine of Judicial Immunity” may apply to protect adjudicators who are alleged to have not provided accommodation in the exercise of their decision-making and dispute resolution functions: see *Thomson v. Ontario Secondary School Teachers’ Federation*, 2011 HRTO 116 (CanLII); *Hazel v. Ainsworth Engineered*, 2009 HRTO 2180 (CanLII); *McWilliams v. Criminal Injuries Compensation Board*, 2010 HRTO 937 (CanLII).

[190] See *Smolak*, *supra* note 12; *Hill v. Bani-Ahmad*, 2014 HRTO 937 (CanLII); *Bourdeau v. Kingston Bazar*, 2012 HRTO 393 (CanLII).

[191] People with disabilities who use service animals to assist them with disability-related needs (such as anxiety) are also protected under the definition of “disability” in section 10 of the *Code*. Service animals do not have to be trained or certified by a recognized disability-related organization. However, where it is not immediately obvious that the animal is performing a disability-related service, a person must be able to show evidence (such as a letter from a doctor or other qualified medical professional) that they have a disability and that the animal assists with their disability-related needs. Service providers and others who receive such documentation should not use their own assumptions and observations to second-guess this verification. See *Allarie v. Rouble*, 2010 HRTO 61 (CanLII); *Sweet v. 1790907 Ontario Inc. o/a Kanda Sushi*, 2015 HRTO 433 (CanLII); *Sprague v. RioCan Empress Walk Inc.*, 2015 HRTO 942 (CanLII); *Schussler v. 1709043 Ontario*, 2009 HRTO 2194 (CanLII); *Kamis v. 1903397 Ontario Inc.*, 2015 HRTO 741 (CanLII). Section 4 of Regulation 429/07 under the AODA, *supra* note 6, also requires organizations to permit a person with a disability to be accompanied by their guide dog or service animal on all premises that are normally open to the public or third parties, unless the animal is otherwise excluded by law from the premises.

[192] For example, some disabilities may result in “acting out” behaviours. Education providers and other responsible organizations need to take into account whether behaviours that would otherwise warrant discipline are related to a disability.

[193] This might apply where a person with a disability does not have a rental or credit history to provide to a prospective landlord because they have previously only lived as a dependent.

[194] *Supra*, note 192.

[195] *Dixon*, *supra* note 38; *Devoe*, *supra* note 12.

[196] See section 8.8 of this Policy on “Confidentiality” for more information.

[197] In *Lane*, *supra* note 6, a case involving an employee with a mental health disability, the HRTO stated at para. 144: “The procedural dimensions of the duty to accommodate required those responsible to engage in a fuller exploration of the nature of bipolar disorder and to form a better informed prognosis of the likely impact of his condition in the workplace.”

[198] See *Dawson*, *supra* note 33 at paras. 243-245.

[199] See section 8.6.1 of this Policy on “Duty to inquire about accommodation needs” for information on when an organization is expected to inquire about accommodation needs, even when a person may not have made a specific request.

[200] In *Baber*, *supra* note 12, the HRTO found that even if the duty to accommodate was triggered, the employer had fulfilled its duty to accommodate because Ms. Baber failed to co-operate in the accommodation process by refusing reasonable requests for information that would confirm her needs. She consistently refused to provide the necessary medical information. The HRTO found that the employer did not breach its duty to accommodate her when it terminated her employment.

[201] *Supra* note 184.

[202] *Supra* note 199.

[203] *Meiorin*, *supra* note 66 at paras. 65-66.

[204] *Conte v. Rogers Cablesystems Ltd.*, (1999) 36 C.H.R.R. D/403 (C.H.R.T.); *Mazuelos v. Clark* (2000) C.H.R.R. Doc. 00-011 (B.C.H.R.T.); *Lane*, *supra* note 6; *Krieger*, *supra* note 12; *Hodkin*, *supra* note

159; *MacLeod*, *supra* note 158.

[205] *Hodkin*, *ibid*.

[206] In *Turnbull*, *supra* note 38, the Board of Inquiry upheld a discrimination complaint finding that although Famous Players had taken steps to comply with the *Code* by providing equal access to its movie theatres for people with disabilities, it had not done so quickly enough, and had failed to act with “due diligence and dispatch” (para. 216).

