CONFLICTS BETWEEN
THE ACCOMMODATION OF DISABLED WORKERS
AND SENIORITY RIGHTS

by

M. Kaye Joachim

A thesis submitted in conformity with the requirements
for the degree of Master of Laws
Graduate Department of Law
University of Toronto

© Copyright by M. Kaye Joachim 1997
The author has granted a non-exclusive licence allowing the National Library of Canada to reproduce, loan, distribute or sell copies of this thesis in microform, paper or electronic formats.

The author retains ownership of the copyright in this thesis. Neither the thesis nor substantial extracts from it may be printed or otherwise reproduced without the author's permission.

L'auteur a accordé une licence non exclusive permettant à la Bibliothèque nationale du Canada de reproduire, prêter, distribuer ou vendre des copies de cette thèse sous la forme de microfiche/film, de reproduction sur papier ou sur format électronique.

L'auteur conserve la propriété du droit d'auteur qui protège cette thèse. Ni la thèse ni des extraits substantiels de celle-ci ne doivent être imprimés ou autrement reproduits sans son autorisation.

0-612-29447-1
Conflicts Between the Accommodation of Disabled Workers and Seniority Rights

by M. Kaye Joachim

Master of Laws, 1997
Graduate Department of Law
University of Toronto

ABSTRACT

The purpose of human rights legislation is to ensure equality of opportunity without discrimination. For disabled workers, this means that employers (and trade unions) are required to accommodate their disability-related needs in the workplace, unless doing so would cause undue hardship. Workers seek seniority provisions in collective agreements to reduce the potential for managerial arbitrariness in the allocation of scarce work opportunities. When these two principles designed to enhance employees' work opportunities conflict which should prevail? In this thesis I argue that when the accommodation of a disabled worker requires interference with the seniority provisions of a collective agreement, the interference with the seniority principle in and of itself, should not bar the requested accommodation. However, when the actual impact on the affected workers' wording conditions and social and financial well-being is significant, the limit of undue hardship has been reached.
ACKNOWLEDGEMENTS

I had the privilege of working with two supervisors in preparing my Masters’ thesis. I would like to take this opportunity to thank Katherine Swinton and Brian Langille for their invaluable assistance and guidance during this past year.

The opportunity to return to law school after several years of practice to reflect at length upon human rights and labour relations principles was a welcome one. I would like to thank Russell, my partner, Frank and Joy, and my mother and father, for their support and assistance throughout this year, which enabled me to devote myself to my work. I would also like to thank my daughter Ali, whose constant refrain “are you finished working yet?” helped me know when it was time to stop. Finally, I would like to make a special acknowledgement to my daughter Leila, who was born the month I started the Masters’ program and who reached her first birthday as I completed my thesis. I would like to think we both accomplished a lot this past year!
CONFLICTS BETWEEN THE ACCOMMODATION OF DISABLED WORKERS AND SENIORITY RIGHTS

TABLE OF CONTENTS

INTRODUCTION

PART ONE THE DUTY TO ACCOMMODATE DISABLED PERSONS: THE NORMATIVE CASE

I. Equality and Discrimination

II. The Development of the Duty to Accommodate as a Means of Achieving Equality
   A. Direct Discrimination
   B. Adverse Effect Discrimination and the Duty to Accommodate
      1. The Limits of Undue Hardship
      2. Accommodation is Different Treatment, not Preferential Treatment
   C. Systemic Discrimination
   D. Relevance of Identifying Categories of Discrimination

III. Disability Discrimination and the Duty to Accommodate
   A. The Development of the Law Relating to Disability Discrimination
   B. Equality of Opportunity for Disabled Persons, Not Equal Representation
   C. Examples of Accommodation of Disability-Related Needs

PART TWO DISABILITY AND THE DUTY TO ACCOMMODATE: THE EMPIRICAL CASE

I. Defining Disability

II. The Position of Disabled Persons in the Labour Force

III. Barriers to Participation in the Labour Force
   A. Employer Attitudes Toward Hiring Disabled Persons
   B. Need for Accommodation

