



Working it Out: MS and Employment

Hosted by

BC & Yukon and Alberta & NWT Divisions

Wednesday February 24, 2016

5:00-6:30 pm (PST)





The MS Society gratefully acknowledges the educational grant received from Biogen Idec Canada, which makes possible the ***Working it out: MS & employment*** session. The MS Society does not approve, endorse or recommend any specific product or therapy but provides information to assist individuals in making their own decisions.

Identification of needs, determination of objectives, selection of content and speakers, educational methods and materials are the sole responsibility of MS Society staff and advisors.



MS Society of Canada

- Mission Statement: To be a leader in finding a cure for multiple sclerosis and enabling people affected by MS to enhance their quality of life.
- Employment is intrinsically linked with quality of life.



Panelists

Ricki Lambeck McConchie

Partner

McConchie and Company LLP

Therese Boullard

Workplace Respect and Human Rights Consultant

Boullard Consulting

Wade King

Advisor, Safe Disclosure & Human Rights

University of Alberta



RICKI LAMBECK MCCONCHIE



- employment lawyer and partner of McConchie and Company, where her focus is on designing and presenting comprehensive training and education programs on key workplace issues for public and private sector employers and trade unions.
- has practiced employment law since 1983
- involved with a variety of volunteer organizations
- is currently a member of the MS Society's Volunteer Legal Advocacy Program's Advisory committee, and a member of the Board of Directors.



THERESE BOULLARD



- human rights consultant based in Vancouver, BC.
- worked in the area of workplace human rights and the duty to accommodate for 20 years.
- worked as an investigator, mediator and educator for the BC Council of Human Rights and the BC Human Rights Commission.
- served as Director of the Northwest Territories Human Rights Commission.
- currently provides education and policy support for employers on their duty to accommodate disabilities in the workplace. Her clients include organizations based in British Columbia and Alberta.



WADE KING



- Currently the Safe Disclosure & Human Rights Advisor to the University of Alberta
- Past - President of the Canadian Association for the Prevention of Discrimination and Harassment in Higher Education (CAPDHHE)
- Advisory Board member of the Canadian Institute of Diversity & Inclusion.
- 13+ years of experience in the post-secondary sector; primarily in the areas of human rights, diversity & inclusion, community relations and safe disclosure.
- **was diagnosed with MS in 2012**



Life Lessons



Diagnosis & Change of World View

- My view out
- The outside view in





Life Lessons

Invisibility & Unpredictability

- Hard to *understand* the reality until you've *experienced* it
- Hard to *express* it when you've *experienced* it
- Because my symptoms can be hidden, I often do, but no one benefits
- Biases, mine and others, as to what disease and injury look like come into play





Life Lessons

Intersection

- MS does not stand alone in your life
- Other characteristics- gender, socio economics, race – come into play in all facets of addressing MS and addressing MS in others.





Life Lessons

My Privilege

- Education
- Race
- Gender
- Socio Economic
- Age of Diagnosis
- Type of Employee
- Type of Employment
- Access to Healthcare and Benefits
- Linguistic
- Healthy Relationship(s)



Life Lessons

My Challenges

- Fatigue
- Brain Fog
- Pain/Spasticity
- Vision Loss
- Numbness, tingling, itchiness
- Aversion to heat
- Hardwired AAA personality





I'll be back...

Have a dual role – Disclosure and Human Rights

- Both related to the Duty to Accommodate

I see the duty to accommodate in action (or not!) on a daily basis, and will discuss my professional experience in disclosure later on.

Next, a lawyer will talk us through the law surrounding accommodation ... very important!



Ricki Lambeck McConchie

Disability and the duty to
accommodate:

The legal basics





BC Human Rights Code & Alberta Human Rights Act

- Protect against discrimination in a variety of areas, such as:
 - Services or facilities customarily available to the public
 - Tenancy
 - Union and association membership
 - **Employment**
 - BC: section 13
 - AB: section 7



BC Human Rights Code – protected characteristics (s.13)

- race
- colour
- ancestry
- place of origin
- political belief
- religion
- marital status
- family status
- **physical or mental disability**
- sex
- sexual orientation
- age (19 or over)



Alberta Human Rights Act – protected characteristics (s.7)

- race
- religious beliefs
- colour
- gender
- gender identity
- gender expression
- **physical disability**
- **mental disability**
- age (18 or over)
- ancestry
- place of origin
- marital status
- source of income
- family status
- sexual orientation



Definitions

- Disability
- Duty to Accommodate
- Undue Hardship





What is a disability?

