The Duty to Accommodate and Undue Hardship: Pro-active Accommodation Expectations following *Meiorin*

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A. INTRODUCTION

The duty to accommodate is not a new concept in workplaces. However, the Supreme Court of Canada, in the 1999 case of *British Columbia (Public Service Employees' Relations Commission) v. BCGSEU* (referred to as *Meiorin*),[1] triggered a whole new look at the duty to accommodate in many respects. The elements of the Court's "new three part" test for analysing discrimination as well as the proactive onus the Court articulated for employers to "build concepts of equality into the workplace" may have put to rest some of the earlier jurisprudential resistence to creative solutions for accommodating workers.

The *Meiorin* test has enjoyed widespread application, having been interpreted and applied by provincial and federal Boards of Inquiry, labour arbitrators and courts. It has been recognized as holding employers to extremely high standards when it comes to applying all three parts of the test and, particularly, the third step of test concerning the duty to accommodate.

Although the *Meiorin* decision dealt with discrimination on the basis of gender in the case of a female firefighter, the "unified test" of discrimination has been repeatedly applied by various tribunals, courts and arbitrators across Canada in a wide range of discrimination cases involving a variety of factual situations with a diverse range of complainants including transsexuals in federal penitentiaries, nannies working in private residences, deaf individuals complaining of closed captioning television, C.S.I.S.

[1] *British Columbia (Public Service Employees' Relations Commission) v. BCGSEU* (referred to as *Meiorin*), [1999] 3 S.C.R. 3, at para. 68

Intelligence Officers on stress leave, theatre-goers with mobility-related disabilities and clerical workers suffering from depression.

Not surprisingly, the widest application of *Meiorin* has been in cases of accommodating workers with disabilities in workplaces. As before, how the duty to accommodate post-*Meiorin* applies in any given employment situation depends on such factors as the particular characteristics of the workplace, the employer, the collective agreement, the rights of other bargaining members, the needs of the employee with the disability and the nature of the disability at issue. One of the effects of *Meiorin*, however, has been a more critical look at undue hardship arguments and a call for more creative and pro-active solutions for accommodation.

This paper will review the principles coming out of *Meiorin* and their application in jurisprudence which followed it with a particular focus on the continuing evolution of the meaning and expectations of the duty to accommodate in employment settings.

B. Meiorin and the Unified Test for Discrimination and Duty to Accommodate

In *Meiorin*, the Supreme Court developed what it called a new unified test for all types of discrimination. This test broadened the notion of the duty to accommodate and widened the remedies available to address all types of discrimination. The court did away with the old bifurcated approach sometimes adopted in discrimination cases which depended on whether the discrimination at issue was direct or adverse effect, and noted that the bifurcated approach "ill-serves the purpose of contemporary human rights legislation."

Under the unified approach, the *bona fide occupational requirement* (BFOR) with an expanded notion of the duty to accommodate applies to both direct and adverse effects discrimination. Finally, a discriminatory standard may be struck down regardless of whether discrimination is direct or adverse effect unless the employer meets the stringent requirements for the BFOR defence.

McLachlin J. proposed the following new three-part test for determining whether a *prima facie* discriminatory standard is a BFOR:

> An employer may justify the impugned standard by establishing on the balance of probabilities:
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> 1. That the employer adopted the standard for a purpose rationally connected to the performance of the job;

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

3. That the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer.[2]

(i) The First Step

The first step is to determine what the impugned standard is generally designed to achieve. The employer "must demonstrate that there is a rational connection between the general purpose for which the impugned standard was introduced and the objective requirements of the job"[3]. The focus at this stage is not on the validity of the particular standard but on the validity of its more general purpose. McLachlin J. points out that this distinction is important because "[i]f there is no rational relationship between the general purpose of the standard and the tasks properly required of the employee, then there is of course no need to continue to assess the legitimacy of the particular standard itself".[4]

(ii) The Second Step

At the second step, the employer must demonstrate that it adopted the particular standard with an honest and good faith belief that it was necessary to the accomplishment of its purpose, with no intention of discriminating against the claimant. At this stage, the analysis shifts from the general purpose of the standard to the particular standard itself. "It is not necessarily so that a particular standard will constitute a BFOR merely because its general purpose is rationally connected to the performance of the job".[5]

(iii) The Third Step

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[2] *Meiorin*, para. 54

[3] *Meiorin*, para. 58

[4] *Meiorin*, para. 59

[5] *Meiorin*, para. 61

At the third step, the employer must show that the impugned standard is "reasonably necessary" for the employer to accomplish its purpose. The employer must establish that it is impossible to accommodate the claimant and others without experiencing undue hardship. McLachlin J. indicates that the question of "accommodation" may now be considered pro-actively as part of the test-design. She lists some important questions that may be asked in the course of this 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?[6]

Also to be considered is the procedure the employer adopted to assess the issue of accommodation and the substantive content of a more accommodating standard that could have been offered, or the employer's reasons for not offering any such standard.[7]

If the impugned standard is not a BFOR, the appropriate remedy will be chosen with reference to the full range of remedies provided in the applicable human rights legislation regardless of the form of discrimination.[8]

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[6] *Meiorin*, para. 65

[7] *Meiorin*, para. 66

[8] *Meiorin*, para. 67

(iv) Positive Duty to Build Equality into Workplace Standards

The final element of the new approach is the articulation of a positive duty on employers to design workplace standards to achieve equality. As the court stated in *Meiorin:*

> "Employers designing workplace standards owe an obligation to be aware of both the differences between individuals, and differences that characterize groups of individuals. **They must build conceptions of equality into workplace standards.** By enacting human rights statutes and providing that they are applicable to the workplace, the legislatures have determined that the standards governing the performance of work should be designed to reflect all members of society, in so far as this reasonably possible. ... The standard itself is required to provide for individual accommodation, if reasonably possible." [emphasis added][9]

Hence, the employer's duty to accommodate does not await a claim of discrimination in order to be activated. Employers are supposed to proactively review their workplace requirements and standards to ensure they are free from discrimination at the outset rather than waiting to react to an individual complaint.

