The Duty to Accommodate in Saskatchewan and Beyond

Barbara Mysko

*Ministry of Justice, Constitutional Law Branch*
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Constitutional Law Branch, Ministry of Justice

Human Rights Code Amendments

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Introduction:
The modern workplace is the site of one of the most common human experiences, characterized by diverse human traits, imbalance of power, competition among co-workers, and pressure to succeed. It is a Petri dish of human rights law, where all of the crucial ingredients for human rights issues inevitably collide. Perhaps due to this combination of characteristics, it is also one of the most common sources of human rights complaints based on disability, sex, family status, and religion.

One of the most frequent problems for human resource professionals and their legal advisors is appreciating when, what, and how to accommodate the diversity of employees in the workplace. The issue of accommodation arises in the context of employees suffering from a range of disabilities, shouldering significant childcare obligations, and holding sincere religious beliefs, to name a few examples. A decision maker can only make an appropriate determination of when, what, and how to accommodate these and other circumstances with a solid understanding of “where” the duty to accommodate originates and “why” it exists, and to what purpose.

The issues that arise in the duty to accommodate are as varied as the dynamics of human relationships, and for this reason, the law of accommodation cannot properly be captured in a matter of a few pages. Bearing this limitation in mind, this paper will be confined to employment relationships, and will focus on the issue of mental health accommodations in the workplace, an emerging issue of accommodations law. For purposes of clarity, the term “mental health” will cover the range of conditions variously described as mental, emotional, or psychological in nature. The paper will begin by introducing the concept of discrimination, then reviewing the relevant sections of The Saskatchewan Human Rights Code (“Code”), summarizing the basic principles from the case law on the duty to accommodate, and will end by examining a number of recent arbitral and lower court decisions related to mental health accommodations.

The Law of Discrimination:
In Saskatchewan, it is against the law to discriminate against anyone based on one or more grounds enumerated in the Code. A few examples of enumerated grounds that are more
commonly engaged in employment accommodation scenarios include religion, sex, family status, and disability. The objects of the Code, enshrined in section 3, are to promote the recognition of the inherent dignity and equal inalienable rights of all individuals, and “to further public policy…that every person is free and equal in dignity and rights and to discourage and eliminate discrimination”. The values of the Code, being equality, dignity and individual worth, permeate both the statutory protections against discriminatory conduct and the remedies available for a contravention of the Code. Decision makers applying the Code are expected to interpret and apply its provisions in a broad and purposive manner to further its objects and values.

The relatively narrow ambit of this paper does not allow for a full review of the discrimination case law and its relevance to accommodation cases. Instead, a recent Supreme Court of Canada case provides a snapshot of how the values of human rights legislation impact the assessment of an accommodation in general. In Moore v. British Columbia, 2012 SCC 61 ("Moore"), the Court clarified the test for discrimination, outlining three major questions at the heart of the analysis (para. 3):

1) Does the complainant have a characteristic protected from discrimination pursuant to the Code?
2) Did the complainant experience an adverse impact with respect to the service?
3) Was the protected characteristic a factor in the adverse impact?

Generally speaking, “once a prima facie case has been established, the burden shifts to the respondent to justify the conduct or practice, within the framework of the exemptions available under human rights statutes. If it cannot be justified, discrimination will be found to occur.”

Moore, supra, at para. 33
Although not an employment law case, *Moore* is a landmark case pertaining to the discrimination analysis in the accommodation of a disability. As explained by lawyer Gwen Brodsky, *Moore* "swept aside a faulty comparator group analysis, holding the line...on how the analysis of a claim for accommodation is to be conducted." In *Moore*, the school board had closed the resource that was able to provide the intensive remediation required by Jeffrey Moore, a student with serious dyslexia. The traditional "comparator group analysis" led the lower courts to compare the level of service provided to Moore to that of other students with disabilities. That comparison resulted in the conclusion that there was no differential treatment engaging Moore and therefore no discrimination against him.


Abella J., writing for the Supreme Court, noted at paragraph 31 that:

> If Jeffrey is compared only to other special needs students, full consideration cannot be given to whether he had *genuine* access to the education that all students in British Columbia are entitled to.

According to the Court, the comparator analysis was limited in that it failed to give due consideration to whether the student was denied a meaningful education. It meant that if services to all disabled students were limited or completely absent, no disabled students could successfully bring a claim of discrimination. The inquiry is not about "who else is or is not experiencing similar barriers" but whether the complainant "has, without reasonable justification, been denied access to the general education available to the public in British Columbia based on his disability, access that must be 'meaningful'."