- Alberta Act contains definitions (see s.44)
 - “**physical disability**” means any degree of physical disability, infirmity, malformation or disfigurement that is caused by bodily injury, birth defect or illness and, without limiting the generality of the foregoing, includes epilepsy, paralysis, amputation, lack of physical co-ordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment, and physical reliance on a guide dog, service dog, wheelchair or other remedial appliance or device;
 - “**mental disability**” means any mental disorder, developmental disorder or learning disorder, regardless of the cause or duration of the disorder;



What is a disability?

- Disability is not defined in the B.C. legislation
- BC common law:
 - The concept of a physical disability, for human rights purposes, generally indicates a physiological state that is involuntary, has some degree of permanence, and impairs the person's ability, in some measure, to carry out the normal functions of life.
 - “Disability” can include a perceived disability



What is a disability?

	Yes	No
• Depression	<input checked="" type="checkbox"/>	<input type="checkbox"/>
• Drug dependency	<input checked="" type="checkbox"/>	<input type="checkbox"/>
• Influenza	<input type="checkbox"/>	<input checked="" type="checkbox"/>
• Colour blindness	<input checked="" type="checkbox"/>	<input type="checkbox"/>
• Difficulty sleeping	<input type="checkbox"/>	<input checked="" type="checkbox"/>
• Multiple Sclerosis	<input checked="" type="checkbox"/>	<input type="checkbox"/>



What is the duty of accommodation?

- The duty of accommodation is not defined in the B.C. or Alberta legislation
- It arises from the prohibition against discrimination
- It is rooted in the social value of equality of opportunity
- The essence of equality is to be treated according to one's own merit... True equality requires that differences be accommodated
- It provides all people with equal access to employment opportunities



What is the duty of accommodation?

“Accommodation means making changes to certain rules, standards, policies, workplace cultures and physical environments to ensure that they don't have a negative effect on a person because of the person's mental or physical disability...or any other protected ground.”

- Alberta Human Rights Commission Interpretive Bulletin



What is the objective of an accommodation ?

The employer must accommodate the employee in a way that, while not causing the employer undue hardship, will ensure that the employee can



Keep a job

Maintain dignity

Work



The employer must accommodate the employee in a way that, while not causing the employer undue hardship, will ensure that the employee can **[keep a job???**]

Sorry! The objective of the accommodation is not merely to ensure that the employee can keep a job.

Employees can expect to keep a job if there is work for them to do and they are capable of performing it.

Accommodation is not intended to replace these basic workplace truths.



Go back and try again



The employer must accommodate the employee in a way that, while not causing the employer undue hardship, will ensure that the employee can **[maintain dignity???)**

Sorry! The objective of the accommodation is not merely to ensure that the employee can maintain dignity.

Work is important to the dignity of an individual, and the law recognizes this. But that is not the objective of accommodation per se.



Go back and try again



The employer must accommodate the employee in a way that, while not causing the employer undue hardship, will ensure that the employee can **work.**



Right! The Supreme Court has recently emphasized that the duty to accommodate is “perfectly compatible with general labour law rules, including ... that employers must respect employees’ fundamental rights and ... that **employees must do their work.**”



Possible accommodations

- Modify job duties
- Modify tools or provide assistive devices
- Modify the physical environment
- Modify working hours
- Modify other working conditions
- Transfer to a different job
- Change policies or job requirements





Some further points on accommodation

- An accommodation may reduce the income earned by the employee (unless you are covered by a contract which provides otherwise).
 - If your hours are reduced, you will be paid accordingly
 - If you move to a different job, you will be paid the rate for that job
- A reduction in income may eventually reduce the amount you can claim under a LTD contract or CPP-D.



Further points on accommodation

- The duty to accommodate only applies when it is necessary; an employee who suffers no impairment from a disability does not require accommodation.
- Accommodations are not static – they may be reviewed and revised over time to reflect the current needs of the employee or the employer.
- Poor performance or misconduct unrelated to the disability will lead to the normal employment consequences.



