

Letter from the president

Did you know a member is within their rights to have a steward accompany them to meetings with supervisors to take notes? In fact, a written record is a simple and effective way to ensure an employee is treated fairly in the event of a disciplinary sanction. Learn about the relevance of interview notes for dispute resolution and much more in this issue of *The Steward*.



BCGEU shop stewards are the backbone of our union. To support you in representing the interests of your fellow members, this publication provides education on established labour law and keeps you up-to-date on the latest developments

in labour arbitrations, human rights rulings and any other legal decisions that could affect your workplace relations.

In this issue, we'll review the duty to accommodate, how it may arise through discrimination based on disability or family status, and the role of the union, the employee and the employer in reaching an accommodation. A short steward's guide to initiating the employer's duty to accommodate is also included on page 17.

We'll also look at the "contracting-in" of staff – a practice that is typically prohibited by a collective agreement, and inherently destructive to bargaining rights. You can help curb this practice through the grievance process.

This issue also discusses the employer's legal duty to protect members from harassment, not just in the workplace, but on the employer's social media platforms as well. Case law from Ontario demonstrates how adopting a social media policy can help protect workers.

Finally, learn about the employee's duty to mitigate lost wages in the event of an unjust termination to ensure the best outcome for a grievance.

Are there areas of labour law or workplace relations issues you would like to see addressed in the next issue? Have a suggestion for steward education? Don't hesitate to email us at steward@bcgeu.ca with your ideas.

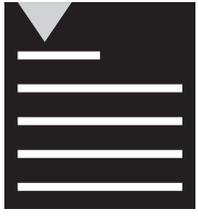
Also, don't forget to check out all of the resources for stewards, including back-issues of this publication, on the BCGEU member portal. Log into your account and find resources under *Tools for Stewards*.

I hope you enjoy the Winter 2018 issue of *The Steward*, and find this issue informative and useful in your work.

In solidarity,



Stephanie Smith
BCGEU president



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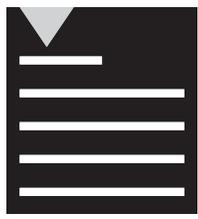
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Disciplinary interviews & the merits of scrivenery

BY KEN MOONEY

Staff Representative
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Paper trails make the world go 'round...
~ *Ballad of the Unknown Solicitor*

One of the most important and underrated functions a shop steward can perform while assisting an employee meeting with a supervisor is to keep meticulous notes.

On occasion, employees may find themselves invited to interviews with their supervisors. These meetings can be characterized as investigatory or fact-finding in nature but meetings with supervisors often involve ramifications of discipline. Article 10.8 of the Public Service Agreement provides an employee with the right to have his or her shop steward present at any discussion with supervisory personnel that the employee believes might be the basis for disciplinary action.

While interviews do not always result in discipline, a written record of what transpired is admissible at arbitration and can be invaluable in the event grievances are filed.

Privileged communications (defined below) are protected from disclosure at arbitration while interview notes are not. Interview notes have been considered "fact-finding endeavours which precede the grievance procedure" (*Canada Post Corporation and Canadian Union of Postal Workers (McNeil Grievance, CUPW 846-85-02040) [1999] C.L.A.D. No. 275*). As such, interview notes are potentially relevant to any dispute involving discipline where an interview was conducted (*British Columbia*

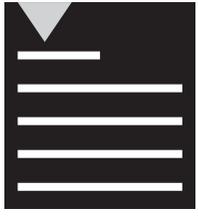
Women's Hospital and Health Care Society (Re) [1995] B.C.L.R.B.D. No. 346).

As a matter of practice, union advocates will request the production of the employer's interview notes when preparing for arbitration. Similarly, an employer's counsel will often request the production of the shop steward's interview notes. Since interview notes are not privileged, the documents can be produced if necessary by an order from an arbitrator. The test for such an order is the potential relevance of the documents (*British Columbia School District No. 65 (Cowichan) and Cowichan Teachers' Association [1996] B.C.C.A.A.A. No. 460*).

As an arbitration may arise months or even years following a specific meeting with a supervisor, the importance of a written record is clear. The union's advocates may be at the starting line in terms of understanding and assessing the facts surrounding a grievance and may not have had any prior involvement in the matters leading up to the discipline and/or discharge. With respect to grievances involving discipline and/or discharge, a written record of an employee's representations at an interview can assist the union's advocates in determining the best strategy in advancing a case on the employee's behalf. For example, an apology (or lack thereof) can in itself influence how a case will be presented at arbitration.

Interview notes can also assist in reaching settlements with employers. An absence of notes makes it difficult to assess what transpired during an interview and more specifically, whether an employer's notes and representations are accurate and complete.





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At hearing, interview notes can be used to refresh a witness's memory. Memories fade over time. It can be difficult to accurately recall everything that was said during an interview that may have occurred months prior. As noted by one arbitrator, perfect recollection of events after six months or more have passed is an unreasonable expectation (*Re Essex Terminal Railway and Teamsters Union, Local 880* (1985) 20 L.A.C. (3d) 1).

It is not uncommon for employees to question their ability to accurately recall details of events that transpired months prior as well. But at arbitration, after an employee has exhausted his or her memory, the notes can be put to the employee as a memory aid. It does not matter whether the employee actually recorded the notes – the employee may still speak to the notes if they record a matter in which he or she was directly involved (*Canada Post, supra*). If something has been missed, the interview notes can assist in reviving one's memory. Additionally, interview notes can be used as an aid if the shop steward or other witnesses should be called upon to testify at an arbitration.