The Supreme Court has had further opportunity to confirm and apply the unified test from *Meiorin.* Importantly, in *Granovsky* v. *Canada (Minister of Employment and Immigration),*[10] a section 15 *Canadian Charter of Rights and Freedoms* case challenging a distinction in the Canada Pension Plan's treatment of severe and permanent disability as compared to temporary disability, Binnie J. noted that, although *Meiorin* on its facts was not a disability case, the principles enunciated by the court should also be applied to cases involving functional disability:

> While not a case of disability as such, the Meiorin case illustrates a situation where a personal characteristic enumerated in s.15 (gender) is shown to be related to a more limited aerobic capacity (functional limitation) but this is then wrongly converted into a state-imposed job handicap which was no less objectionable because it was misconceived rather than intentionally discriminatory. The "problem" did not lie with the female applicant, but with the state's substitution of a male norm in place of what the appellant was entitled to,

[9] *Meiorin*, para. 68

[10] *Granovsky v. Canada (Minister of Employment and Immigration),* [2001] 1 S.C.R. 703

namely a fair-minded gender-neutral job analysis. A parallel view would be urged in cases where the functional limitation is disability.[11]

C. Meiorin and the Ontario *Human Rights Code*

The facts in *Meiorin* involved British Columbia human rights legislation. The Ontario Court of Appeal has found that the full impact of the unified approach in *Meiorin* applies in Ontario despite different wording of the Ontario *Human Rights Code*. In *Entrop,*[12] the Court of Appeal applied *Meiorin* to the case before it involving issues of drug and alcohol testing and the removal of an employee from a safety-sensitive position because of a self-disclosed alcohol problem seven years before. Laskin JA set out four compelling reasons for applying *Meiorin* in Ontario:

1. Although the Supreme Court only referred to the BC statute in the *Meiorin* decision, it seems clear that the approach should have general application to human rights legislation.

2. McLachlin observed in *Meiorin* that the Ontario statute already reflects the unified approach in s. 11(2). That section provides that a Board of Inquiry shall not find a rule to be a BFOR "unless it is satisfied that the needs of the group of which the person is a member cannot be accommodated without undue hardship." Similarly, s. 17 requires accommodation to the point of undue hardship.

3. The distinction between direct and adverse discrimination in s. 11 of the Ontario statute should be limited to a very extreme form of direct discrimination such as a requirement that "no Catholics" or "no Blacks" need apply for a job. The distinction should have no broader application than this.

4. The unified approach is consistent with the jurisprudence under ss. 11 and 17 of the Ontario statute. For example, reviewing *Ontario v. Borough of Etobicoke,* [1982] 1 SCR 202 and *Large v. Stratford* (1995), 128 DLR (4th) 193 (SCC), Laskin JA found that the unified approach essentially combines the elements of the previous test for justifying adverse effect discrimination with the elements of the previous test for justifying direct

[11] *Granovsky,* para. 40

[12] *Entrop v. Imperial Oil Ltd. (2000),* 50 O.R. (3d) 18 (C.A.)

> discrimination. As McLachlin J. observed in Meiorin, there is little difference between the tests other than semantics.

The Ontario Human Rights Commission has reviewed *Entrop* and *Meiorin* and found that the results of these two cases eliminate the distinction between direct discrimination and constructive, or indirect discrimination, despite the wording of the Ontario Code. In its Policy on Drug and Alcohol Testing the Commission states:

> Although the Code distinguishes between direct and constructive discrimination, the distinction is less important than it used to be, particularly in the area of disability. This is a result of the combined impact of two factors. First, the Supreme Court of Canada has blurred the distinction between the two for practical purposes and has developed a single three-step test. The Ontario Court of Appeal has applied similar reasoning in the Ontario context, specifically in the area of disability and drug and alcohol testing.
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> Second, Section 17 of the *Code* provides a defence where a person with a disability is unable to perform an essential requirement. However, the defence is only available if the requirement is *bona fide* and reasonable, and only after the person has been accommodated to the point of undue hardship. Since employers usually argue that the requirement for impairment-free performance is essential, s. 17 of the *Code* will be an important part of a Respondent's defence.
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> In either event, the Ontario Court of Appeal has indicated that except in the most obvious cases of direct discrimination, the focus should be on determining whether the employer can justify the policy or standard using the new three-step test set out by the Supreme Court of Canada. Applying this approach, company-wide policies such as drug and alcohol testing policies will attract the need to accommodate employees and, most importantly, on an individual basis. The Commission supports this position. Individualisation is central to the notion of dignity for persons with disabilities and to the concept of accommodation on the ground of disability, regardless of whether a particular form of drug testing or alcohol testing is likely to be considered "direct" or "constructive". "Blanket" rules that make no allowances for individual circumstances are necessarily unable to meet individual requirements and are therefore likely to be struck down.[13]

[13] *"Policy on Drug and Alcohol Testing"*, Ontario Human Rights Commission, September 27, 2000, pg 3

D. Undue Hardship

As outlined above, the third step in the *Meiorin* unified test, requires that the employer demonstrate that it is impossible to accommodate employees in a given situation of discrimination without imposing undue hardship upon the employer.

In *Grismer*,[14] the Supreme Court applied the *Meiorin* framework and again reiterated this impossibility aspect of the test. *Grismer* was a non-employment case involving a truck driver whose driver's licence was cancelled when he lost significant peripheral vision in both eyes as a result of a medical condition he developed after suffering a stroke. The British Columbia Motor Vehicle Branch cancelled the licence, relying on standards developed by the British Columbia Medical Association. These standards set a minimum peripheral vision requirement to which exceptions were made in some cases but never in cases involving Mr. Grismer's medical condition.

Focussing on the third branch of the unified approach from *Meiorin*, the Court held that the onus was on the Superintendent to establish that "[i]ncorporating aspects of individual accommodation within the standard was impossible short of undue hardship." The Court required the Superintendent to establish either: (1) that no person with Mr. Grismer's particular disability could ever meet a standard of reasonable highway safety, or (2) that testing individuals to determine whether they can drive to a reasonable standard of highway safety is impossible short of undue hardship. In other words, the Court confirmed the stringent "impossibility" test defined in *Meiorin* for establishing accommodation short of undue hardship as well as the heavy onus on Respondents to demonstrate that they have comprehensively researched and canvassed all alternatives to setting a standard which fails to accommodate distinctive needs, abilities or realities.

In any given case of discrimination turning on whether an employer has met the duty to accommodate, this standard of impossibility will require that the employer demonstrate (1) evidence of a relatively extensive search for accommodation possibilities and (2) substantial evidence of undue hardship. Possible factors of undue hardship have been explored in a myriad of decisions. While it has been said in some cases before, certainly, post-*Meiorin*, the evidence required to actually establish that such factors are relevant in a given set circumstances will have to be qualitatively sound and neither impressionistic nor speculative.

Some post-*Meiorin* examples of jurisprudential consideration of commonly cited undue hardship factors are reviewed below.

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[14] *British Columbia (Superintendent of Motor Vehicles v. British Columbia (Council of* Human Rights) (1999), 181 D.L.R. (4th) 385 (S.C.C.)