Limitations on the duty to accommodate : Undue Hardship

- Financial costs
- Size and resources of employer
- Interchangeability of workforce
- Disruption of operations
- Interference with others' rights
- Effect on morale of other employees
- Health and safety concerns



Legal Remedies



- Human Rights complaint
 - In BC: file a complaint with the BC Human Rights Tribunal
 - In Alberta: Alberta Human Rights Commission
- If you are a member of a Union
 - File grievance
- If your workplace has an anti-discrimination policy
 - File a complaint under the policy



Limitation Periods



- Human Rights complaint
 - In BC: file within 6 month of the alleged contravention or, if continuing contravention, within 6 month of last instance. (s.22)
 - Time may be extended if in the public interest and no substantial prejudice will result to anyone because of delay.
 - In Alberta: complaint must be filed within 1 year after the alleged contravention (s.20 (2)(b))
- Grievance or Policy complaints
 - Depends on the terms of the Collective Agreement or Policy



Next up...

We will hear more about the duty to accommodate from a human rights consultant.



Therese Boullard

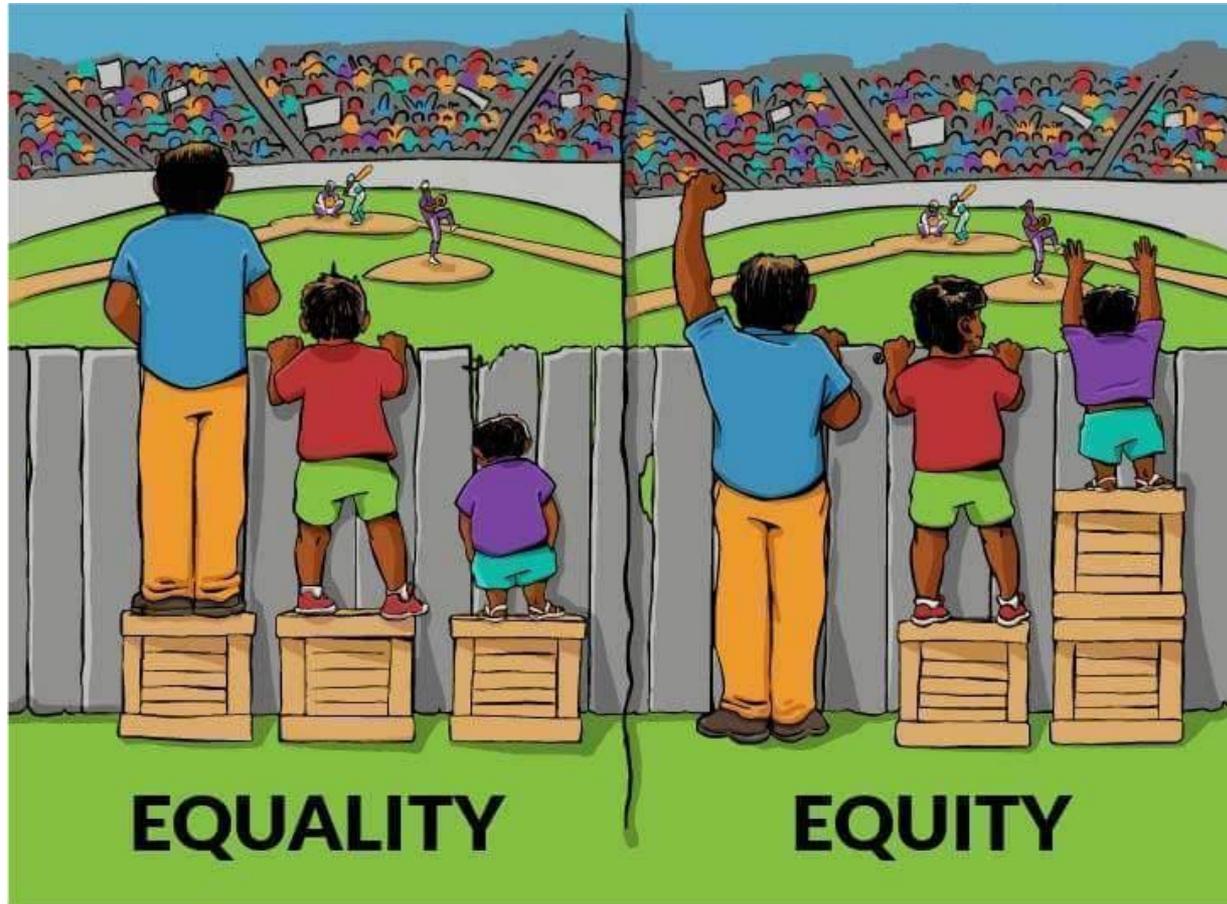
Duty to accommodate:
A shared responsibility





The Duty to Accommodate

The Duty to Accommodate recognizes that we must treat people differently in order to achieve equality of access.