[207] Human rights decision-makers have not been consistent on the issue of who is responsible for the costs of accommodation (or what types of expenses are included in “the costs of accommodation”). See *Iley v. Sault Ste. Marie Community Information and Career Centre*, 2010 HRTO 1773 (CanLII) in which the HRTO ordered the applicant to obtain medical information and stated: “The respondents are... directed to reimburse the applicant for the costs of such a production, since it is being done at their request.” But also see *Drost v. Ottawa-Carleton District School Board*, 2012 HRTO 235 (CanLII) where, in the context of a hearing in which the parties are subject to the HRTO’s rules that require that they disclose all arguably relevant documents, the HRTO placed the onus of covering the costs of medical information for both establishing a disability and outlining the accommodation needs on the applicant. It is the OHRC’s position that the procedural component of the duty to accommodate – which includes obtaining all relevant information and considering how to accommodate – includes a responsibility to pay the costs necessary to facilitate accommodation, such as medical assessments and doctor’s reports, unless to do so would cause undue hardship. This position is consistent with the human rights principle that the *Code* be given a broad, purposive and contextual interpretation to advance the goal of eliminating discrimination.

[208] *Central Okanagan School Dist. No. 23 v. Renaud*, [1992] 2 S.C.R. 970, [Renaud].

[209] In *DeSouza*, *supra* note 12, the HRTO found that a tennis club discriminated against a tennis instructor based on disability when it imposed requirements on the instructor that he tell all private clients about his epilepsy and instruct all staff on how to deal with a seizure.

[210] *Puleio v. Moneris Solutions*, 2011 HRTO 659 (CanLII).

[211] The Supreme Court of Canada’s decision in *Renaud*, *supra* note 208, sets out the obligations of unions. See also *Bubb-Clarke v. Toronto Transit Commission*, 2002 CanLII 46503 (HRTO) [Bubb-Clarke]; and *Carter*, *supra* note 161. See section 9 of this Policy on Undue Hardship for more detailed information.

[212] *Eldridge*, *supra* note 1.

[213] For example, people with mental health disabilities experiencing a first episode of a disability may be unaware that they are experiencing impairment. Also, denying the presence of a disability may be an aspect of having an addiction. For more information on mental health disabilities and addictions, see the OHRC’s *Mental Health Policy*, *supra* note 9.

[214] See, for example, *Lane*, *supra* note 6; *ADGA*, *supra* note 6; *Krieger*, *supra* note 12; *Mellon v. Canada (Human Resources Development)*, 2006 CHRT 3 (CanLII) [Mellon] at paras. 97-98; *MacLeod*, *supra* note 158.

[215] *Sears*, *supra* note 118 at para. 114. See also *Wall v. The Lippé Group*, 2008 HRTO 50 (CanLII) [Wall]; *Davis v. 1041433 Ontario Ltd. (No. 2)*, 2005 HRTO 37 (CanLII), at paras. 67-68.

[216] See, for example, *Lane*, *supra* note 6; *Krieger*, *supra* note 12; *Mellon*, *supra* note 214; *Willems-Wilson v. Allbright Drycleaners Ltd.* (1997), 32 C.H.R.R. D/71 (B.C.H.R.T.); *Zaryski v. Loftsgard* (1995), 22 C.H.R.R. D/256 (Sask. Bd. Inq.).

[217] See *Krieger*, *ibid*, at para. 157; *Bowden v. Yellow Cab and others (No. 2)*, 2011 BCHRT 14 (CanLII); *Trask v. Nova Scotia (Correctional Services) (No. 1)* (2010), 70 C.H.R.R. D/21 (N.S. Bd. Inq.); *Fleming v. North Bay (City)*, 2010 HRTO 355 (CanLII) [Fleming]; *Walton Enterprises v. Lombardi*, 2013 ONSC 4218 (CanLII) [Walton]; *McLean v. Riverside Health Care Facilities Inc.*, 2014 HRTO 1621 (CanLII) at para. 27.

[218] See *Fleming and Lombardi*, *ibid*, and *Wright v. College and Association of Registered Nurses of Alberta* (Appeals Committee), 2012 ABCA 267, leave to appeal refused [2012] S.C.C.A. No. 486.