(a) *cost*

In *Grismer*,[15] the Supreme Court of Canada considered cost as a possible undue hardship factor by stating that "excessive" cost can in some cases constitute undue hardship. The Court did not attempt to define excessive cost, but made it very clear that excessive cost should not easily be found. On this point, the Court wrote that: "[o]ne must be wary of putting too low a value on accommodating the disabled", "[i]mpressionistic evidence of increased expense will not generally suffice", and the Superintendent "[d]id not negate the possibility of cost-reduced alternatives". Several Canadian Boards of Inquiry have repeated the view that impressionistic evidence will not satisfy the stringent requirements of the duty to accommodate.

Cost was put in issue as a factor relevant to assessing undue hardship in two recent movie theatre cases. In *Turnbull v. Famous Players*[16], the Ontario Board of Inquiry found that Famous Players' failure to provide wheelchair-accessible theatres and its non-admittance policy with respect to those in wheelchairs were both *prima facie* violations of the *Ontario Human Rights Code*. The Board rejected Famous Players' defence that it would have been an "improvident use of resources" to carry out renovations to make the theatres wheelchair-accessible. It also found that although Famous Players had moved toward compliance with its legal obligations by renovating its theatres over the last number of years, it had not acted with sufficient due diligence and dispatch. Accordingly, it had not met the threshold for accommodation short of undue hardship.

In *Miele v. Famous Players,*[17] which again involved mobility-related disabilities and access to movie theatres, a B.C. Human Rights Tribunal emphasized that the Respondent must demonstrate that it is "impossible" to accommodate the claimant without imposing undue hardship upon the employer (paragraph 59). Famous Players had required patrons to purchase tickets at one door, but persons in wheelchairs were then required to enter at another door. In respect of the first door, Famous Players had argued that the entrance was not structurally capable of being made accessible and the Tribunal accepted this argument as evidence of undue hardship. In respect of the second door, Famous Players claimed that it would have been too expensive to establish an entrance open at all times at the second door, so that those in wheelchairs could purchase their tickets there. The Tribunal found through the evidence that it would have cost $75,000.00 to keep the other entrance permanently open. The

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[15] *British Columbia (Superintendent of Motor Vehicles v. British Columbia (Council of* Human Rights) (1999), 181 D.L.R. (4th) 385 (S.C.C.)

[16] *Turnbull v. Famous Players Inc.*, [2001] O.H.R.B.I.D. No. 20 (Sep. 2001)

[17] *Miele v. Famous Players,* [2000] B.C.H.R.T.D. No. 56 (Feb. 2000)

Tribunal noted at paragraph 73 that "an expenditure of $75,000.00 a year might represent undue hardship for small business whereas it would not have the same effect on operations of a multinational company. There is no evidence to establish where the Respondent's business fits on the scale." The Tribunal therefore found that the Respondent did not meet the third step of the test, despite the fact that the Respondent had tendered concrete and non-impressionistic financial evidence as part of its defence.

In *Kavanagh v. Canada (AG),*[18] a case involving the Corrections Services of Canada policy regarding the placement of pre-operative transsexual inmates, the Board of Inquiry agreed with Corrections that the creation of a dedicated facility for pre-operative transsexuals in transition was not feasible in part at least because of the costs that would be involved.

In *Vlug v. CBC,*[19] the Canadian Human Rights Tribunal considered a cost defence to the duty to accommodate in a case involving the issue of closed captioning of CBC programs. Prior to the case, the CBC had provided closed captioning for people who were hearing impaired for some but not all of its programs. The CBC tendered significant evidence with respect to its financial stress due to recent cut-backs. After applying the *Meiorin* three-part test, the Tribunal found that, even though the CBC was under financial stress, and even though significant improvements to the level of closed-captioning had been implemented over recent years, more could have been done with respect to closed-captioning without imposing undue hardship on the CBC. In addition to monetary compensation, the tribunal ordered the CBC English language network and Newsworld to caption all of their television programs, including shows, commercials, promos and unscheduled newsflashes.

This particularly stringent standard of proof for cost as undue hardship harkens back to earlier jurisprudence which had suggested that cost would be considered undue hardship if it were such that it was so substantial that it would seriously affect or fundamentally alter the operations of the employer.[20] In practice, however, pre-*Meiorin* cases appeared at times to be decided on the basis of broad assertions and assumptions about costs rather than the kind of substantive evidence which now appears to be expected.

Somewhat of a departure from this approach to cost consideration was the majority decision of the Ontario Superior Court in *Ontario (Human Rights Commission) v.*

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[18] *Kavanagh v. Canada (AG),* [2000] C.H.R.D. No. 21 (Aug. 2001)

[19] *Vlug v. Canadian Broadcasting Corp.,* [2000] C.H.R.D. No. 5 (Nov. 2000)

[20] *Howard v. University of British Columbia*, [1993] B.C.C.H.R.D. No. 8 at para. 62

Roosma.[21] The case involved a question of religious accommodation. The employer in the case scheduled its employees on two-week night/two-week day shifts. Two employees became involved in the Worldwide Church of God and were required to be absent from work on Friday nights for religious obligation. The employer, concerned with a large amount of absenteeism on Friday nights, as well as the seniority of other employees, refused to allow the employees Friday nights off and also refused to move them to different jobs within the corporation that did not require Friday night work. For some time, the employees were able to switch shifts with co-workers in order to avoid discipline under the employer's absenteeism control policy. Eventually, however, they were unable to always make alternative arrangements and as such were subject to discipline under the policy. In the meantime, the employer and the union met with the employees to discuss possible accommodation, but both determined that no accommodation was possible. The Board of Inquiry held that a *prima facie* case of discrimination existed but, considering the cost to the employer, disruption of the collective agreement, and the company's concerns about the absentee rate at the plant, the company had met its duty to accommodate. The majority of the Divisional Court panel declined to interfere with this decision, deferring to the trier of fact.

It should be noted, however, that Madam Justice Lax dissented from the majority on the basis of an application of *Meiorin*. She reasoned that the Board of Inquiry had not applied the more rigorous post-*Meiorin* standard but, rather, had applied the U.S. *de minimus* standard in determining whether the employer had met its duty to accommodate. She described *Meiorin* as imposing a very high standard on employers to accommodate employees. On a review of the evidence presented by the company, she found that the employer had not demonstrated undue hardship. For example, the cost in dollars of accommodating the employees was minimal in comparison to the size of the corporation.