*Moore, supra*, at paras. 30-4
As demonstrated in *Moore*, the values of equality, dignity and individual worth lead the assessment of a complaint of discrimination. Formulaic tests for discrimination are unhelpful to the extent that they fail to do justice to the objects of the *Code*.

**Definitions in the *Code***:

*The Saskatchewan Human Rights Code* provides definitions for some of the basic concepts relevant to the duty to accommodate.

Although the *Code* does not define “employment”, it defines "employee" and "employer" as follows:

2 (e) “employee” means a person employed by an employer and includes a person engaged pursuant to a limited term contract;

(f) “employer” means a person employing one or more employees and includes a person acting on behalf of an employer;

According to the definitions, an individual does not have to hold a permanent position with his or her employer to be considered an employee pursuant to the *Code*.

In line with the broad, liberal, and purposive interpretation given to human rights legislation, the courts and other decision makers in human rights cases give the concept of employment a generous interpretation. The British Columbia Court of Appeal recently confirmed this approach in *Fasken Martineau DuMoulin LLP v. British Columbia (Human Rights Tribunal)*, 2012 BCCA 313 (“Fasken”), highlighting a series of cases focusing on the *nature* of the relationship between the parties rather than the *characterization* of the relationship at common law or in traditional employment law concepts. The Court cautioned, however, that the *Code* does not extend “to every relationship and circumstance”, citing the Supreme Court in *University of British Columbia v. Berg*, [1993] 2 S.C.R. 353 for the proposition that “[t]his interpretation approach does not give a board or court a license to ignore the words of the Act in order to prevent discrimination wherever it is found.”

*Fasken, supra*, at paras. 26-9
The very issue at the heart of *Fasken* is apparently one such cautionary tale – that is, a partner of a limited liability partnership claiming protection against discrimination on the basis of age. The B.C. Court of Appeal held that the relationship between an LLP and its partner was not an “employment” relationship as contemplated by the *Code* and failed to attract the protection of human rights legislation. In doing so, the Court of Appeal attempted to strike a balance between a broad and, at the same time, practical interpretation of the *Code*. The *Fasken* decision is subject to an appeal to the highest court and it is hoped that the decision will provide clarity as to the contours of the employment relationship in human rights law.

The term "disability" receives a similarly broad interpretation within the *Code*, while benefiting from a number of specific examples:

(d.1) “disability” means:

(i) any degree of physical disability, infirmity, malformation or disfigurement and, without limiting the generality of the foregoing, includes:

(A) epilepsy;
(B) any degree of paralysis;
(C) amputation;
(D) lack of physical co-ordination;
(E) blindness or visual impediment;
(F) deafness or hearing impediment;
(G) muteness or speech impediment; or
(H) physical reliance on a service animal, wheelchair or other remedial appliance or device; or

(ii) any of:

(A) an intellectual disability or impairment;
(B) a learning disability or a dysfunction in one or more of the processes involved in the comprehension or use of symbols or spoken language; or
(C) a mental disorder;

In the context of the duty to accommodate, "undue hardship" is defined in the *Code* as follows:
2 (q) “undue hardship” means, for the purposes of sections 31.2 and 31.3, intolerable financial cost or disruption to business having regard to the effect on:

(i) the financial stability and profitability of the business undertaking;
(ii) the value of existing amenities, structures and premises as compared to the cost of providing proper amenities or physical access;
(iii) the essence or purpose of the business undertaking; and
(iv) the employees, customers or clients of the business undertaking, disregarding personal preferences;

but does not include the cost or business inconvenience of providing washroom facilities, living quarters or other facilities for persons with physical disabilities where those facilities must be provided by law for persons of both sexes.

Undue hardship, although defined in the Code, is established on a case-by-case basis taking into account the factors set out in subsection 2(q) and informed by the case law in the areas of employment and labour law and human rights.

Relevant Sections of the Code Pertaining to Discrimination:
The Code prohibits discrimination in employment on the basis of a prohibited ground:

16(1) No employer shall refuse to employ or continue to employ or otherwise discriminate against any person or class of persons with respect to employment, or any term of employment, on the basis of a prohibited ground.

... 

(7) The provisions of this section relating to any discrimination, limitation, specification or preference for a position or employment based on sex, disability or age do not apply where sex, ability or age is a reasonable occupational qualification and requirement for the position or employment.