IV. Effectiveness of Accommodation

V. Costs and Benefits of Accommodation

VI. Summary

PART THREE STRUCTURE OF A DISABILITY DISCRIMINATION COMPLAINT

I. The Legislative Framework in Ontario Relating to the Duty to Accommodate Disabled Workers

II The Meaning of Employment
   A. The Scope of the Claim to Employment at Common Law
   B. The Scope of the Claim to Employment in a Unionized Environment
   C. The Scope of the Claim to Employment under the Human Rights Code
PART FOUR  

SENIORITY

I.  
The Benefits of Collective Bargaining

II.  
Seniority Systems
     A.  Accumulation of Seniority
     B.  Applications of Seniority

III.  
Legal Status of Seniority

IV.  
Justifications for the Use of Seniority and Reasons for Respecting Seniority Rules
     A.  Objective Measurement
         1.  Check on Managerial Discretion
         2.  Check on Union Discretion
         3.  Enhances Union Solidarity
     B.  Fairness
     C.  Seniority is an Earned Benefit
         1.  Affects Economic Interests
         2.  Reliance Interest
     D.  Protection of Older Workers
     E.  Nature of the Employment Opportunity

V.  
Similarities Between Seniority Systems and the Duty to Accommodate

VI.  
Conflict Between Seniority Systems and the Duty to Accommodate

PART FIVE  

CONFLICTS BETWEEN THE ACCOMMODATION OF DISABLED WORKERS AND SENIORITY RIGHTS

I.  
Conflicts Between the Accommodation of Disabled Workers and Seniority Rights
     A.  The Accumulation of Seniority
         1.  Competitive Seniority
             a.  Date of Hire Seniority Systems
             b.  Hours Worked Seniority Systems
         2.  Benefit Seniority
     B.  Application of Seniority
         1.  Impact on Future Working Conditions
             a.  Hiring and Promotion Systems
             b.  Shift Selection
             c.  Transfer to Vacant Position Within the Bargaining Unit
         2.  Impact on Current Working Conditions: Bumping
         3.  Impact on Ability to Maintain/Regain Existing Employment Status
             a.  Protection Against Bumping
             b.  Recall Rights
             c.  Transfer of Seniority Across Bargaining Units (or Seniority Units)
PART SIX NEGOTIATION AND ADMINISTRATION OF THE COLLECTIVE AGREEMENT

I. Disabled Worker Clauses

II. Mail Survey of Selected Ontario Workplaces
   A. Accumulation of Seniority
   B. Protections Negotiated for Disabled Workers
      1. Transfer to Suitable Alternative Position Within the Bargaining Unit
      2. Waiver of Posting/Other Provisions
      3. Bumping
      4. Transfer to Another Seniority Unit
      5. Transfer Outside the Bargaining Unit
      6. Protection Against Bumping
      7. Training
      8. Light Duty Positions
   C. Factors Which Affect Accommodation

III. Duty of Fair Representation
   A. The Negotiation of the Collective Agreement
   B. The Administration of the Collective Agreement

PART SEVEN RESOLVING THE CONFLICT

I. The Duty to Accommodate and the Limits of Undue Hardship

III. Some Interference with Seniority Rules in Justifiable
   A. Impact of Accommodation on Managerial and Union Discretion
   B. Impact of Accommodation on Union Solidarity
   C. Impact on the Fairness Principle in the Accumulation of Seniority
   D. Reduction of Earned Seniority Credits in the Application of Seniority Rules

IV. Conflicts Revisited
   A. The Accumulation of Seniority
      1. Competitive Seniority
         a. Date of Hire Seniority Systems
         b. Hours Worked Seniority Systems
      2. Benefit Seniority
   B. Application of Seniority
      1. Impact on Future Working Conditions
         a. Hiring and Promotion Systems
         b. Shift Selection
         c. Transfer to Vacant Position Within/Outside the Bargaining Unit
      2. Impact on Current Working Conditions: Bumping
3. Impact on Ability to Maintain/Regain Existing Employment Status
   a. Protection Against Bumping
   b. Recall Rights
   c. Transfer of Seniority Across Bargaining Units (or Seniority Units)