(b) *safety*

In both *Meiorin* and *Grismer*, potential risk to public safety was part of the factual context. In *Meiorin*, the Court accepted the arbitrator's findings that Ms Meiorin did not pose a "serious safety risk" in performing firefighting duties. In *Grismer*, the Court specifically held that "sufficient risk" was no longer the test, and endorsed "serious risk" or "undue risk" as the level of risk which must be demonstrated in order to establish undue hardship.

[21][2002] O.J. No. 3688 (Div. Ct)

In *Entrop,* Laskin J.A. applied the *Meiorin* test to the issue of the requirement for random drug testing and the policy of automatic termination upon a positive test. He found that random drug testing of employees in safety-sensitive positions was a BFOR, provided that sanctions for a positive test were tailored to the individual employee.

An employer's refusal to allow a disabled worker to demonstrate his ability to perform alternative work assignments on the basis of the employer's fear of further worker's compensation claims amounted to a breach of the duty to accommodate short of undue hardship, according to a B.C. Arbitrator in *Doman Forest Products v. Industrial Wood and Allied Workers*.[22] In that case, the WCB vocational rehabilitation representative was supportive of the work trials.

(c) *seniority*

The issue of the relevance of seniority rights arises particularly in the context of allegations that a trade union has failed in its duty to accommodate disabled members. It is trite law that trade unions also bear a duty to accommodate workers in situations of discrimination. In addition to this duty, trade unions also bear a duty to represent the bargaining unit as a whole, particularly in respect of the collectively bargained rights of all of the members of the bargaining unit as set out in collective agreements.[23]

Even post-*Meiorin,* the predominant arbitral view remains that employers are not free simply to override seniority provisions of collective agreements in the name of the duty to accommodate. For example, it has been held that is not open to an employer simply to refuse to post a position and to then place a worker with a disability in the position that should have been posted.[24] Although arbitrators have determined that the collective agreement may have to "bend" in some circumstances in order for accommodation to be achieved, there has been a relatively common sentiment among arbitrators that such interference should be minimized.[25] The pre-*Meiorin* caselaw

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[22][2001] C.C.C.A.A.A. No. 398

[23]Ontario *Labour Relations Act*, S.O. 1995, c.1, Sch. A, s.74

[24]*Vancouver v. District of North Vancouver Fire Fighter* (2001) 101 L.A.C. (4th) 229.

[25]Eg. *Canada Post Corporation and Canadian Union of Postal Workers* (November 9, 1995) (Ponak); *Canada Post Corp. and CUPW (Lascelles*) (1992) 33 LAC (4th) 279; *Bayer Rubber and Communication Energy and Paperworkers Union of Canada*, Local 914 (1997), 65 L.A.C. (4th) 261; *Colonial Cookies and United Food and Commercial Workers, Local 617P (Bingeman)* (1999), 82 L.A.C. (4th) 101. *Canada Post and CUPW (Godbout)* (1993) 32 LAC (4th)289; *Greater Niagara General Hospital and SEIU Local 204* (1995) 47 LAC (4th) 366 (Brent); *Drager v I.A.M. & A.W. Automotive Lodge 1857 and Agrifoods International Cooperative Ltd* (1994) 20 CHRR D/119 at D/134; and Ibid. at para. 46

required exploration of the various alternatives possible and an examination of the specific impact of placing a worker out of seniority as an accommodation.[26] It is not enough for an employer looking to accommodate an employee to point to a vacant position for placement. There must be a review of other possible placements whereby accommodation could be achieved short of substantial interference with the collectively bargained rights of other workers.

A different approach was adopted in a recent Ontario Board of Inquiry case, *Bubb-Clarke v. Toronto Transit Commission*, where the Board approached seniority rights as theoretical absent evidence of actual prejudice to bargaining unit members. The case concerned a union's refusal to agree to a worker's request to transfer seniority between work groups contrary to the collective agreement. Although the Board of Inquiry understood that granting full seniority to the employee would mean he could succeed in a job posting over other employees who had accumulated seniority over time, the Board appeared to consider this prospect as theoretical and, as such, not constituting evidence of undue hardship on the other employees of the bargaining unit or the division in question.[27] In a virtual post script to the decision, the Board suggested that if full seniority was granted and used to bump another employee, then that effect could amount to undue hardship. However, the hypothetical prospect of this effect was disregarded by the Board which suggested that this issue would have to be considered only if that eventuality occurred.[28] Further, rather than recognizing the Union's willingness to agree to the transfer of the 5 years of seniority accumulated while the worker temporarily worked in the Maintenance department as a degree of accommodation, the Board interpreted this "concession" as evidence that the seniority provisions at issue were not the kind of hard-won collective agreement provisions that the Union was justified in preserving.[29]

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[26]Eg. *Welland County General Hospital and SEIU Local 204* (March 29, 2000) (Knopf).

[27]At para. 58.

[28]At para. 87.

[29]This analysis was in the context of the Board of Inquiry's consideration of the Supreme Court of Canada's decision of *Lavigne v. Ontario Public Service Employees Union*, [1992] 2 S.C.R. 211 where Wilson J. observed

> However, the disruption to the Union's hard-won position under the collective agreement is a relevant factor to be considered in determining whether it has discharged its responsibility to accommodate up to the point undue hardship.

The Board of Inquiry's approach and analysis of these issues in *Bubb-Clarke* depart in substantial ways from arbitral jurisprudence addressing similar issues. Labour arbitrators have generally recognized the relative seniority rights of other workers as fundamentally important and impacts on those rights as great and frequently amounting to undue hardship.[30] The impact on those rights has been recognized as undue hardship from the point of aberration of the collective agreement rather than only in the context of those impacts having actually occurred. In other words, boards of arbitration have not waited to find undue hardship until they have evidence of a specific employee being impacted by disruption of seniority rights. Rather, they have recognized that overriding collective agreement provisions is in itself an significant impact on the bargaining unit members as a whole.[31]

Although, as addressed above, employers generally will not be permitted in any *carte blanche* manner to override seniority issues in the course of accommodating an employee, at least one decision has held that an employer also cannot rely on seniority provisions as an absolute bar to an accommodated return to work. In *Doman Forest-Products v. Industrial Wood and Allied Workers of Canada, Local 1-80*, an employer was found to have failed to satisfy the third step of *Meiorin*, the duty to accommodate, in part because it insisted that the disabled worker could only attempt a return to work in a position for which he had seniority under the collective agreement.[32] In that case, the evidence was that the union had suggested that lack of seniority would not be an absolute bar to the grievor's return to other jobs if there were no other jobs into which he could be accommodated.