In the event that the employer cannot recall the details of a disciplinary interview, meeting notes taken by a steward can fill this gap. For example, at arbitration employer witnesses may not clearly recall or may not have made a record of an employee's admission of error, contrition and/or apology during a disciplinary interview. A steward's notes can provide a record and demonstrate an employee's admissions and apology – thus the notes can be used to corroborate an employee's claims of such, thereby challenging any assertions to the contrary.

In grievances involving discipline, arbitrators will almost always look to an employee's demeanour at the time he or she is asked to respond to an employer's concerns regarding performance or workplace conduct.

If an interview leads to discipline, detailed notes assist the union in the grievance process, and enhance the likelihood of a positive outcome for the member.

This is particularly so in cases of discharge. When reviewing disciplinary sanctions, arbitrators will invariably assess (among other things) an employee's candor, contrition and willingness to apologize as factors that speak directly to rehabilitative potential. Interview notes can be very useful in helping to establish an employee's demeanour during an interview. If an interview leads to discipline, detailed notes assist the union in the grievance process, and enhance the likelihood of a positive outcome for the member.

Advocacy starts on the shop floor. A written record of what transpired during an interview is a simple yet effective way by which to ensure an employee is treated fairly in the review of a disciplinary sanction.

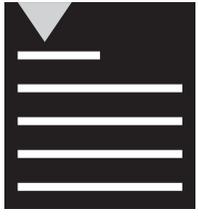
DETERMINING PRIVILEGED COMMUNICATION

The "Wigmore test," as noted in *Slavutych v. Baker* [1976] 1 S.C.R. 254, is often used as a framework to determine whether or not a communication is privileged.

It requires that:

1. The communications must originate in a confidence that they will not be disclosed;
2. The element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties;
3. The relation must be one which in the opinion of the community ought to be sedulously fostered; and



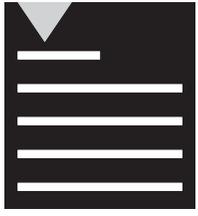


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4. The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.

Expressed generally and subject to facts, privileged documents will include communications between an employee and shop steward (*Canada Safeway Ltd. and Retail Clerks Union, Local 1518* (1986) 21 L.A.C. 3d 50), internal management correspondence (*British Columbia (Ministry of Transportation & Highways) and British Columbia Government and Service Employees' Union, Local 1103* (1991) 13 L.A.C. (4th) 190), communications between solicitors and their clients (*Ontario (Ministry of Correctional Services) and Ontario Public Service Employees' Union (Knight)* (1994) 39 L.A.C. (4th) 205) or communications made while preparing for grievance and/or arbitrations and grievance settlement discussions (*Re Ottawa-Carleton (Regional Municipality) and C.U.P.E., Loc. 503* (1984), 14 L.A.C. (3d) 445).





The employer's duty to protect employees from online harassment

BY DORA TSAO

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With social media usage an accepted mainstream practice, issues around online behaviour in relation to employment are increasingly prevalent. Most of the previous labour cases concerning social media use involve disciplinary grievances for employees expressing inappropriate content online. Employers have disciplined and terminated employees for expressing dissatisfaction towards their employers and inappropriate comments about co-workers online. This article examines the other side of online harassment in the workplace – what are the employer's obligations when employees experience harassment on the employer's social media platforms?

It is a well-established principle that employers have a legal duty to take all reasonable steps to prevent harassment of employees in the workplace, even by third parties such as customers or other members of the public. This legal duty is mandated by occupational health and safety statutes and oftentimes incorporated into collective agreements. A recent Ontario arbitration decision has established that this legal duty for employers includes protecting employees from harassment received through the employer's social media platforms.

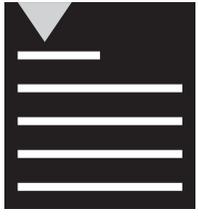
The decision, *Toronto Transit Commission v ATU, Local 113 (Use of Social Media)*, [2016] OLAA No 267, 270 LAC (4th) 341, effectively expanded the definition of the "workplace" to include online forums in which employers solicit comments and feedback from their customers and the public.

In *Toronto Transit Commission*, the union filed a policy grievance requesting the employer shut down its Twitter account @TTChelps. While the employer effectively used the account to receive and respond to customer complaints and inquiries, the account also received a high number of offensive tweets that directed profanity, derogatory language and threats of violence at Toronto Transit Commission (TTC) employees. Some of the offensive tweets contained photographs and video capturing TTC employees, and some tweets identified the badge or bus number of the employee concerned.

In response to offensive tweets directed to @TTChelps, the employer's policy was to send the offending Twitter user a response indicating that it did not condone offensive comments, and ask them to refrain from such conduct. They also advised the user on how to appropriately file a complaint regarding TTC services or employees. When the union initially raised their concern with the employer about online harassment, the employer advised that the company could not stop the public from making comments about TTC on Twitter.

The arbitrator upheld the union's grievance in part, ruling that the employer's use of @TTChelps was in violation of





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its duty to provide a workplace free from harassment. The arbitrator declined to order the employer to shut down the account in recognition that social media constitutes a necessary and beneficial communication strategy in response to consumer demand, and is an effective platform for citizen engagement. Instead, the arbitrator ordered the employer to work with the union to develop an appropriate social media policy that included a requirement to ban users who posted offensive tweets and content that invaded the privacy of TTC employees.

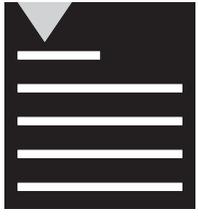
The arbitrator held it was insufficient for the employer to merely communicate to the public that it does not condone abusive, profane, derogatory or offensive comments. The arbitrator held the employer should request offending Twitter users immediately delete offensive tweets, and advise them that if they do not do so, they will be blocked. If the offending user does not delete the offensive tweet, then the employer should proceed to block the user and when appropriate, the employer should seek the assistance of Twitter in deleting offensive tweets.