(8) This section does not prohibit an employer from refusing to employ or refusing to continue to employ a person for reasons of any prohibited ground of discrimination where the employee is:

... 

(9) The provisions of this section shall not be construed to prohibit distinctions in terms or conditions of employment where those distinctions are permitted by virtue of The Labour Standards Act or the regulations made pursuant to that Act.

...
2(1)(m.01) “prohibited ground” means:

(i) religion; (ii) creed; (iii) marital status; (iv) family status; (v) sex; (vi) sexual orientation; (vii) disability; (viii) age; (ix) colour; (x) ancestry; (xi) nationality; (xii) place of origin; (xiii) race or perceived race; and (xiv) receipt of public assistance…

It is important for any employer to take note of the onus of proof in employment discrimination cases as set out at section 39 of the Code. To paraphrase the provision, when it is established that the employer refused to employ or continue to employ or otherwise discriminated against a person, the onus is on the respondent employer to prove on a balance of probabilities that the refusal was not because of discrimination.

Section 31.3 of the Code outlines the broad range of remedies available to a Court on a contravention of the Code and section 31.4 allows for a $10,000 maximum award where a person has willfully and recklessly contravened the Code or where an injured person has suffered with respect to “feeling, dignity or self-respect as a result of the contravention”. When an employer is found to have violated section 16 or otherwise sanctioned an employee contrary to the Code (ss. 31.3 and 40), the Court may order compensation for lost wages, salary or remuneration and reinstatement.

Case Law on the Duty to Accommodate:
The duty to accommodate requires that employers accommodate employees to the point of undue hardship. Undue hardship is determined on a case-by-case basis with consideration given to the factors set out in the Code. If a standard or a rule is a bona fide occupational requirement (BFOR), changes to that standard or rule will create an undue hardship and the employer will not be liable for discrimination. Some hardship is implied in the duty to accommodate.

The Supreme Court of Canada in British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees’ Union, [1999] 3 S.C.R. 3 (“Meiorin”) set out the three step test for establishing a BFOR:
1. the employer adopted the standard for a purpose rationally connected to the performance of the job;

2. the employer adopted the standard in an honest and good faith belief that it was necessary to fulfilment of that legitimate work-related purpose; and

3. the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose.

It is not obvious, but the legal obligation to accommodate requires more than simply providing an accommodation to an employee. There is both a substantive and a procedural element to determining whether the standard is reasonably necessary and whether the employer can provide an accommodation. Prudent employers adopt a procedure for assessing an accommodation request and follow that procedure, in addition to offering a more accommodating standard when there is no undue hardship. Regardless of whether an appropriate case is made for an accommodation, the procedural aspect of the duty to accommodate remains and has to be addressed.

Although each case is assessed on its own facts, the existing case law provides some guidance for individuals involved in the assessment process. In *Meiorin*, Chief Justice McLachlin described the questions that may be asked in the context of the undue hardship analysis:

(a) Has the employer investigated alternative approaches that do not have a discriminatory effect such as individual testing against a more individually sensitive standard?

(b) If alternative standards were investigated and found to be capable of fulfilling the employer’s purpose, why were they not implemented?

(c) Is it necessary to have all employees meet the single standard for the employer to
accomplish its legitimate purpose or could standards reflective of group or individual differences and capabilities be established?

(d) Is there a way to do the job that is less discriminatory while still accomplishing the employer’s legitimate purpose?

(e) Is the standard properly designed to ensure that the desired qualification is met without placing an undue burden on those to whom the standard applies?

(f) Have other parties who are obliged to assist in the search for possible accommodation fulfilled their roles?

Meiorin, supra, at para. 65

Examples of factors that may be considered in assessing undue hardship include: financial cost, the terms of a collective agreement, workforce morale, interchangeability of the workforce and facilities, size of the business and safety.


If a standard is a bona fide occupational requirement, a change to that standard will constitute undue hardship. In Central Alberta Dairy Pool the Court clarified the proper approach to the bona fide occupational requirement, stating that,

…what is reasonable in these terms is a question of fact. If the employer fails to provide an explanation as to why individual accommodation cannot be accomplished without undue hardship, this will ordinarily result in a finding that the duty to accommodate has not been discharged and that the BFORQ has not been established.

Central Alberta Dairy Pool, supra, at para. 93
The Court’s statement is deceptively simple: in practice, the assessment of a BFOR is complicated by the uncertain contours of “undue hardship”. Although the cases have provided guidance to assess each individual case, there is no bright line neatly separating the “undue” situations from the situations involving so-called “due” hardship; and there is certainly no silver bullet solution for a particular case.