[219] In *Morris v. British Columbia Railway Co.* (2003), 46 C.H.R.R. D/162, 2003 BCHRT 14 [Morris], a tribunal found that if performance problems related to a disability are a reason for the termination, the disability is a factor in the termination. Knowing of the claimant’s condition, the employer should have considered whether the disability was affecting his performance and sought further medical assessment. It failed to do so. The case also confirms that an employer can’t “blind itself to its observations of an employee’s behaviour...All relevant factors must be considered by an employer dealing with an employee with a disability, including medical evidence, its own observations, and the employee’s own comments and concerns.” (at para. 238).

[220] Many disabilities continue to be highly stigmatized (e.g. mental health disabilities, addictions, HIV and AIDS), and many people may be justifiably worried that sharing personal medical information will make them vulnerable to discrimination.

[221] *Morris*, *supra* note 219; *Yeats*, *supra* note 155 at paras. 47-8.

[222] For more information on human rights issues in the job recruitment process, see the OHRC’s *Policy on employment-related medical information*, available online at: www.ohrc.on.ca/sites/default/files/attachments/Policy_on_employment-related_medical_information.pdf.

[223] The Court applied the *Code* and the OHRC’s 2001 *Disability Policy* and held that it would have been reasonable and appropriate for the co-op to obtain answers from the occupant’s doctor to determine if any of the volunteer tasks could be performed, notwithstanding her medical condition. If so, it could have accommodated her by assigning her tasks she could perform, but if not, the cost of accommodating her by exempting her from the volunteer work requirement would be unlikely to impose an undue hardship. The Court concluded that it would be unjust in all the circumstances to evict the occupant: *Eagleson*, *supra* note 12.

[224] In *Providence Care, Mental Health Services v. Ontario Public Service Employees Union, Local 431*, 2011 CanLII 6863 (ON LA), the arbitrator distinguishes the “nature of disability” from a “diagnosis” by saying at para. 33: “However, I continue to be of the view that nature of illness (or injury) is a general statement of same in plain language without an actual diagnosis or other technical medical details or symptoms. Diagnosis and nature of illness are not synonymous terms, but there is an overlap between them, such that a description of the nature of an illness or injury may reveal the diagnosis and in others it will not.”

[225] See *Dulimas*, *supra* note 44; *Devoe*, *supra* note 12; and, *Eagleson*, *supra* note 12.

[226] See *Morris*, *supra* note 219; *Russell*, *supra* note 44. But also see *Oak Bay Marina Ltd. v. British Columbia (Human Rights Tribunal) (No. 2)* (2002), 43 C.H.R.R. D/487, 2002 BCCA 495 [Oak Bay].

[227] In *Simpson v. Commissionaires (Great Lakes)*, 2009 HRTO 1362 (CanLII), the HRTO stated at para. 35:

For the purposes of a request for employment accommodation, generally the focus should be on the functional limitations of the employee’s condition (capacities and symptoms) and how those functional aspects interact with the workplace duties and environment. Consequently, an employer need not be informed of the specific cause of the employee’s condition or the exact diagnosis in order to be put on notice that an employee has disability-related needs requiring accommodation.

Similarly, in *Cristiano v. Grand National Apparel Inc.*, 2012 HRTO 991 (CanLII), the HRTO stated at para. 20: “There are limits on what a respondent can require of its employees claiming a need for a medical leave. For example, in most instances, an employer is not entitled to a diagnosis. But an employer is entitled to know enough to make some assessment of the *bona fides* of the leave request and sufficient information to determine what if any accommodations might be made...” See also *Wall*, *supra* note 215; *Mellon*, *supra* note 214; *Leong v. Ontario (Attorney General)*, 2012 HRTO 1685 (CanLII); *Noe*, *supra* note 50; *Ilevbare*, *supra* note 44; *Jarrold v. Brewers Retail Inc. (c.o.b. Beer Store)*, 2014 HRTO 1070 (CanLII); *Easthom v. Dyna-Mig*, 2014 HRTO 1457 (CanLII).