On the issue of privacy, the arbitrator held that the TTC should not allow Twitter users to post photographs or videos of employees. The arbitrator found that tweets that included an employee's badge or bus number were not an invasion of privacy, holding that TTC employees do not have a reasonable expectation of privacy regarding this information when working in the public sphere.

In conclusion, the employer's workplace includes online communication platforms operated by the employer, and thus the employer has an obligation to protect employees from harassment received from third parties on the employer's social media platforms. If an employer chooses to utilize social media to engage with their customers and the public, the employer should adopt and implement a comprehensive social media policy that includes proactive measures to ban users who harass employees, or post materials that invade the privacy of employees.

The employer has an obligation to protect employees from harassment received from third parties on the employer's social media platforms.





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Challenging “Contracting-in” of bargaining unit work

BY EMILY LUTHER
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WHAT IS “CONTRACTING-IN”?

Contracting-in occurs when an employer uses employees of a contractor to do the same work as bargaining unit employees at the same worksite, such that the work done by the two groups of workers is virtually indistinguishable.

WHAT IS CONTRACTING-OUT?

In contracting-out, the employer abdicates control over an identifiable bundle of work to an independent contractor. A valid contracting-out should involve either different work than that being done by bargaining unit members, or a different worksite, or both.

In contracting-out, control of the work moves to the contractor, whereas with contracting-in, the work remains under the control and direction of the employer.

For example, imagine the employer owns and operates two grocery stores at different locations. At each location the employer employs cashiers and delivery drivers, all of whom are in the bargaining unit. If the employer contracts with an independent contractor to operate one of the stores, that would likely be seen as valid contracting-out. If the employer contracts with an independent contractor to deliver its groceries, but keeps the cashiers in-house, this would also likely be contracting-out.

On the other hand, if the employer contracts with a personnel agency to provide cashiers and/or delivery drivers to fill gaps in its schedule, and these cashiers and delivery drivers work alongside the employer’s employees, this would be considered contracting-in.

WHEN ARE CONTRACTING-OUT AND CONTRACTING-IN PERMITTED?

Contracting-out is assumed to be permitted, subject to the terms of the collective agreement. Some collective agreements prohibit contracting-out, while others allow it only if it does not result in layoffs. Some collective agreements do not mention it, in which case it is permissible.

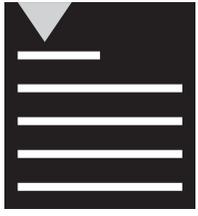
Contracting-in is the opposite, and is always prohibited unless explicitly allowed by a collective agreement (which is unlikely). A prohibition on contracting-in can be considered an implied term in every collective agreement, based on the scope clause and the classification and posting provisions.

Contracting-in is considered by arbitrators to be “inherently destructive of the bargaining relationship.” See for example *St. Jude’s Anglican Home*, 53 LAC (4th) 111 (Larson); *Tofino General Hospital Society*, [1991] BCCAAA No 390 (Dorsey).

A good explanation for the destructive nature of contracting-in is found in *Bristol-Myers Pharmaceutical Group, Division of Bristol-Myers Canada Inc.*, 15 LAC 4th 210 (Shime):

When a company and union negotiate a collective agreement, they negotiate about the work. Usually, as in this case, there are different job classifications receiving different rates of pay. The substratum upon which those classifications are formed is the work of the enterprise.





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To bring persons into a plant or work location to perform the same work as bargaining unit employees destroys or erodes the foundation upon which the collective agreement is negotiated.

Therefore, if an employer is engaging in what appears to be contracting-in, a grievance need not be tied to a specific prohibition in the collective agreement. The grievance can say something along the lines of “the employer is engaging in impermissible contracting-in” and it can cite the scope clause and the classification and posting provisions of the collective agreement.

ADDITIONAL CONSIDERATIONS IN THE HEALTH SECTOR

In a recent decision, *Health Employers Assn. of British Columbia v. Community Bargaining Association*, [2017] BCCAAA No 57, arbitrator Julie Nichols held that the test for whether contracting-in had occurred in the health sector (meaning all unionized employers who are members of HEABC) was modified by section 6(3) of the *Health and Social Services Delivery Improvement Act* (“HSSDIA”). Section 6(3) prohibits arbitrators from declaring employees of a contractor to be employees of a health sector employer unless the employer *intended* for those employees to be fully integrated and under its direct supervision and control.

Nichols found that the employer, Vancouver Coastal Health Authority, was not contracting-in, because the contracts between the employer and the agencies contained a clause that stated that the contracts were not *intended* to fully integrate the agency employees or place them under the direct supervision and control of the employer.

The BCGEU strongly disagrees with this decision. The union is in the process of appealing it to the Labour Relations Board on the grounds that it incorrectly

interprets the HSSDIA and is contrary to the values underlying the *Canadian Charter of Rights and Freedoms* – most notably freedom of association, which protects the process of collective bargaining.

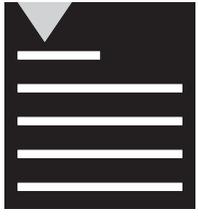
In the meantime, however, the Nichols decision means that it will be more challenging for unions in the Health Sector to prove contracting-in. Health sector employers will also have more leeway to erode the bargaining unit by using agency employees instead of offering hours to bargaining unit employees and/or posting additional positions.