Deschamps J., writing for the Supreme Court, clarified the standard of undue hardship in *Hydro-Quebec v. Syndicat des employe-e-s des techniques professionnelles*, 2008 SCC 43 (“Hydro-Quebec”). The Court confirmed that, even when an employer has a duty to accommodate, the employee continues to have an obligation to provide work. The test is not, as it has often been described, that it is impossible for the employer to accommodate the employee or "total unfitness for work in the foreseeable future". Instead,

[i]f the characteristics of an illness are such that the proper operation of the business is hampered excessively or if an employee with such an illness remains unable to work for the reasonably foreseeable future even though the employer has tried to accommodate him or her, the employer will have satisfied the test.

*Hydro-Quebec, supra*, at para. 18

To add to the complexity of the assessment, the duty to accommodate is a multi-party endeavor, engaging the employer, the employee and the union where applicable. Any employment relationship is a two-way street, and in the case of a union, three. Not only does the employer have a duty to accommodate an employee; but an employee has a duty to assist and actively participate in the process of accommodation: *Central Okanagan School District No. 23 v. Renaud* [1992] 2 SCR 970 (“Central Okanagan”). The union, as a third party, is obliged to assist in the accommodation process where possible.

One of the fundamental duties of the employee is to inform the employer of the facts related to the allegation of discrimination, and in the case of a disability, to inform the employer of the disability to the extent necessary to facilitate an accommodation. The employee is not necessarily
obliged to provide the employer with a precise diagnosis. In addition to informing the employer, the employee is obliged to facilitate the search for an accommodation and the implementation of reasonable proposals. If the proposal falters because the employee has failed to take reasonable steps, the complaint of discrimination should be dismissed. The employee cannot expect perfection: the solution does not have to be ideal to engage the employee's obligation.

**Accommodating Mental Health Disabilities:**
As mentioned at the outset, the remainder of this paper will focus on mental health-related disabilities, one of the most pressing issues in the modern workplace. The examination of relevant case studies will demonstrate the complexity inherent in this area of accommodation law, revealing issues that the cases dealing with physical disabilities have not adequately contemplated or addressed.

The difficulty arises from the nature of the disability itself – mental disabilities can be difficult to detect and even more difficult to understand or seek to accommodate. The very nature of mental disabilities, together with the associated stigma, can make it difficult for the employee to inform the employer of the existence of a disability and to fulfill his or her duty to facilitate the accommodation process. As with any accommodation, the perfect solution remains elusive; but in the case of mental health disabilities the duty of the employee in facilitating a solution is increasingly murky.

**Case Studies in Mental Health Accommodation:**

In Saskatchewan, section 2(d.1) of the *Code* extends protection to mental disabilities. The section specifically includes in the definition of disability: an intellectual disability or impairment; a learning disability or a dysfunction in one or more of the processes involved in the comprehension or use of symbols or spoken language; or a mental disorder.
The following cases consist of a sampling of lower court and arbitral decisions, which serve as examples of the difficulties inherent in this area of accommodation law, as well as some of the remedies awarded.

Absenteeism:

While *Hydro-Quebec* clarified the law with respect to undue hardship, it did so in the context of a mental health accommodation, simultaneously providing some relief to employers dealing with chronic absenteeism. In *Hydro-Quebec*, the complainant suffered numerous physical and mental problems including tendinitis, bursitis, hypothyroidism, depression, as well as personality disorders. The complainant had a significant record of absences due to these problems, having missed 960 days of work in the last seven and a half years of her employment with Hydro-Quebec. The employer had made various accommodations for her challenges throughout her period of employment. Her relationships with her co-workers and supervisors were strained. At one point, the employer assigned the employee to a new position despite her position having been abolished and in spite of the union not consenting to the assignment. At the time that the employee was dismissed she had been absent from work over five months and had been advised by her physician not to return to work until the "work-related dispute is resolved".

*Hydro-Quebec, supra*, at paras. 1-4

The Supreme Court upheld the Arbitrator's decision dismissing the discrimination allegation, stating that he had not erred in law and there was no basis for interfering with his assessment of the facts. The Arbitrator had taken note of the expert opinion that no medication could treat the complainant's psychological condition, that there was a 90 percent chance of a depressive relapse, and that the "future would mirror the past". The arbitrator concluded that the employer would have to "periodically, on a recurring basis, provide the complainant with a new work environment, a new immediate supervisor and new co-workers to keep pace with the evolution of the ‘love–hate’ cycle of her relationships with supervisors and co-workers". Some of the factors that contributed to the illness were beyond the employer's control, and while the
employer had acted with patience and tolerance toward the complainant, the requirement to accommodate the employee's conditions would result in undue hardship.