(d) *Impact on others*

Often related to the seniority issue, is the general question of whether the effect of an accommodation on other employees or people at large constitutes undue hardship.

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[30]E.g. *Greater Niagara General Hospital and Service Employees International Union, Local 204(1995),* 47 L.A.C. (4th) 366; *Re Bayer Ribber Inc. and Communications, Energy and Paperworkers Union, Local 914* (1997), 65 L.A.C. (4th) 261.

[31]Eg. *Greater Niagara General Hospital and SEIU Local 204* (1995) 47 LAC (4th) 366 (Brent); *Welland County General Hospital and Service Employees International Union, Local 204* (March 29, 2000,) unreported, (Knopf).

[32][2001] B.C.C.A.A.A. No. 398 at paras. 72-73.

Traditionally, arbitrators have been quite reluctant to consider displacing one employee from a current position in order to accommodate another employee[33] However, the breadth of the accommodation principles in *Meiorin* have been raised as an argument against a categorical rejection of this kind of remedy. In *Re Essex Police Services Board and Essex Police Association*,[34] the arbitrator commented as follows:

> ....in my view,"the fact that a position is occupied does not create a legal obstacle to the accommodation of a disabled employee in that position....
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> ...The notion that the duty to accommodate a disabled employee can never include displacing another employee from his or her positions seems to me to be entirely inconsistent with the broad sweep given to human rights legislation in general, and the duty to accommodate in particular, in such cases as [*Meiorin*]...
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> ...While it may be that in many cases the duty to accommodate will not require the displacement of an incumbent from his or her position, it must surely depend upon the facts. Included within the relevant facts would be such information as the employment and other circumstances of the disabled employee, whether any other forms of accommodation are available, the collective agreement provisions governing the acquisition and holding of jobs, and the consequences of displacement to the incumbent.[35]

In that case, the arbitrator did not actually order this remedy. However, he indicated that he would have been amenable to such an order had the grievor been able to perform the occupied position and had the occupied position been the only accommodation available to the employee. One of the factors considered by the arbitrator in this respect was that the position in question was not acquired by seniority under the collective agreement but at the discretion of the employer. Similarly, a change in position or assignment did not involve a change in pay.[36]

Another arbitrator, relying on the premise that accommodation efforts should interfere as little as possible with collective agreement rights, required an employer to post a

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[33]Eg. *Better Beef Ltd and U.F.C.W., Region 18* (1994), 42 L.A.C. (4th) 244; *Re Canada Post Corporation and C.U.P.W. (Godbout)* (1993), 32 L.A.C. (4th) 289

[34](2002), 105 L.A.C. (4th) 193

[35]At 222 to 223

[36]At 223

position given to an employee requiring accommodation on the basis that the employee requiring accommodation could continue the modified duties already being done and the posting provisions under the collective agreement could not be ignored.[37]

Outside of the employment law context, *Meiorin* was applied in *Kavanagh v. Canada (AG)*[38] which included an analysis of the impact that an accommodation would have on the rights or interests of others. The case involved a Corrections Services of Canada policy regarding the placement of pre-operative transsexual inmates The Board of Inquiry carefully considered the impact on the inmate population as a whole of an accommodation involving holding pre-operative male-to-female inmates in a female facility. Corrections had argued that the female inmate population would be negatively affected by having to live for extended periods of time in close quarters with a person who is anatomically of the opposite sex. The Board of Inquiry was sensitive to the fact that the feelings of the female inmates would be based not just on a lack of knowledge about transsexuals, but also on painful life experiences, as many of the inmates had been physically, psychologically and sexually abused at the hands of men. The Board of Inquiry noted that, like transsexuals, female inmates are a vulnerable group who are entitled to have their needs recognized and respected.[39] For those reasons, the Board found that Corrections had met its burden and demonstrated that, having regard to the unique nature of correctional settings and the needs of the female inmate population, it was not possible to house pre-operative male-to-female transsexuals in women's prisons.

E. Forms of Accommodation Short of Undue Hardship

What follows is a survey of forms or examples of accommodation efforts that have been required of employers since they were considered not to constitute undue hardship in the particular facts of cases decided after *Meiorin*.

(a) *accommodation for indefinite duration*

In *Halifax (Regional Municipality) and Municipal Association of Police Personnel,*[40] a Nova Scotia arbitrator considered a case where an employer was unwilling to consider a particular accommodation on the basis that the duration of the accommodation was

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[37]North Vancouver (City) v. district of North Vancouver Fire Fighters Union Local 1183 (Bagnell Grievance), (2001) 101 L.A.C. (4th) 229 (Burke)

[38] *Kavanagh v. Canada (AG),* [2000] C.H.R.D. No. 21 (Aug. 2001)

[39] See para. 158

[40](2002) 105 L.A.C. (4th) 232

unknown. The case involved an employer police force's decision to return a worker with a disability to a civilianized position rather than to a non-operational position with retention of police status. The position offered by the employer involved a lower rate of pay and removal of the employee's status as a sworn police officer. The grievor asserted that the demotion to the accommodated position was discrimination and contrary to the collective agreement. The employer had essentially been willing to accommodate police officers temporarily disabled into non-operational positions as police officer. However, it was unwilling to so accommodate officers who were indefinitely disabled. In other words, the employer insisted that there be a genuine expectation of return to full duties in a reasonable time frame as a precondition to such accommodation.

The arbitrator applied *Meiorin* and assessed whether the employer had demonstrated that it was impossible to accommodate the grievor in a non-operational position as a police officer. The Arbitrator considered the employer's absolute refusal to consider a return to work in a non-operational job as a police officer to be an unproductive and adversarial approach to the accommodation process which was inconsistent with the expectations laid out in human rights and arbitral jurisprudence. The Arbitrator found no evidence of undue hardship in respect of the accommodation request and noted that

> The expected duration of the accommodation is only one of many factors to be taken into account and, even if a maximum time limit is necessary in order to avoid undue hardship, such limit would have to be fixed on the basis of concrete facts, not impressionistic evidence or by the exercise of unfettered managerial discretion.[41]

In *Community Lifecare Inc. and O.N.A. (Clark)*[42], the grievor was unable to perform her usual duties because of an injury and requested to be included in the employer's return to work rehabilitation program. The employer refused her request, citing in part the fact that the grievor's injuries were permanent and, as such, she did not qualify for th return to work program, which was designed to assist employees in returning to their normal duties. The grievor was dismissed because the employer did not have a permanent modified duties position for her.