CONCLUSION

Contracting-in, where employers contract with a contractor to provide employees who work alongside bargaining unit employees, doing the same work as those employees and under the control and direction of the employer, is an inherently destructive practice. It should generally be grieved when it is happening, regardless of whether or not the collective agreement contains an explicit prohibition.

The legal requirements of proving contracting-in may differ depending on the sector the employer is in; however, every effort should be made to curb this practice when we can so as to avoid the erosion of bargaining rights.





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Protecting our bargaining unit at work: what are exclusions and why do they matter?

BY JEN ARNOLD
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BCGEU Advocacy Department

Employers sometimes create positions that are exempt or excluded from the bargaining unit. It is important to know why certain positions are excluded, the process for excluding them and why knowing about exclusions is important to preserving your bargaining unit rights.

WHAT IS AN EXCLUSION?

An “exclusion” is when the employer creates a new position that does not become part of the bargaining unit.

The overarching reason for excluding positions from the bargaining unit is to avoid conflict of interest, and to aid collective bargaining between the parties by preserving an “arm’s length” relationship. For example, if a BCGEU member is asked to make a decision about firing another BCGEU member within the same bargaining unit, that individual’s competing loyalties as a union member and as management may be in conflict. An arm’s length relationship through exclusion creates “undivided loyalties” with the objective of avoiding a conflict of interest.

WHAT IS THE CRITERIA FOR EXCLUDING A POSITION?

New positions are generally excluded under one of the following broad categories:

1. The position exercises managerial authority.
2. The position is required to regularly work in a

confidential capacity related to labour relations and personnel issues.

3. The position is part of the management team.

Managerial authority

Positions are excluded from the bargaining unit when they are making effective determinations on discipline and discharge, providing labour relations input, and making effective determinations on hiring, promotion and demotion.

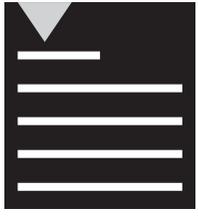
While some cases have found this authority must be *bona fide* and not a “mere sprinkling” of powers (*Vancouver General Hospital and BCNU, Re*, [1993] B.C.L.R.B.D. No 104), the case law also confirms that there is no minimum level of discipline and that labour relations or human resources advice does not detract from the exercise of managerial authority (*Cowichan Home Support Society v. U.F.C.W., Local 1518*, [1997] B.C.L.R.B.D. No. 28). Ultimately, it is a potential and not an actual conflict of interest that leads a position to be excluded from the bargaining unit (*Vancouver General Hospital and BCNU, Re*, [1993] B.C.L.R.B.D. No 104).

Confidential capacity

Positions also are excluded from the bargaining unit when they are employed in a confidential capacity in matters relating to labour relations or personnel matters.

This does not mean all positions that handle confidential information will be excluded.





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Many collective agreements will provide a process for dealing with exclusion requests from the employer. This language is often located under “bargaining unit defined.”

Only positions that handle confidential information that would put them in a conflict of interest with their union membership, such as information about dismissals or about collective bargaining, would be excluded. For exclusion on this basis, the handling of confidential information must be a “substantial and regular” part of a person’s job, not just a matter of “occasional and accidental involvement.” If it can be avoided, an employer must organize its workplace so that employees are not occasionally in a conflict of interest situation that requires the exclusion of their position from the union and collective bargaining, (*Burnaby (District) and CUPE, Local 23, Re*, [1974] 1 Can. L.R.B.R. 1)).

Management team and confidential planning

The final basis on which positions are excluded from the bargaining unit is when the position is part of the management team and their “community of interest” lies with management, and not the union (*Vancouver General Hospital*). While the management team basis is understood in the case law to be a relatively rare justification for restricting bargaining unit rights, it is far too commonly relied on by employers in justifying the exclusion of certain positions from the bargaining unit.

Under the *Public Service Labour Relations Act*, positions can also be excluded on the basis of their role in confidential planning and policy-making, but only where the work goes to the root of the operations (*British Columbia v. B.C.G.E.U.*, [2012] B.C.W.L.D. 9365, 111 C.L.A.S. 39).

WHO OVERSEES THE DECISION TO EXCLUDE A POSITION?

When the employer asks for a position to be excluded from the bargaining unit, there are three authorities that guide the process and the outcome:

1. The labour relations legislation (definition of “employee”).
2. The collective agreement.
3. Arbitration or Labour Board decisions on exclusions.

The *Labour Relations Code* defines an “employee” as:

A person employed by an employer, and includes a dependent contractor, but does not include a person who, in the board’s opinion, (a) performs the functions of a manager or superintendent, or (b) is employed in a confidential capacity in matters relating to labour relations or personnel.

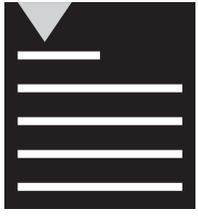
Positions that perform the duties in (a) and (b) will be excluded from the bargaining unit.

Many collective agreements will provide a process for dealing with exclusion requests from the employer. This language is often located under “bargaining unit defined.” Each process will be slightly different, but typically have common elements, such as the employer providing notice to the union and the employer seeking agreement from the union to exclude positions. In most cases, the employer is restricted from excluding positions from the bargaining unit without first consulting with and getting agreement from the union.

WHAT IS THE IMPORTANCE OF HAVING AN EXCLUSIONS PROCESS?

Having an exclusions process assists the union to monitor what new excluded positions the employer is creating, ensures some consistency in exclusion decisions, and





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allows the union to keep a record of its decisions so it can refer to them later for reference. For example, if the employer says they excluded a position in 2012, it is helpful to be able to review our records and see if the union agreed and on what basis.