_Hydro-Quebec, supra_, at paras. 5-6, 23

**Duty to Inform the Employer:**

In _Re: Cape Breton (Regional Municipality) and CUPE, Local 993 (B.(A.), 2014 NSSC 97_ ("Cape Breton"), the Nova Scotia Supreme Court upheld an Arbitrator's award of conditional reinstatement despite the fact that the employer lacked the requisite information to accommodate prior to terminating the employee. The issues, as set out by the Court, were whether the Arbitrator erred in allowing and relying on "post-termination" evidence and in finding that a duty of accommodation arose "post-termination".

The employee had been suffering from diagnosed depression and had been seeing a psychologist for her condition. She had not, however, provided the employer with information as to the nature and extent of her illness or its impact on her ability to work. Although her excessive absenteeism became an issue for the employer, she failed to attribute it to her depression. In one of their discussions about her absenteeism, the employer warned of potential termination and the employee promised to address the problem. The absences continued and the employee was terminated.

The Arbitrator found that the employer did not have sufficient information to make any further inquiries of the employee and had done all that it could do given the information at its disposal. The employer did not fail as such in its duty to accommodate. Despite this, the Arbitrator found that the employee did not fully appreciate her disability and therefore could not be faulted for not providing information in support of an accommodation. In essence, "the nature of the depression prevented the Grievor from recognizing her disability and asking for accommodation".

_Cape Breton, supra_, at paras. 78-80
In reviewing the Arbitrator's award, the Court cited author Ronald Snyder for his conclusion that subsequent event evidence may be relevant and admissible to establish:

(a) that the employer's assessment of the grievor's condition at the point of discharge was incorrect or incomplete;

(b) that the grievor's failure to cooperate in his or her accommodation was involuntary and an incident of his or her disability;

(c) that the accommodation at issue was inadequate or unreasonable in view of the grievor's condition.

*Cape Breton, supra*, at para. 61, citing Ronald Snyder, *Collective Agreement Arbitration in Canada*, 4th ed. (LexisNexis, 2009)

The Court further noted that, although *Central Okanagan* confirmed a duty for the employee in facilitating the accommodation process, the decision provided no direction "as to how that duty could be discharged...in the circumstances of a mental health disability".

*Cape Breton, supra*, at para. 75

The Court found that, in awarding reinstatement, the Arbitrator struck a balance between the protections of human rights law and the employer's need for recourse in cases of excessive absenteeism. The court found that the Arbitrator’s decision was reasonable and upheld the award of reinstatement based on the employer’s duty to accommodate.

*Duty to Inform the Employer (Saskatchewan):*

A similar case was reported in Saskatchewan recently in *Re: Cypress Health Region and SEIU-West (Paczkoski)*, 1117 C.L.A.S. 379 ("Cypress Health"). In this case, the employee was found
to be within the borderline range of general intellectual ability as assessed prior to her termination and to be suffering from an adjustment disorder according to an assessment undertaken after her termination. Her deficits negatively impacted her ability to cope with stressors and had other negative impacts on her everyday functioning, including her judgment as well as her planning and organizing ability. The employee was repeatedly absent from shifts that she had agreed to work, was seen in public on multiple occasions when taking sick days, and had a history of concocting stories to explain her absences.

The employee did not inform her employer that she had a disability or that her disability interfered with her ability to do her job. The panel acknowledged that, in the absence of this crucial information, the employer did not err in not accommodating the employee. The employer could not be "held liable for failing to accommodate the [employee] in such circumstances".

_Cypress Health, supra_, at para. 60

The panel found that the employee did suffer from a mental disability, and that some of the problems in her employment were linked to her diagnosis, including her failure to attend work on various occasions. In contrast, the employee's failure to be completely honest with her employer was not caused by her disability. The evidence did not establish that the employer should have known or inquired about the disability prior to the union raising the issue, which occurred only a few days before the termination. There was nothing in the employee’s workplace behavior that should have alerted her supervisors to a potential disability. She performed reasonably well in her employment, had attained a 98% average in her diploma program, and succeeded at taking the training courses that were mandatory for her employment.