CONCLUSION

BIBLIOGRAPHY

Appendix A

Methodology and Summary of Survey Results, Questionnaire

Tables Summarizing Survey Responses

Table 1: Number of Employees, Sector and Industry Code
Table 2: Absenteeism Clauses
Table 3: Use of Seniority
Table 4: Comprehensiveness of Disabled Worker Clause
Table 5: Support for Strengthening Disabled Worker Clause
INTRODUCTION

Accommodating the needs of disadvantaged individuals and groups is a mechanism for enhancing equality of opportunity. The duty to accommodate has particular significance for disabled persons because mainstream society poses many barriers to disabled persons. Without recognition of and accommodation of their disability-related needs many disabled persons would be unable to participate effectively in activities of daily living such as work, school, leisure, transportation and other services.

Many disabilities cause some loss or reduction of functional ability. When those limitations preclude a disabled person from performing the essential functions of the work, then it is not discriminatory to refuse to employ that person for that work. However, before judging whether the disabled person can perform the essential functions of the work, steps must be taken to accommodate the needs of the disabled persons, unless to do so would cause undue hardship to the person responsible for accommodating those needs. In some situations, the accommodation needed to maintain a disabled worker in the workplace may affect the working conditions of other workers. In a unionized workplace, workers’ rights are determined by the collective agreement. One of the most significant benefits workers achieve through collective bargaining is the right to require that employers allocate limited workplace opportunities based on seniority. In a growing number of cases, the accommodation requested by disabled workers conflicts with the seniority provisions in collective agreements.

In this thesis I identify the circumstances in which the duty to accommodate disabled workers under human rights legislation conflicts with other workers’ seniority rights under a collective agreement and explore how this conflict can be resolved. In part one I outline the normative arguments which justify imposing a duty to accommodate disabled persons on employers and trade unions as a means of enhancing equality of opportunity in the workplace. In part two I set out the empirical evidence which illustrates the barriers disabled persons face in gaining access to the workplace, and which demonstrates that accommodating their needs increases their participation in the workforce. In part three I outline the legislative framework in Ontario relating to the duty to accommodate disabled persons in the workplace and analyze the scope of the right to equal treatment in employment without discrimination because of disability. In part four I describe how seniority systems operate in a unionized workplace, review the
normative rationales for the use of seniority as a means of allocating limited work opportunities between workers, and describe the extensive use of seniority provisions in Ontario collective agreements. In part five, I describe the circumstances in which the accommodation of disabled workers in the workplace can conflict with seniority provisions under a collective agreement. In part six I examine how unions and employers have attempted to address these conflicts. I review the types of clauses which Ontario unions and employers have negotiated in order to accommodate the needs of disabled workers and report on the results of a survey I conducted of Ontario workplaces which have negotiated such clauses. I also analyze whether a union which accommodates the needs of a disabled worker in a manner which diminishes the seniority rights of another worker, would violate its duty of fair representation to other workers in the bargaining unit. In part seven I argue that it would be contrary to public policy for the seniority provisions of the collective agreement to operate as a bar to a required accommodation, unless the actual impact on the rights of other workers is substantial or significant.
PART ONE
THE DUTY TO ACCOMMODATE DISABLED PERSONS: THE NORMATIVE CASE

I. Equality and Discrimination

The purpose of human rights laws is to achieve equality and eliminate discrimination; this is obvious.¹

While the general purpose of human rights statutes may be undisputed, the meanings of "equality" and "discrimination" are not. There are ongoing debates about the meaning of equality and the most appropriate measures to achieve it. In the area of employment, it has been shown that certain groups in society including visible minorities, women, and disabled persons do not occupy a similar position in the workforce as white, male, able-bodied workers, in terms of participation level, occupational distribution and income levels.² These indicia are often cited as evidence of the inequality experienced by certain groups in employment.³ Accordingly, one view is that in order to achieve equality in employment, the goal is the equal representation of these groups in the labour force. An alternative view is that equality in employment can be achieved through the elimination of discriminatory practices, resulting in equality of opportunity in the workplace.⁴ Notwithstanding the conflicting views on the meaning of equality, there can be little dispute that human rights statutes are only one means of achieving greater equality in

---


³Black, supra note 1 at 4 - 10. Black also cited evidence of direct discrimination against these groups.