[228] A person may have more rigorous obligations to disclose medical information in the context of litigation. In *Hicks v. Hamilton-Wentworth Catholic District School Board*, 2015 HRTO 1285 (CanLII), the HRTO stated at paragraph 17: “Where there is a dispute about the medical status of an employee further medical information may be required and where, as in these circumstances, there is litigation with respect to the dispute the parties will be entitled to much more fulsome disclosure of the medical documentation than might be the case in other circumstances.” See also *Fay v. Independent Living Services*, 2014 HRTO 720 (CanLII).

[229] Where there is a reasonable basis to question the legitimacy of a person’s request for accommodation or the adequacy of the information provided, an accommodation provider may be entitled to medical confirmation that a diagnosis exists, though this would not normally include disclosure of a person’s specific diagnosis. Accommodation providers should keep in mind that diagnoses for certain disabilities can be difficult to get, may change over time and may result in vastly different symptoms and experiences for different people. Therefore, a general statement that a person has a disability and identifying what a person needs in relation to their functional limitations is often more helpful to the accommodation process than a diagnosis. See *Mellon*, *supra* note 214 at para. 99: “An individual with a disability...may not know the exact nature and extent of that disability at the time they are experiencing the symptoms. In such circumstances, we cannot impose a duty to disclose a conclusive medical diagnosis.” Some people may present with a set of symptoms, but without a specific diagnosis. See *Ball*, *supra* note 56.

[230] See *Canadian Union of Public Employees, Local 831 v. Brampton (City)* [2008] O.L.A.A. No. 359 [C.U.P.E.].

[231] The Canadian Human Rights Tribunal has found that requests for a person with autism to undergo a psychiatric examination after asking for a leave of absence because of workplace harassment was in itself a form of harassment. It stated, “Indeed, the evidence shows that the Respondent remained deaf to the pleas of Ms. Dawson who did not want to see a physician whom she did not know and who knew nothing about autism, of her union representatives who expressed concern and consternation about Ms. Dawson having to submit to a medical examination by a Canada Post designated physician, but more importantly, of her treating physician who stated that she was very concerned that this could provoke a serious emotional reaction from Ms. Dawson. ...However well-intended Canada Post management was in seeking a medical evaluation, the Tribunal finds that, in the present circumstances, the general behaviour of those Canada Post employees who were involved in the medical evaluation process constitutes harassment.” See *Dawson*, *supra* note 33 at paras. 216 and 219. For arbitration cases that have found that treatment requirements imposed by employers interfered with employees’ privacy, see: *Central Care Corp. v. Christian Labour Assn. of Canada, Local 302 (Courtney Grievance)*, [2011] O.L.A.A. No. 144; *Federated Cooperatives Ltd. v. General Teamsters, Local 987 (Policy Grievance)* (2010), 194 L.A.C. (4th) 326; and, *Brant Community Healthcare System v. Ontario Nurses’ Assn. (Medical Form Grievance)*, [2008] O.L.A.A. No. 116, in which the arbitrator stated: “Treatment modalities are a matter for the doctor and the patient.”

[232] See, for example, *Oak Bay*, *supra* note 226.

[2333] In one case, a doctor's note stating that a woman had a "medical condition" was considered insufficient to establish that she had a disability as per the meaning of the *Code*: see *Simcoe Condominium Corporation No. 89 v. Dominelli*, 2015 ONSC 3661 (CanLII) .

[2341] *Alberta (Human Rights and Citizenship Comm.) v. Federated Co-operatives Ltd.* (2005), 53 C.H.R.R. D/496, 2005 ABQB 58; *Dulinas*, *supra* note 44 at para. 77, and *Pridham*, *supra* note 12. See also *Liu v. Carleton University*, 2015 HRTO 621 (CanLII).

[235] See *Baber*, *supra* note 12 and *C.U.P.E.*, *supra* note 230.

[236] See section 4.9.g) in the OHRC's publication *Human Rights at Work* for a more detailed description of these factors, available online at: www.ohrc.on.ca/en/human-rights-work-2008-third-edition?page=human-Contents.html.

[237] See: www.priv.gc.ca/index_e.asp and www.ipc.on.ca/english/Home-Page/. Different privacy laws apply to different organizations – for example, private housing providers may be covered by the *Personal Information Protection and Electronic Documents Act (PIPEDA)*, S.C. 2000, c. 5, and are only permitted to disclose personal health information under certain circumstances (see Section 7(3)).