WHAT TO DO IF THE EMPLOYER CREATES A NEW EXCLUDED POSITION

If you learn a new position has been excluded:

1. Ask the employer if they have gone through the exclusions process in the collective agreement and if they have the union's agreement.
2. Bring the exclusion to the attention of your local staff representative who will contact the advocacy staff representative assigned to exclusions.

The advocacy staff representative will follow the process outlined in the collective agreement, determine if it meets the test for exclusion, and take the appropriate next steps.

Sometimes the union may offer a temporary exclusion for a position to be filled and performed to determine if excluded work is in fact involved. This is where we need your help as a shop steward to help make a determination to support a permanent exclusion.

If you discover a position has already been posted and filled as excluded without the union's agreement, you should file a grievance under the exclusion language so the union can collect dues for the period the position was excluded without the union's agreement, and train the employer to follow the process they agreed to in bargaining.

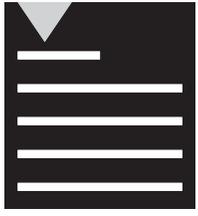
In some agreements, there is a process for reviewing previously agreed to exclusions and in other agreements there is not. This means excluded positions cannot always be revisited after they are agreed to, which makes

it even more important to get the decision right the first time around.

CONCLUSION

Access to collective bargaining is a right we are all entitled to except in very specific circumstances. Together we can hold employers accountable to the exclusion processes in the collective agreement they have agreed to, and to only exclude positions that meet the criteria outlined in the *Labour Relations Code*.





Discrimination in the workplace and the duty to accommodate

BY SATKARAN SANDHU

Co-op Student

BCGEU Advocacy Department

The duty to accommodate requires employers, employees and unions to work together to alleviate workplace conditions that cause adverse impacts on employees by accommodating the hardship faced. When workplace conditions give rise to discrimination based on disability, family status, or any other protected characteristic, the duty to accommodate arises.

DISCRIMINATION

Anti-discrimination laws work to ensure that all employees have an equal opportunity to participate in the workplace. The *Canada Human Rights Act* and the *B.C. Human Rights Code* both protect workers from discrimination on the basis of race, religion, marital status, family status, physical or mental disability, sex, sexual orientation, age, and other enumerated characteristics. The only limitation to this protection is that it does not apply to discriminatory conduct that is related to a *bona fide* occupational requirement (BFOR) (discussed more below).

Discrimination in the workplace may arise in many forms but generally occurs when an employee experiences adverse treatment, compared to others, due to their characteristics. The courts have identified a three-part test for discrimination:

1. The person had or was *perceived* to have a disability, or to be part of a certain group;
2. The person received adverse treatment; and
3. The disability or group characteristic was a factor in the adverse treatment.

Discrimination based on disability and family status are two of the most common types of discrimination experienced by employees.

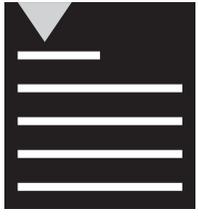
Disability

The Supreme Court of Canada (SCC) has taken a broad approach to what constitutes a disability. Generally, a disability is medical condition or illness that affects your movements, activities or senses. Disabilities can be physical or mental, visible or invisible, continuous or episodic. Examples include vision or hearing loss, quadriplegia, chronic health conditions such as arthritis, learning disabilities and many others. While a condition does not need to be permanent for it to be considered a disability, the SCC has also held that normal ailments are not encompassed by the term – the condition in question needs to have some degree of ongoing impact on the ability to perform one's job. Discrimination based on the mere perception that a person has a disability is prohibited, and an employee is not required to show that discrimination was based on an actual disability.

Family status

Many people have to balance workplace demands against responsibilities to their families. Human rights laws recognize that many people have caregiving responsibilities over dependent children, parents or other family members that may require accommodation, and workers cannot be discriminated against on this basis. With that said, employees must attempt to resolve their own caregiving obligations before the duty





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to accommodate is triggered. Discrimination based on family status can also occur when an employee experiences adverse treatment because of pregnancy, or related to parental leave.

THE EMPLOYEE AND UNION'S ROLE

Bringing the matter forward

Significantly, many tribunals have held that the onus is on the employee and/or their union to take the first step to establish a *prima facie* case of discrimination before the employer's duty to accommodate arises. In other words, employees have the duty to take immediate action against discrimination. Otherwise they may risk losing protection under the duty to accommodate. Notwithstanding an employee's responsibility to bring requests to their employer, in some instances arbitrators have decided that an employer's duty to accommodate can be triggered in the absence of notice from the employee or union. Specifically, the duty may arise where the employer has had constructive knowledge of discrimination faced by the employee. Overall, the golden rule is that as soon as an employee informs a steward that they are having difficulty performing their job due to a disability or discrimination on other protected grounds, it should be brought to the attention of the employer.

Providing the appropriate information

Balancing the employer's need for relevant information in evaluating accommodation options and the employee's desire for privacy is also a very important factor in accommodation cases. This concern is especially important in cases where a disability or medical issues are at the heart of the matter. Employees must provide stewards and employers with the necessary information required to determine the nature and extent of medical restrictions so that the appropriate accommodations can be explored. Determining what information is necessary is a case-by-case exercise.

In a similar vein, the union and employee must actively work together to find possible accommodations with the employer. The union has expertise in finding accommodations, and the employee suffering the discrimination is best able to identify how barriers can be removed.

Compromising

Both the union and employee are expected to compromise with the employer in terms of the type of accommodation offered.