⁴Some of the more commonly used terms in the human rights literature include formal versus substantive equality, equal treatment, equality of opportunity and equality of result, direct discrimination, adverse effect (or indirect, unintentional or constructive) discrimination, and systemic discrimination. While there is little consensus on the meaning of these terms, some trends in the literature can be discerned. Formal equality is generally associated with an emphasis on equal treatment or equality of opportunity, and the absence of direct discrimination. Substantive equality is associated with an emphasis on group rights and a recognition of the negative impact that the routine rules of society have on persons and groups who are "different". Thus, recognizing and correcting adverse effect discrimination and systemic discrimination (these terms are discussed in greater detail infra) are essential measures to achieve substantive equality. Sometimes, substantive equality is equated with "equality of results" or equal representation of all groups in all sectors of society, although the concepts are not necessarily synonymous.
employment. In my view, human rights statutes are essentially “anti-discrimination” statutes, whose goal is the eradication of discriminatory practices and the enhancement of equality of opportunity. This can be seen both in the preamble and in the basic structure of human rights statutes. For example, the preamble to the Ontario Human Rights Code states, “...it is public policy in Ontario to recognize the dignity and worth of every person and to provide for equal rights and opportunities without discrimination...” The protection in the Ontario Code with respect to employment is expressed as “[e]very person has a right to equal treatment in employment... without discrimination because of [prohibited grounds].” While the elimination of discriminatory practices and barriers will likely enhance the representativeness of protected groups in the workforce, that is not the primary goal of human rights statutes. This can be contrasted with the policy objective of affirmative action or employment equity legislation, which is to increase the representativeness of specified groups in the workplace.  

5Black, supra note 1 at 14 - 5 recognized that a typical anti-discrimination statute is ill-equipped to correct persistent patterns of unequal representation in the workplace.

... The Report would do a great disservice, however, if it gave the impression that the Human Rights Act is alone capable of dealing adequately with problems of inequality or if it discouraged other initiatives to do so. This Report has tried to identify broader patterns of inequality that have a particularly severe effect on some groups within society. It recommends ways that the Human Rights Act can make a larger contribution to modifying those patterns of inequality. But no matter how it is improved, the Act will fail if it is expected to do this job alone.

Accordingly, Black recommended that the B.C. legislature give consideration to the passage of affirmative action legislation to attempt to achieve greater representation in employment (at 18).

6Human Rights Code, R.S.O. 1990, C. H. 19.[hereinafter the Code], Preamble. In Ontario Human Rights Commission v Simpsons-Sears Ltd. [1985] 2 S.C.R. 536 [hereinafter O’Malley] at 547, the Supreme Court of Canada stated “The Code aims at the removal of discrimination. This is to state the obvious.” In Action Travail des Femmes v. Canadian National Railway Co., [1987] 1 S.C.R. 1114 at 1134, the Court referred to the wording in the Canadian Human Rights Act. R.S.C. 1985, c. H-6, section 2 (which was similar to the preamble to the Ontario Code) and noted that the purpose of that Act was to “promote the goal of equal opportunity for each individual to achieve, ‘the life that he or she is able and wishes to have’. the Act seeks to prevent all “discriminatory practices”. In this paper I focus on the situation in Ontario, but I suggest that the overall purpose of all Canadian human rights statutes is similar. K. Swinton. “Accommodating Equality in the Unionized Workplace” (1995). 33 Osgoode Hall Law Journal 703 [hereinafter Swinton, 1995] at 713 - 22 reviews the Supreme Court of Canada decisions on equality and concludes that the Court, while adopting and embracing terminology associated with “substantive equality” in employment law, has adopted “an approach that emphasizes equality of opportunity and removal of barriers, rather than equal results.”