The employer had shown significant compassion towards the employee and had likely done everything reasonable to assist the employee in fulfilling her job requirements, despite not being aware of her disability. Although the employer did not know that the employee had a disability, the panel found that the disability was now established and the employer therefore had a duty to accommodate the employee. The employer did not have just cause to terminate the employee and
the panel awarded reinstatement, along with conditions mandating that certain steps be taken to ensure the accommodation. The panel simultaneously affirmed the employer's right to terminate the employee for just cause.

In addition to reinstatement, the panel awarded compensation to the employee based on the fact that there were “earlier opportunities … to seek medical substantiation of…the disability”. Two panel members agreed to restrict the timeline covered by the compensation award owing to the multi-party nature of the duty while Member Huculak disagreed, stating that "to withhold financial compensation for the first 18 months following termination...is much too harsh". The Member noted the sophistication of the respondent employer, and suggested that the employer should have known better:

> When employees exhibit behaviors as described in this case that occur frequently, both at home and at work, last for several weeks, months and even years and become a general pattern of conduct, such behavior indicates the potential of significant mental health issues that an employer should recognize, investigate and most importantly, accommodate....

*Cypress Health, supra*, at p. 29

Both *Cape Breton* and *Cypress Health* suggest that the duty to inform and to facilitate an accommodation may be evolving to account for the nature of mental health-related disabilities. The values of human rights legislation demand a broad and purposive interpretation of the case law, and the dynamics of these emerging cases are chipping away at the formulaic categories of duties pertaining to employers and employees.

*Knowledge of a Disability; Transfer of a Term Employee:*

In *Hughes v. Human Resources and Social Development Canada*, 2014 FC 278 (“Hughes”), the Federal Court reviewed a tribunal's award on a finding of discrimination in a termination case. The case involved an employee with depression who was on a term position set to end on June 27, 2008. The employee had been processing claims for the Common Experience Payment
through the residential schools settlement and had been receiving calls from individuals relaying their traumatic life experiences. The phone calls exacerbated the employee's symptoms and when he started to experience a recurrence of depressive episodes he obtained a medical note requesting that he be exposed to fewer client calls. On the initial request for an accommodation, the employer changed his duties. In a second request for an accommodation, the employee sought a transfer to another position where there was a demand for new hires. The employer did not follow up the request for accommodation and instead sent a termination letter five weeks after the request, effective the date of the expiry of his term.

The Federal Court pointed out that it could not seriously be contended that the employer did not know of the disability; nor was it the case that an employer must continue to employ a worker beyond the expiry of the term of employment when the worker is disabled. The Court pointed out that there was a demand to hire employees in the position that was the subject of the transfer request and it was not a case of the tribunal requiring that a position be created for the employee. The Court upheld the compensation award of the tribunal, including the $10,000 awarded for willful and reckless misconduct, finding that the “Tribunal could certainly find that the discrimination was intentional". The special compensation was due to the fact that the employer failed to “have regard to the central question of accommodating the [employee] for [his] legitimate grounds of discrimination”.

To some, Hughes seemingly undercuts the fundamental principle that an employer is not required to create a new position for the employee requesting an accommodation. On the other hand, the case highlights the variability in human rights decisions depending on the specific facts of a given case. In Hughes, it worked to the employee’s advantage that he was a strong performer in his job and that there was significant demand for employees in the position to which he requested a transfer.

Both Member Huculak’s dissent in Cypress Health and the Federal Court’s decision to uphold the award of special compensation in Hughes represent important cautionary notes for employers. With the passage of time and greater recognition of mental health issues, decision
makers may have less tolerance for employers pleading ignorance of the reality of mental health challenges. This is problematic, in part, given that so much of mental health remains misunderstood by the very medical experts who practice in the field. The uncertainty in the law is a product of this reality. On this backdrop, decision makers should be cautious about imputing knowledge to the employer regarding the nature of mental health impacts in the workplace and the appropriate solutions.

Conclusion:
The foregoing consists of only a small sampling of lower court and arbitral decisions in the area of mental health accommodations. And yet, despite the sometimes black letter legal training that many of us have enjoyed, there is something to be said for the human factor in accommodation cases. The compassion of decision-makers does not fit neatly into legal categories or tests. Given the unpredictable nature of the human factor, and the large, liberal and purposive interpretation given to human rights law, the most apt watchword for human resources professionals responding to requests for mental health accommodations is “caution”.