The SCC in *Okanagan School District No. 23 v Renaud* (1992) 95 DLR (4th) 577 held that a union may have to accept disruption of some parts of a collective agreement where it is necessary for accommodation to be reached. But, it also stated that a union is usually justified in refusing accommodation where there is significant interference in the collective rights of the members. Overall, a union can be held liable for failing to discharge its duty to accommodate.

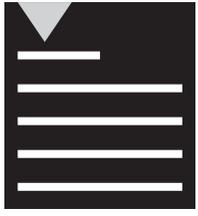
In terms of employees, the case law has clearly established that employees cannot expect "perfect" accommodation, and must accept reasonable offers of accommodation. As a steward, you play an important role in helping employees determine whether offers of accommodation are in fact reasonable.

THE EMPLOYER'S ROLE

As soon as an employer becomes aware of discrimination that inhibits an employee's ability to perform their work, they must conduct an inquiry into accommodation. The Ontario Grievance Settlement Board succinctly broke down the employer's role into four steps in *Ontario (Human Rights Commission) and O.P.S.E.U.* (Kerna), [2005] O.G.S.BA No. 30 (QL).

First, the employer must consider whether the employee can perform the job as it exists. If not, the employer has





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to determine whether the existing job can be modified to meet the employee's needs. For example lighter duties, a shift in working hours or installation of software programs may help accommodate the employee. If the existing position is still not suitable, the employer must determine if alternate positions may be suitable to the employee's circumstances. The last option would be to determine whether alternative positions could be modified to meet the needs of the employee. Importantly, an employer does not have to alter the essential duties and responsibilities at the core of the job in order for them to meet their obligation to accommodate.

Undue hardship

The duty to accommodate is not unfettered – employers only have to take steps to accommodate the circumstances of their employees to the point of undue hardship. This was discussed in the seminal case, *British Columbia (Public Service Employee Relations Commission) v. BCGEU (Meiorin)* (1999), 176 DLR (4th) 1 (“Meorin”). Where a workplace rule, standard, policy or other requirement is considered a BFOR, an employer may be deemed exempt from the duty to accommodate on the basis that it would cause undue hardship. As stated in *Meorin*, the employer must establish that the rule is in fact a BFOR by meeting the following three-step test:

1. The standard was adopted for a purpose rationally connected to the performance of the job;
2. The standard was adopted with an honest and good-faith belief that it was necessary to the fulfilment of that legitimate work-related purpose; and
3. The standard is reasonably necessary to the accomplishment of the purpose. To show that the standard is reasonably necessary, the employer must prove that it is impossible to accommodate individual employees sharing the characteristics of the complainant without undue hardship.

When is undue hardship established under the third step?

The SCC in *Hydro-Quebec v. Syndicat des employe-e-s de techniques professionnelles et de bureau d'Hydro-Quebec, section locale 2000* (2008), 294 DLR (4th) 407 clarified this point holding that there is no single definition of undue hardship – whether the steps needed to pursue accommodation amount to undue hardship is determined on a case-by-case basis. Generally, the test of undue hardship is a high one and an employer must face extreme and realistic difficulty in implementing the accommodation before it applies.

Factors to consider:

The SCC in *Central Alberta Dairy Pool v. Alberta (Human Rights Commission)* (1990), 72 D.L.R. (4th) 417 provided a non-exhaustive list of factors that are relevant to the consideration of undue hardship:

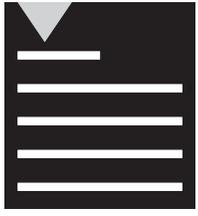
- financial costs
- disruption of a collective agreement
- problems of morale of other employees
- size of employer's operation
- interchangeability of workforce and facilities
- safety

Again, whether the impact of the proposed accommodation based on one of these factors amounts to undue hardship depends on the particular circumstances of the case. For example, switching an employee's working hours may be viable for a larger company, but may put the business of a smaller company at risk.

CONCLUSION

Overall, employees experiencing discrimination in the workplace can face tremendous hardship and all relevant parties should treat the process of accommodation seriously and with due diligence.





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Working with members to initiate the duty to accommodate

ELISABETH FINNEY

Staff Representative
BCGEU Advocacy Department

A member approaches you and tells you that they have a medical issue that is interfering with their ability to do their work. They are worried they can't perform the duties of their job anymore and are even more worried about how to tell their manager, or if they even should. What should you do?

Below is a brief guide to initiating the employer's duty to accommodate.

ASK THE MEMBER TO SHARE MORE INFORMATION WITH YOU

The first thing to figure out is what kind of medical issue the member is dealing with. A medical issue that may resolve with some time off work would be handled differently than an on-going medical issue that impacts the member's physical or mental functioning. Ask the member to describe the issue to you in more detail to determine which situation you are dealing with. Encourage the member to be as open with you as possible about their situation. The member is not obligated to share their diagnosis with you, but you will certainly be a more effective advocate for them if you know all the details.

EXPLAIN THE EMPLOYER'S LEGAL DUTY TO ACCOMMODATE

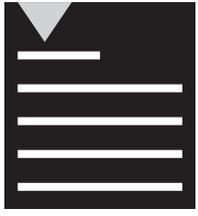
Briefly outline the employer's duty to accommodate employees who have medical issues. Highlight that at

its core, the duty to accommodate requires the employer to take all reasonable steps, short of undue hardship, to ensure that the member can continue to work.¹ This can include allowing the member to take sick time to recover, providing the member with voice recognition software or other special tools to allow them to continue to perform their job duties, altering the member's job duties if they are medically unable to perform them and even in some cases, providing the member with a different job. What the duty to accommodate will look like in each case is different. Every person seeking an accommodation has individual needs and they are entitled to an individualized assessment.² It is important to alert the member to the fact that the employer's obligation is to provide a reasonable accommodation, not a perfect accommodation.³

EXPLAIN THAT THE MEMBER ALSO HAS RESPONSIBILITIES IN THE DUTY TO ACCOMMODATE PROCESS

The member must also understand that they also have obligations in the duty to accommodate process and there are two essential obligations. First, the member must advise the employer that they have a medical condition that requires accommodation, and provide medical documentation that supports the accommodation request.⁴ Second, the member must participate in the accommodation process.⁵ What this will entail will depend on the circumstances, but may include providing additional medical information to support the accommodation, attending meetings to review accommodation options, or trying out various





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accommodation options to see if they are workable. The member may also suggest accommodation options, but is not responsible for finding an accommodation solution.