The majority of the board of arbitration held that, despite the laudable nature of the employer's return to work program generally , the *Human Rights Code*'s imposition of a duty to accommodate ought not to be construed so narrowly so as to encompass only temporary disabilities. Indeed, the Arbitrator, citing with approval the award in *Riverdale*

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[41] At p.24.

[42] (2001) 101 L.A.C. (4th) 87 (Howe)

Hospital (Board of Governors) and C.U.P.E. Loc. 79[43], stated that the duty to accommodate is ongoing unless undue hardship can be established. To take this approach, stated the majority of the Board, is to give effect to the purposes and the quasi-constitutional nature of human rights legislation.

Similarly, a Canadian Human Rights Tribunal, in *Conte v. Rogers Cablesystems,*[44] did not find the employer's relatively extensive efforts to accommodate employees with temporary disabilities to constitute a full defence to its obligations to accommodate an employee with a potentially permanent condition.

(b) *creating positions and bundling duties*

Under the stringent requirements of the undue hardship test in *Meiorin*, it is unlikely that an employer could satisfy its duty to accommodate simply by considering whether existing positions fall within the scope of abilities of employees with disabilities.

An Ontario Board of Inquiry, in *Metsala v. Falconbridge,*[45] reviewed the situation of an employer failing to return an employee to work when she could no longer do her job as payroll clerk. The employer, Falconbridge, argued that the duty to accommodate did not require it to "create" a job for her. The Board did not have to determine if there was such a duty as it found that the employer had, in fact, created positions in other cases and that in this case, Falconbridge did not consider accommodation measures. Citing arbitration cases, the Board found that the duty to accommodate goes beyond mere consideration of whether the employee can perform in an existing job.

This issue of whether the duty to accommodate extends to require that employers create positions has arisen in several cases since *Meiorin*.

In *Air Canada v. Canadian Union of Public Employees (Gent),*[46] the issue was raised in the course of a preliminarily when the employer asserted that the duty to accommodate did not require employers to create new positions to accommodate employees under the *Canadian Human Rights Act*. The Arbitrator rejected this position as an absolute principle as follows:

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[43](1994) 41 L.A.C. (4th) 24 (Knopf)

[44][1999] C.H.R.D. No.4 (Nov 10, 1999)

[45] *Metsala v. Falconbridge Ltd.*, [2001] O.H.R.B.I.D. No. 3 (Feb. 2001)

[46]2001 C.L.A.D. No. 266

> ...To place, as a matter of law, a limitation around the particular configurations of work which may be available to employees under the Act, without regard to the specific circumstances of the employer or employee, would not, in my opinion, be to advance its purposes: rather, it would be to impose restrictions on the possible application of the Act that are not present on its face...
>
> The better approach, in my view, is not to exclude automatically and without any consideration of the circumstances (eg. whether the accommodation is temporary or permanent) bodies of work that do not yet exist as formal positions but to evaluate whether the creation or designation of such positions is a form of accommodation that would impose undue hardship on the employer. To the extent that there has been a reluctance in the case law to require employers to create such positions, it is one that is more properly arrived at through an evaluation of the individual circumstances, not as an implied rule of law.

As a result of *Meiorin* and the expectation in the third step of the unified approach that employers demonstrate that accommodation is impossible, the possibility of whether newly created jobs could be made available short of undue hardship will have to be considered. While this is not likely to extend to require employers to create positions which are unproductive, redundant or supernumerary,[47] it will require a level of creativity on the part of the employer in their search of possible accommodations that has not previously expected of employers under earlier, pre-*Meiorin* jurisprudence.

Part of the exploration of whether positions might be created to accommodate employees with disabilities has to include some consideration of whether duties may be reconfigured or bundled. In *Canada Safeway and UFCW, Local 401*,[48] an Alberta arbitrator applying the various considerations in *Meiorin* determined that the employer failed to sufficiently consider whether the duties of a cashier could be reconfigured to enable an employee with a repetitive strain injury to perform a range of off-till duties and so be accommodated in her former position.

An Ontario arbitrator in *Re Essex Police Services Board and Essex Police Association*,[49] determined that an employer police board's duty to accommodate an officer with a disability included an obligation to cull together the less physically

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[47]Consider *Byers Transport Ltd. v. Teamsters Local Union 213* [2002] C.L.A.D. No. 237; also *Essex Police Services Board and Essex Police Association* (2002), 105 L.A.C (4th) 193 at 228

[48](2000), 89 L.A.C. (4th) 312

[49](2002), 105 L.A.C. (4th) 193

demanding aspects of the jobs of other officers to create a light duties police officer position as a form of permanent accommodation.[50] The fact that the set of duties did not yet exist as a position was not considered a legal obstacle to requiring the employer to carry out this accommodation. The arbitrator was particularly persuaded of this in light of the fact that the positions under the collective agreement were not formally defined and were substantially interchangeable. The arbitrator noted that the officer, who had 27 years experience, would be highly versatile and capable of performing all of the work in question with little to no instruction.

A similar finding with respect to bundling duties was made in *Community Lifecare Inc. and O.N.A.*,[51] where the majority of the arbitration board held that, although there was no one job suitable to accommodate the employee's modified work requirements, that the employer nonetheless ought to have examined the possibility of assigning the grievor various light duties to determine the financial and other implications of the creation of a position encompassing such duties.

An Ontario Board of Inquiry applying *Meiorin* made similar findings in *Jeppesen v. Ancaster (Canada),*[52] a case involving a firefighter's claim that he was discriminated against because of visual impairment which disqualified him from operating an ambulance and, as a result, he was not able to get the position that he sought. The Ontario Board of Inquiry found that the Respondents discriminated against him on the basis of disability because they failed to accommodate him by permitting him to perform only firefighting and fire prevention duties, not driving, when they were able to do so without incurring undue hardship. The Board found that the Respondents could have accommodated him by giving him a job that would not have required the class "F" license, which is necessary to drive an ambulance. The Board rejected the Respondent's argument that they would have had to hire another employee or incur additional costs to ensure the ambulance was staffed. The Board of Inquiry found instead that the nature and structure of the service would allow accommodation when one looked at "true priorities and resources."