EQUALITY

EQUITY



Steps in accommodation process:

1. Request Accommodation
2. Explore options for Accommodation
3. Decide/Implement Accommodation
4. Review and Revise Accommodation



Steps in accommodation process

1. Request Accommodation

2. Explore options for Accommodation

3. Decide/Implement Accommodation

4. Review and Revise Accommodation



Employee's Responsibilities

- Provide employer with information about your request, and your unique needs.
- Provide medical information to support your request.
- Do not expect immediate solutions or decisions.
- Keep records!



Employer's Responsibilities

- Ask only for pertinent information.
- Seek expert advice as needed.
- Respect confidentiality!
- Respond to the request as soon as possible.
- Be impartial and objective.



Verbicky v. Morningstar Golf Club



Verbicky has MS.

She worked for Morningstar for 10 years on a seasonal basis. She did not require accommodation.

During the last two seasons of work, Verbicky and her co-workers worked out of a basement office space.

The basement had experienced flooding and the carpet became mouldy. The carpet was removed.



Verbicky v. Morningstar Golf Club



Verbicky requested that she be moved out of the basement office space. Morningstar refused.

Verbicky quit her job and filed a human rights complaint.

Verbicky argued that Morningstar should have known that her MS compromised her immunity and it was unhealthy for her to work in a mouldy environment.



Verbicky v. Morningstar Golf Club



- Morningstar said that it had no idea that Verbicky needed accommodation. It knew that she had MS. The BC Human Rights Tribunal dismissed Verbicky's case because:
- She did not provide Morningstar with a medical reason and/or doctor's note at the time.
 - Morningstar could not be expected to know or to initiate the inquiry into accommodation.



Steps in accommodation process

1. Request Accommodation
- 2. Explore options for Accommodation**
3. Decide/Implement Accommodation
4. Review and Revise Accommodation



Employer's Responsibilities

- Involve you in the search for solutions.
- Identify their needs and be open to yours.
- Take all suggestions seriously.
- Act on info as early as reasonably possible.
- Consider your unique needs – do not blindly apply policy.



Employee's Responsibilities

- Participate in the search for solutions.
- Identify your needs and consider the needs of the employer and workplace.
- Be flexible and open in considering multiple options.
- Keep records!



MackKay v. Gateway Casinos



MackKay has MS. She worked for Gateway as a full-time dealer. Gateway has a benefits plan.

For years, she was accommodated with a shift of Mon, Tues, Thurs, Frid, from 10am to 6pm. This allowed her to not work busy weekends; gave her a day of rest during the week; and a regular eat/sleep schedule.

Gateway reorganized and changed the available shifts.



Mackay v. Gateway Casinos



MackKay was offered either a 10am-8pm shift (10 hours) or 12pm – 8pm. She explained that she couldn't work 10 hours and the 12-8pm interfered with her sleep/eating schedules. Gateway said she could not keep her previous shift.

She accepted to work the 12-8pm shift. Employees could opt to leave early when it was not busy. MackKay used this option frequently and it affected her income.



Mackay v. Gateway Casinos



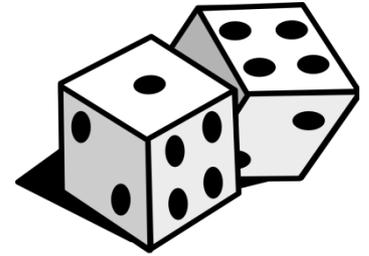
Mackay submitted a doctor's note confirming the following limitations: work daytime hours, no shifts longer than 8 hours, and a break mid-week for rest.

Gateway felt that the 12-8pm complied with these limitations. Mackay disagreed.

Gateway said that creating a unique shift (10am-6pm) just for her would be an undue hardship.



MackKay v. Gateway Casinos



Gateway offered her a 6-hour shift (12pm-6pm).

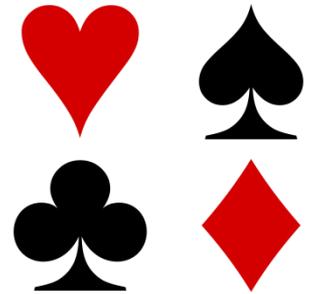
MackKay feared that it would result in losing her benefits.

Gateway explored continuing her benefits if she worked 24-hours a week. The insurer said no.

Gateway offered MacKay 24-hours/week as a dealer (12-6pm) + 4-hours/week data entry so that she would qualify for benefits.