DETERMINE WHAT KIND OF MEDICAL DOCUMENTATION IS NECESSARY TO SUPPORT THE ACCOMMODATION

The member will need to provide the employer with medical documentation that states the date on which the physician last saw the member, the nature of the illness, the nature of the member’s medical restrictions and limitations, whether the member is following a recommended treatment plan and the prognosis. In general, it is not necessary to provide a diagnosis, particularly when the member is providing a medical note to initiate the duty to accommodate process.⁶ However, as the duty to accommodate process progresses, it may become necessary for the member to disclose more information, such as the diagnosis. Consult with your BCGEU area representative should this issue arise.

As for who should write the medical note, it is always best to have a treating specialist write it if there is one. Ensure that the physician knows that the medical note must be as objective as possible. The physician should avoid any mention of the member’s personal circumstances or preferences unless the personal facts are relevant to the member’s medical restrictions and limitations. The employer will likely be suspicious of the objectivity of a medical note that discusses the member’s financial situation or work hour preferences, and this could cause difficulties in the accommodation process.

ARRANGE A MEETING WITH THE EMPLOYER TO DISCUSS THE ACCOMMODATION REQUEST

Once the member has collected the necessary medical information, a meeting with the member’s supervisor/ manager to initiate the accommodation process should be arranged. Ensure that the member asks for a steward’s

presence at the meeting. Recently, the British Columbia Court of Appeal found that a union had no right under the collective agreement or the *Labour Code* to participate in the accommodation process.⁷ However if the member specifically asks for union representation, the union should be involved. To avoid confusion, ask the member to request a meeting by email, specifically asking that you attend as their steward. This way the request for union participation in the accommodation process is in writing, and clear from the start.

If the member is in need of immediate accommodation, ensure that arrangements are made at the initial meeting with the supervisor/manager.

Once you meet with the member’s supervisor/manager to initiate the accommodation process, the employer will need some time to review the request and the medical documentation. Remain available to the member for support as they will likely be under a lot of stress throughout the accommodation process.

How the accommodation process unfolds from the initial meeting is unique to each situation. If you have any questions about how to proceed, do not hesitate to reach out to your BCGEU area representative for advice and assistance.

1 See <https://www.chrc-ccdp.gc.ca/eng/content/what-duty-accommodate> or https://www.albertahumanrights.ab.ca/publications/bulletins_sheets_booklets/sheets/hr_and_employment/Pages/duty_to_accommodate.aspx.

2 See *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights) “Grismer”* [1999] 3 S.C.R. 8680.

3 See, for example, *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970.

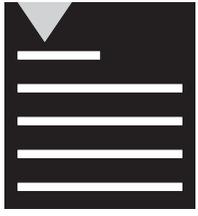
4 See, for example, *Williams v. Elty Publications Ltd.*, [1992] B.C.C.H.R.D. No. 25, where the duty to accommodate did not arise when an employee failed to inform their employer of a disability. Also see *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970.

5 See, for example, *Garda Security Screening Inc. v. United Food and Commercial Workers’ Union Local 175 (Ciccione Grievance)* [2015] C.L.A.D. No. 114.

6 See *Ontario (Ministry of Children and Youth Services) and O.P.S.E.U. (Hyland) (Re)* (2006), 150 L.A.C. (4th) 149 (Petryshen).

7 See *Telecommunications Workers’ Union v. Telus Communications Inc.*, 2017 BCCA 100.





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An employee's duty to mitigate

BY REBECCA KANTWERG

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An employee's duty to mitigate often comes up in termination grievances. This article explains why an employee has a duty to mitigate, what an employee has to do in order to satisfy her duty to mitigate, and what documents an employee should keep in order to prove that they have in fact mitigated.

WHAT IS "MITIGATION"?

The collective agreement is an employment contract. Because it is a contract, its terms are governed by the law of contract. When an employee covered by the collective agreement is terminated from their employment without just cause, this is considered to be a breach of contract, or a breach of the collective agreement.

When one party breaches a term of the contract, the law requires that the other party "mitigate their losses." This means that when an employer breaches the collective agreement by terminating an employee without just cause, the employee must mitigate the loss that results from this breach – typically lost income.

THE OBLIGATION TO MITIGATE

In the interest of achieving the best possible outcome, a terminated employee who grieves a breach of contract has a legal obligation to mitigate their lost income by replacing that income. Thus, it is very important that terminated employees try to find work. If their grievance is heard by an arbitrator and is successful, the arbitrator will ask whether the employee has attempted as best they can to mitigate their losses. **If the employee has not mitigated or cannot show that they have been trying their best to mitigate, the arbitrator may reduce the**

amount of lost wages that she or he will award. If an employee fails to mitigate, this can also affect the amount of settlement that an employee can reasonably offer or accept.

If the grievance is subject to settlement discussions, an employer may ask for proof of mitigation or "mitigation documents."

