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Accommodation is a Challenging Issue for Employers, Employees and Human Rights Commissions

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Case commented on: *Robinson v Edmonton (City)*, [2014 ABQB 29](#)

It is perhaps only logical that since physical disability is the most common ground and employment is the most common area for discrimination claims in Alberta, accommodation would be a recurring issue in this context (see Alberta Human Rights Commission, [Annual Report 2012-13](#)). Employers (as well as service providers, landlords, etc.) have a duty to accommodate employees who experience discrimination to the point of undue hardship.

Employers' duties are set out in an interpretive bulletin provided by the Alberta Human Rights Commission (see [here](#)). Once it is determined that the request for accommodation falls under the areas and grounds protected under the *Alberta Human Rights Act*, [RSA 2000 c A-25.5](#), some of the key responsibilities include the following (summarized from the AHRC bulletin reference above):

- Respecting the dignity of the person requesting the accommodation;
- Respecting the privacy of the person requesting the accommodation and abiding by applicable privacy legislation;
- Listening to and considering the needs of the person seeking accommodation and their suggestions for accommodation;
- Reviewing the medical or other information provided to support the request for accommodation;
- Being willing to take substantial and meaningful measures to accommodate the needs of the person seeking accommodation;
- Consulting a human resources officer or lawyer if more information is needed to assess the request;
- Being flexible and creative when considering and developing options;
- Discussing the options with the person seeking accommodation;
- Taking reasonable steps to accommodate the person to the point of undue hardship. If full accommodation is not possible without undue hardship, suggesting options that may partially meet the needs of the person seeking accommodation;
- Replying to the request for accommodation within a reasonable period of time;
- Making a formal written agreement with the person seeking accommodation and ensuring that the accommodation is given the chance to work;
- Providing details that justify any refusal to accommodate because it poses an undue hardship or because of a bona fide (good faith) occupational requirement; and

- Being willing to review and modify the accommodation agreement if circumstances or needs change and the agreement is no longer working.

The factors that will be considered when determining whether it is an undue hardship to accommodate an employee include the following (also summarized from the above bulletin):

- Financial costs are so substantial that they would affect productivity or efficiency of the employer;
- Size and resources of the employer and cost of modifying premises or equipment;
- Disruption of operations and inconvenience to carrying out essential business;
- Morale of other employees brought about by the accommodation (e.g., negative impact of increased duties);
- Substantial interference with rights of other individuals or groups;
- Ability of employer to relocate employees to other positions on a temporary or permanent basis; and
- Health and safety concerns.

Accommodation, however, is a two-way process. Employees (as well as service recipients, tenants, etc.) also have duties. Once the person seeking accommodation has determined that the concern falls under the areas and grounds protected by the *AHRA*, he or she has the following responsibilities (summarized from the bulletin):

- Informing the employer about the need for accommodation, preferably in writing – explain why accommodation is required, include supporting documents, provide medical information, suggest appropriate accommodation measures, and indicate how long accommodation is required;
- Allowing the employer a reasonable period of time to reply to the accommodation request;
- Listening to and considering any reasonable accommodation options proposed by the employer; employees have a duty to accept a reasonable accommodation, even if it is not one that the person prefers;
- If the employer indicates that there is an undue hardship, requesting the details of the factors that create the undue hardship and provide more information if that would be helpful;
- Consulting human resources consultant, union representative or lawyer for assistance in determining if the proposed options are reasonable;
- Once the accommodation is provided, making a formal written agreement;
- Cooperating to make the agreement work;
- Advising the employer when accommodation needs have changed and providing necessary medical documentation;
- Being willing to review and modify the accommodation agreement if the circumstances or needs have changed; and
- Telling the employer if the need for accommodation has ended.

Thus, communication and ongoing dialogue between employer and employee are very important to effective accommodation.

The recent decision of *Robinson* demonstrates some of the challenges faced by employers and employees in achieving effective accommodation. Susan Robinson complained that her employer, the City of Edmonton, failed to accommodate her disability, which interfered with her ability to perform her duties as an Edmonton Transit bus driver (2014 ABQB 29, para 1).

Ms. Robinson had an environmental disability, in which exposure to fumes, such as diesel fumes or perfumes, caused hives and other reactions. The treatment for these reactions involved the use of antihistamines and this caused drowsiness, which rendered it unsafe for Ms. Robinson to drive a bus (para

3). The City of Edmonton acknowledged that this was a disability and that Ms. Robinson could not work as a bus driver because of the disability.

From 1995 until 2009, Ms. Robinson was frequently absent from work and was on short-term disability at times. Sometimes, her husband, who was a bus driver, worked her shift. Her disability was accommodated in this way. In the fall of 2009, Ms. Robinson applied to the City's long-term disability insurer for long-term disability benefits. She was refused. The insurer had obtained information that she had the seniority to drive a LRT (Light Rail Transit), which would limit her exposure to fumes. Once the City knew about this possibility, it set out to consider the arrangements necessary to achieve it (paras 4 to 6).

Although she was advised by the disability management person to see her supervisor, after Ms. Robinson was denied long-term disability, she decided to resign (para 7). There was a conflict in the evidence as to whether Ms. Robinson was aware of the LRT option when she resigned. She admitted that she knew that the LRT option was available before she was denied long-term disability, but argued that once she was denied, she was not advised of the LRT option. She understood that she was being instructed to return to work as a bus driver (para 8). On the other hand, the City argued that Ms. Robinson was instructed to report to her supervisor in order to work out the details regarding training for the LRT option (para 9).

The Human Rights Tribunal held that it was most likely that Ms. Robinson had discussed the LRT option after she was denied long-term disability. This conclusion was consistent with her doctor's chart notes, the City's internal documentation and the wording she used in her human rights complaint. Ms. Robinson's testimony about all of this was unclear (para 10). Her supervisor had advised both Ms. Robinson and her husband that she could appeal the denial of long-term disability (paras 12-13). The Tribunal concluded that this was not a case of a denial of disability or a refusal to accommodate. The City had taken all reasonable steps to accommodate Ms. Robinson (para 16). She had preempted and prevented the City from fulfilling its duty to accommodate any further because she opted out of the process by resigning (para 17).

Ms. Robinson appealed the Tribunal's dismissal of her complaint to the Alberta Court of Queen's Bench. She argued that if the City intended to seriously facilitate a trial of the LRT option, it failed to communicate its intention to her, such that she reasonably concluded that she had no option but to resign (paras 19, 25). Ms. Robinson's counsel argued that the Tribunal had not applied the correct legal principles regarding the employer's duty to accommodate (para 18). Justice B.R. Burrows disagreed, and held that these arguments were actually challenges to the Tribunal's finding of facts. He concluded that, based on a standard of review of either reasonableness or correctness, the Tribunal's decision was not only reasonable, it was correct (para 25). He dismissed the appeal.

This case demonstrates the role of both parties in effective communication in the accommodation process. It also shows what can occur if the communication breaks down. It is likely with our aging population the issue of accommodation will continue to challenge employers, employees and Human Rights Tribunals.

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