Mackay v. Gateway Casinos



Mackay responded with a request that her hours be increased to 32/week.

Before Gateway could respond, Mackay said that she wanted to work only as a Dealer.

Mackay went on medical leave and filed a human rights complaint.

Gateway applied to have her complaint dismissed. The BC Human Rights Tribunal ordered a full hearing.



Steps in accommodation process

1. Request Accommodation
2. Explore options for Accommodation
- 3. Decide/Implement Accommodation**
4. Review and Revise Accommodation



Employer Responsibilities

- Choose option that balances needs of organization; and aims for full inclusion and dignity of employee.
- If accommodation in current job is not possible, consider other options within organization.
- If accommodation within organization is not possible, consider severance, early retirement, long term disability, or other transition options.



Employee Responsibilities

- Accept reasonable accommodation.
- Do not expect the “perfect” accommodation. Be prepared to compromise.
- Act with good faith in making accommodation work.
- Keep records!



Steps in accommodation process

1. Request Accommodation
2. Explore options for Accommodation
3. Decide/Implement Accommodation
- 4. Review and Revise Accommodation**



Review and Revise Accommodation

Over time, the accommodation may be adjusted to reflect following changes:

- circumstances in health of the employee
- workplace (reorganization, downsizing).
- economy (labour shortage, downturn in business)

When adjustments are needed, return to Step 1.



Employer Responsibilities

- Respond to any issues with accommodation as quickly as possible.
- Be objective in assessing whether accommodation is working for the organization.



Employee Responsibilities

- Work with good faith intention to make accommodation successful.
- Participate in follow up meetings.
- Be constructive in feedback on the effectiveness of the accommodation.
- Keep records!



Cassidy v. Emergency Health Services Comm.

Cassidy, a paramedic for the BC Ambulance Service (BCAS), lost sensation in his fingers due to MS.

Cassidy informed BCAS that he could no longer manually palpate pulses. His doctor confirmed he could carry out all other duties.

BCAS accommodated: Cassidy's co-workers took pulses, and Cassidy used technical aids.





Cassidy v. Emergency Health Services Comm.



A year into accommodation, a new supervisor removed Cassidy from active duty due to limitations. Over the next few months, Supervisor repeatedly requested new medical information and reports. Supervisor spoke to Cassidy's co-workers about any concerns they had with working with Cassidy. Cassidy asked to be returned to work as a Driver only. Supervisor refused.



Cassidy v. Emergency Health Services Comm.

The Tribunal decided that it was an occupational requirement for paramedics to manually palpate pulses. It was undue hardship to accommodate Cassidy as a paramedic.

However, BCAS could have accommodated Cassidy in a Driver position.

Awards: Injury to feelings and self-respect, \$22,500.00; lost wages \$35,000 + interest.





Links to cases

Verbicky v. Morningstar Golf Course

<http://bit.ly/1Lcvd8r>

Mackay v. Gateway Casinos

<http://bit.ly/1TP3AJP>

Cassidy v. Emergency Health Services

<http://bit.ly/20GAPnX>



And now...

We will hear again from Wade King, this time about his work as a professional in the area of disclosure.



Wade King

Duty to accommodate:
Disclosing to an Employer





Work Lessons

Disclosure is a big decision!

Differing “Philosophies” Regarding Disclosure

How to Request, Who to Request It Of

- Employer and employee roles
- Formal vs. Informal
 - No such thing as informal accommodation, but some processes can be less formal
- Deemed Knowledge/ Institutional Awareness:
 - Role of employer/service provider

The Subtle Art of Retaliation

Implications in different industries

- Bona fide requirements
- Workplace culture

Document, document, document !!!





Work Lessons

Good Practice

- Accommodation is a conversation
- Be aware of the policies/legislation in place
 - Be prepared to educate others
 - An unnecessary burden that might be necessary
- Initiate the process at the right place with the right person
- Seek appropriate supports (Union/HR etc.)
- Be clear on needs, reasonable in solutions
- Don't get overwhelmed by the entirety of the issue – focus on specific needs for the request at hand



Work Lessons

Common Missteps

- Doing nothing at all
- Not asking for advice/support
- Lack of documentation
- Inflexible approach
- Indirect or unclear requests
- Past conflicts being rolled into the present request
- Raising the issue when there's not proper time and space to address it
- Taking no for an answer
- Feeling undeserving or not important enough





For Further Information Please Contact



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THANK YOU