Even if available positions do meet the restrictions of employees with disabilities, placement in those positions may not satisfy the duty to accommodate if insufficient consideration is given to aspect of the positions such as status and compensation. For example, in *Halifax (Regional Municipality) and Municipal Association of Police*

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[50] At 227

[51] (2001) 101 L.A.C. (4th) 87 (Howe)

[52] *Jeppesen v. Ancaster (Canada),* [2001] O.H.R.B.I.D. No. 1 (Jan. 2, 2001)

Personnel,[53] discussed above, it was not enough to accommodate a police officer with a disability into a civilian position. Similarly, in *Cape Breton Healthcare Complex and C.A.W., Local 4600*,[54] an employer was not found to have satisfied its duty to accommodate an employee with a disability when it placed him in a lower-rated job and only considered him for job openings as they arose.[55]

(c) *reduced hour employment*

In *Biltrite Rubber (1984) Inc. and United Steelworkers of America Local 526,*[56] an Ontario arbitrator considered the case of an employer who refused to continue to accommodate an employee with a disability on a reduced hour basis. The grievor had been hired as a full-time employee until sustaining a permanent workplace back injury. The company eventually created a position for the grievor within his restrictions and the grievor performed it on a reduced hour basis. The Company was dissatisfied with the grievor's inability to return to work at increased hours. It ultimately advised the WSIB that it could not accommodate the grievor on a permanent basis. The company took the position at arbitration that it was not required to create a non-existing job for the grievor (with none of the core functions for which he was hired) for 4 hours/day on an indefinite basis. The Union relied on *Meiorin* and argued that the employer had cut-off the accommodated work prematurely since further medical assessment and treatment was expected at the time. The Arbitrator considered whether the employer had reached the point of undue hardship at the time that it refused to continue the accommodated position. She found that the company could not show undue hardship in the circumstances.

(d) *alternatives to termination: extending leaves of absence and exploring accommodation*

Terminating employees without efforts to accommodate them based on assumptions without evidence that the disability at issue precludes the employee from handling his or her duties will be considered unlawful discrimination. This was demonstrated in

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[53](2002) 105 L.A.C. (4th) 232

[54](2000) 90 L.A.C. (4th) 403.

[55]See also *Air Canada and CAW, Local 2213 (Bird)* [2002] C.L.A.D. No. 113 (March 7, 2002)

[56][2002] O.L.A.A. No. 34

Mazuelos v. Clark[57] where a nanny was let go by the woman who hired her to work in her home, when the nanny became pregnant and ill with nausea associated with pregnancy. The BC Human Rights Tribunal, while recognizing that the employer/mother had two children who needed child care, found that the employer/mother decided to terminate the employment based on her own assumptions and this failed the *Meiorin* test. The Tribunal said as follows at paragraph 50:

> In sum, I accept that the standard of being physically and emotionally fit to care for two active young boys was an appropriate one in general. However, Ms. Clark made no serious effort to objectively establish that Ms. Mazuelos could not meet the standard, once her pregnancy and related circumstances were disclosed. Instead Ms. Clark decided to terminate the employment based on her own assumptions about Ms. Mazuelos' condition and circumstances. On the basis of a single conversation, she decided that Ms. Mazuelos' emotional crisis would not resolve quickly and would distract her from her work, and that her nausea was so severe and uncontrollable that she could not handle the transportation routines and ensure the children's well-being. The Respondent has not satisfied the third element of the test in *Meiorin*. Accordingly I find the complaint is justified.

A long-standing principle of labour jurisprudence has been that employees cannot be terminated for non-culpable absences arising from disability unless there is no reasonable likelihood of a return to work in the foreseeable future. This jurisprudence will have to be applied now in light of the unified test in *Meiorin* and the requirements of the duty to accommodate outlined in that case.

The lawfulness of conditional reinstatement in the event of poor attendance related to disability has received some limited attention since *Meiorin*. The British Columbia Court of Appeal in *Canadian Union of Postal Workers v. Canada Post Corp.*,[58] considered an appeal from an application for judicial review in a case where an arbitrator had reinstated a worker suffering from depression but on conditions which included not exceeding plant average absences in the 12 months following reinstatement. The court considered the condition to be *prima facie* discrimination in that the attendance requirement on threat of termination was not imposed on other employees and was only imposed on the grievor whose excessive absences were a result of her disability. However, the court considered the conditions imposed to constitute an accommodation which satisfied the province's human rights legislation. It should be noted that the court

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[57] *Mazuelos v. Clark,* [2000] B.C.H.R.T.D. No. 1(Jan. 2000)

[58] [2001] B.C.J. No. 680 (B.C. C.A.)

considered *Meiorin* and *Grismer* as marking dramatic changes in human rights law and purported to apply them in their review of the lower level decisions. However, it deferred to the arbitrator's analysis of undue hardship on the basis of it being a factual matter despite the fact that the arbitration award was released before *Meiorin*. As such, the arbitrator's consideration of undue hardship was not made within the *Meiorin* framework.

The duty to accommodate may itself require that employers provide disabled employees with leaves of absence in such circumstances, rather than terminating the services to the extent that such leaves of absence do not constitute undue hardship. In a recent decision by the Canadian Human Rights Tribunal, *Stevenson v. Canada (Canadian Security Intelligence Service),*[59] a C.S.I.S. security officer was terminated after requesting stress leave following a stressful period of time when he was accused of leaking information. The Canadian Human Rights Commission found that C.S.I.S. had discriminated against him by terminating his employment because of a disability contrary to the *Canadian Human Rights Act* (section 7). The Tribunal followed the *Meiorin* approach and found that the employer failed the third step, duty to accommodate:

> C.S.I.S. is an organization consisting of approximately 2000 employees, a third of whom would be intelligence officers. In these circumstances, it would be difficult to imagine the loss of one experienced intelligence officer for a limited time would have any significant impact on the service. In my view, the Respondent has failed to prove that retaining a position for Mr. Stevenson would have caused any hardship, let alone any undue hardship.

The jurisprudence surrounding the ability of employers to terminate employees on extended leaves of absence will also have to be considered in light of *Meiorin*. At least one arbitrator, in *Money's Mushrooms Ltd. and Retail Wholesale Union Local 580,*[60] has suggested that *Meiorin* may be read as establishing a standard or rule of accommodation that is not only triggered by an employee's request for accommodation. As such, before terminating an employee on long-term absence, an employer would have to consider whether the employee could be accommodated regardless of whether the employee was seeking accommodation. The case before the arbitrator involved a situation where an employer terminated several employees who had been absent for disability for extended periods of time. The arbitrator did not ultimately consider the third step in *Meiorin* because it found that the employer had failed the second step of

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[59] *Stevenson v. Canada (Canadian Security Intelligence Service)*, [2001] C.H.R.R.D. No. 40 (Dec. 2001)

[60] [2000] B.C.C.A.A.A. No. 83 at para 29 ff

the test in that the employer was expecting a shut-down and its decision to terminate the employees in question was motivated by potential liability for severance payments and its desire to bar these disabled employees from those payments.