WHAT DOES AN EMPLOYEE HAVE TO DO TO MITIGATE?

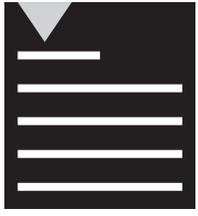
An employee who has been unjustly terminated **must attempt to find alternate comparable work.** Comparable work does not mean work that is exactly the same as the work that an employee was terminated from. Comparable work may pay less, include a position with less responsibility, or may be in a different work environment. However, an employee does not need to accept work of a substantially lesser type.

WHAT DOES AN EMPLOYEE NEED TO PROVE THAT THEY HAVE MITIGATED?

It is important that an employee documents her mitigation efforts. If an employee wins her grievance, they may need to prove that they have mitigated. If the grievance is subject to settlement discussions, an employer may ask for proof of mitigation or "mitigation documents."

An employee should keep a list of jobs that she applies for, where the jobs are located, the salary range for the





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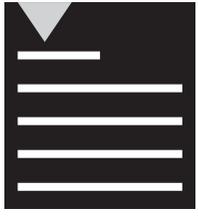
positions, when she applied for them, whether she got an interview or not and whether she received an offer or not.

An employee should also keep copies of all job applications that she submits and all correspondence from prospective employers. It's a good idea for an employee to save all of the applications in one "mitigation folder" on her computer as she applies for jobs, or to print them out and keep them in a paper folder.

Once an employee gets a new job, the employee should keep the letter from her new employer confirming the offer of employment. This will confirm the employee's start date at their new job, their rate of pay, whether they are receiving any benefits, and how long their probationary period is. If an employee passes probation at their new job, the employee should keep the letter from their new employer that confirms this. The employee should also keep all of their pay stubs indicating their pay from their new job.

Being terminated is a challenging experience for employees, but by fulfilling the employee's duty to mitigate, they can put themselves in the best position to receive compensation for lost wages in a successful grievance.





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Applying for posted positions: know your rights

BY ERIK HOIBAK
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Unless the collective agreement explicitly authorizes it, an employer cannot restrict an employee from applying for a job posting. This includes temporary postings for positions at the same pay level, and even positions that would represent a drop in pay. An example of an employer attempting to do this would be requiring employees to get the permission of their manager before applying for a job posting.

The leading case on this issue is *Manitoba Telephone System* [1972] 1 LAC (2d) 221 in which the grievor was prevented from applying for a lateral position. The employer claimed allowing the transfer would represent a burden on the operations of the employer. The arbitration board allowed the grievance, stating that only clear language in the collective agreement would allow the employer to restrict an employee from applying for a job posting. This was because:

In refusing even to consider an application submitted by a person with acceptable qualifications for the job being posted, the system is exercising a form of discrimination against its own employees. Their seniority, instead of counting in their favour, is in effect held against them: because of the experience they have in their present job the system will not consider their applications for other positions which they would prefer to have. Whereas the application of any outsider with acceptable qualifications would be sent forward for consideration by the hiring department, the application of an equally qualified system employee might not be sent forward. The system employee seeking the same job might apparently be subject to the obligation to obtain, from a superior, permission to transfer.

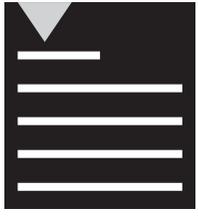
This decision was followed soon after in *Cadbury Schweppes Powell Ltd.* [1977] 16 L.A.C. (2d) 66. In that decision arbitrator Burket stated that the job posting provisions of the collective agreement represent an explicit limit on the right of the company to unilaterally hire, transfer and assign employees in a job-vacancy situation. He concluded that:

Having regard to the purpose of the job-posting provision (to provide opportunity for mobility to existing bargaining unit employees) and to its relationship to the seniority rights of bargaining unit employees the board reiterates that as a general proposition all bargaining unit employees are entitled to bid on job vacancies unless denied the opportunity by the clear words of the agreement.

Examples where arbitration boards have applied the *Manitoba Telephone System* decision include situations where:

- employees have been denied the ability to apply to lower paying positions (*RCA Ltd.*, [1972] 24 LAC 267)
- the employer claimed that allowing lateral or downward transfers would result in undue movement and associated training costs (*Edwards of Canada* [1974] 6 LAC (2d) 137)
- the employer filled a vacancy through a transfer without posting it (*Re Dufferin Association for Community Living and C.U.P.E., Local 3083*, [1996] O.L.A.A. No. 724)





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- a temporary employee was prevented from applying to another temporary position (*Fairview Villa (Re)* [1997] 48 CLAS 24)
- the employer failed to post the position and instead awarded the job to someone outside the bargaining unit (*National Steel Car Ltd. (Maleske Grievance)*, [2000] O.L.A.A. No. 247)

In all of these cases, the arbitration boards allowed the grievances.

A recent BCGEU case has confirmed that this is still good law. In *Community Living British Columbia -and- BCGEU (Nissinen Grievance)*, October 30, 2017 (to be published), arbitrator Sullivan considered a situation where the employer had required the permission of one's manager before applying for temporary postings of longer than seven months. Arbitrator Sullivan decided that the employer was in breach of the collective agreement and that they could not restrict employees from applying for postings, including temporary postings, without explicit language in the collective agreement authorizing them to do so. In doing so, Sullivan cited the *Manitoba Telephone System* case with approval.

In practical terms, if you see an employee being denied the ability to apply for a posting – where employees require permission to apply, or the employer is otherwise breaching the job posting provisions, please have the impacted employee(s) file a grievance, or contact your area office.