(e) *accommodation to allow for the exercise of bumping rights*

In situations of lay-off, the duty to accommodate also required employers to consider what accommodations may be necessary to enable an employee with a disability to exercise bumping rights. A B.C. arbitrator applying *Meiorin* in *Exchange-A-Blade* v. *Teamsters Local No.213,*[61] considered this issue in the context of an employee seeking to assert bumping rights in accordance with his relative seniority. The arbitrator determined that the employer breached its duty to accommodate the employee when it took the position that the employee could not bump because he did not have the present abilities to perform the jobs in question. The bumping rights in the collective agreement were subject to an employee's ability to perform the necessary work. The arbitrator held that the employer was required to make the necessary modifications to the job into which the grievor could bump and found that there was no evidence that such modifications would constitute undue hardship.

(f) accommodation through placement in positions outside the bargaining unit

In *Toronto Board of Education v. Canadian Union of Public Employees, Local 4400*[62] , the question of whether the duty to accommodate can require an employer to provide a position outside the bargaining unit was considered. In that award, the arbitrator considered several grievances at once. Looking to the decisions in *Renaud* and *Central Alberta Dairy Pool* regarding disruption to the bargaining unit as a question of undue hardship, the arbitrator determined that, although it would only rarely occur, there are situations where the employer must look beyond the bargaining unit in order to fulfil its duty. However, the more the employer looks outside the bargaining unit, the more disruption to the collective agreement it would cause, and the effect on other employees and the employer's operation, the more likely undue hardship would be found. The arbitrator in that case also held that there was some question as to whether an arbitrator had the jurisdiction to award this kind of remedy, where she concluded a human rights tribunal would clearly have this type of authority.

(g) *accommodating addictions*

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[61][2000] B.C.C.A.A..A..A.. No. 343

[62][2000] O.L.A.A. No. 326 (Davie)

In *Entrop*, the Court of Appeal found that Imperial Oil had discriminated against Mr. Entrop on the basis of his alcoholism when it removed him from his safety-sensitive provision on the basis of his disclosed problem with alcohol seven years before. Specifically, the court found that the employer failed to meet the third step of the *Meiorin* test because the conditions imposed on Mr. Entrop were not BFORs.

In *Cominco Ltd. v. United Steelworkers of America,*[63] a B.C. arbitrator ruled that nicotine addiction was a disability that must be protected under the B.C. *Human Rights Code*. The employer's "no smoking" policy, while a reasonable intrusion, was discriminatory because it disproportionately affected addicted smokers who suffered from a disability "no less than someone with diabetes or arthritis". In light of the *Meiorin* decision, which was released during the arbitration, the arbitrator ruled that the employer had to directly incorporate accommodation into the workplace standards. The arbitrator therefore referred the matter back to the employer, requiring it to accommodate nicotine-addicted employees.

(h) accommodating religious requirements

Aside from cases involving accommodation of workers with disabilities, many of the key pre-*Meiorin* duty to accommodate cases involved the accommodation of religious observance in the workplace.[64] While the principles of the duty to accommodate and the concept of undue hardship remain the same in religious accommodation cases, the conception of what constitutes undue hardship is different in these types of fact situations, which often involve scheduling around Sabbath observance.

The Ontario Court of Appeal has considered *Meiorin* in light of a question of religious accommodation in the case *Ontario (Ministry of Community and Social Services) v. OPSEU* [65] In that case, the employee alleged there had been a failure to accommodate him in respect of the required 12 days he required away from work for religious observance required by his faith. The employer's policy allowed two days for religious observance, and the employer offered the employee the opportunity to use his "social contract" days as well as to bank days earned in a compressed work week plan, something not normally offered to employees. Under the compressed work week plan, employees worked longer days for three weeks in order to receive every third Friday as a paid day off. Normally, employees had to take such days as they arose every third week.

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[63] *Cominco Ltd. v. United Steelworkers,* [2000] B.C.C.A.A.A. No. 62 (D. Larson, Feb. 2000)

[64]See for example; *Ontario (Human Rights Commission) v. Simpson-Sears Ltd* (1985) 23 D.L.R. (4th) 321 (S.C.C.); *Central Okanagan School District No. 23 v. Renaud* [1992] 2 S.C.R. 970

[65][2000] O.J. No. 3411.

The employee grieved that this time did not sufficiently accommodate him because, under this arrangement, the employee was forced to use time for religious observance which would entail a loss to him, either of pay or of accumulated earned paid time off, such as vacation or compressed work week days.

The Employer argued that, because all employees are allowed only two paid days for religious observance, and because it had offered the opportunity to the employee to bank his compressed work week days, the employer had fulfilled its duty to accommodate.

At the Grievance Settlement Board, it was held that the protected right in question was the right to have recognized holy days off for religious observance without financial penalty. As such, it held, the employer did not discriminate against the employee in requiring him to use his “social contract” days for religious observance, as these were unpaid days that he would have had to have taken anyway. However, it characterized the compressed work week days as paid holidays, and as such, in forcing the grievor to use these days for religious observance, the employer was imposing a burden not imposed on others and therefore unless the employer could show undue hardship, which it could not, the other days were required to be paid days off. The Divisional Court dismissed the employer’s appeal.

At the Court of Appeal, it was held that the employer had met its duty to accommodate in that it allowed the employee to bank the compressed work week credits, a practice not normally allowed to other employees. The Court based its decision on the premise that the compressed work week days were not earned entitlements akin to vacation time. The Court held that to hold compressed work week schedule days, which it characterized as scheduling changes, to be vacation benefits was patently unreasonable and thus reviewable. Instead, as a scheduling change, the employer was well within its duty to accommodate as outlined by jurisprudence surrounding scheduling changes as reasonable accommodation, given that it allowed the employee to bank the days as opposed to forcing him to use them at the end of the three week period.

F. CONCLUSION

The majority of tribunals and courts which have considered *Meiorin* have described it as a significant restructuring of the application of human rights legislation in the context of BFORs and the duty to accommodate. The *Meiorin* test is now being applied throughout Canada by arbitrators, human rights tribunals, and courts dealing with the duty to accommodate. For the most part, adjudicators appear to be applying the particularly stringent standards concerning the duty to accommodate outlined by the Supreme Court first in *Meiorin* and again in *Grismer*. Tribunals are generally holding employers to a high onus of fully proving this part of the defence and are refusing to accept "impressionistic"

references to hardship. In order to satisfy the duty to accommodate, employers are expected to fully investigate all alternative and creative ways to accommodate complainants, from modifying employees' pre-disability positions to creating new positions through re-bundling of employment duties for extended or even indefinite lengths of time.