7Employment equity policies can take various forms. At one end of the spectrum are entirely voluntary programs, initiated and implemented by employers. Such programs may be, but need not be, submitted to a human rights commission for prior approval, so as to insulate the employer from complaints by individuals not included in the program. In Ontario, this power is found in section 14 of the Code. Another type of affirmative action program is “contract compliance”, whereby private employers who contract with the state are required to survey their workforce and implement affirmative action programs to increase the participation of underrepresented groups. At the other end
II. The Development of the Duty to Accommodate as a Means of Achieving Equality of Opportunity

Human rights statutes prohibit discrimination in various activities of life such as employment, the provision of services, the occupancy of accommodation, the right to contract, and membership in a trade union. In the area of employment, the prohibition against discrimination operates primarily as a restriction on the factors an employer can consider in making employment-related decisions such as hiring, transfer, promotion, dismissal or lay-off and compensation, rather than as a positive obligation towards members of protected groups.

A. Direct Discrimination

The concept of discrimination has evolved since the first human rights statutes were enacted in Canada. Initially, the law was concerned with direct discrimination, which involved differentiating between individuals on grounds prohibited by human rights statutes. While human rights statutes were introduced to address hostile racism and bigotry, it quickly became accepted that proof of discrimination did not require evidence of malice or hostility. Differential treatment resulting from paternalism or stereotypical assumptions about the abilities of an individual based on his or her membership in a particular group was also prohibited.\(^8\) Direct discrimination in

\(^8\)In Cameron v. Nel-Gor Castle Nursing Home (1984), 5 C.H.R.R. D/2170 (Ont. Bd. of Inq.) [hereinafter Cameron] at paragraph 18485, the board of inquiry stated:

It is understandable why there is some confusion in the area of "human rights' law whereby some equate
employment occurs when an individual or a group is treated differently by an employer because of membership in a group protected under human rights legislation. The employer’s action may be the result of an individualized judgment, (eg a refusal to hire or promote a particular person because of race, gender or disability) or it may be based on a rule or practice (eg mandatory retirement at a specific age, female correctional officers cannot guard male prisoners). In cases of direct discrimination, the employer must establish either that the differential treatment was not based on the prohibited ground (eg the refusal to hire or promote was not related to race, or gender or disability) or that the differential treatment is justified because of the nature of the employment. All Canadian human rights statutes provide that it is not a discriminatory practice to differentiate in employment if the distinction is a bona fide occupational qualification or requirement (hereinafter referred to as a bfoq).\(^9\)

**B. Adverse Effect Discrimination and the Duty to Accommodate\(^{10}\)**

"intention" with "malice." The historical experience with respect to discrimination has focused upon the hatred and ill-will experienced by racial, ethnic and religious minorities. Intention to discriminate, and malice or improper motive, were inextricably bound up together. However, the laws against discrimination have progressed far beyond simply the most visible historical injustices. The new Code's "handicap" provisions were enacted primarily to prohibit wide-spread employment practices whereby employers refuse, not out of any malice toward the handicapped, but out of fear, ignorance, stereotypical assumptions, or misguided paternalism, to make employment decisions on the basis of a handicapped person's true ability.


\(^{10}\)The Canadian category of adverse effect discrimination has its origins in two categories of American discrimination. The United States Supreme Court first recognized that the equal application of workplace rules could operate to exclude and thereby discriminate against protected groups in *Griggs v Duke Power Company* 91 S. Ct. 849 (1971). In that case, the employer's use of employment tests disproportionately excluded Blacks from employment. If an employment test or other criteria for employment has a substantial adverse impact on a protected group, the employer must establish that the test or criteria is "significantly related to job performance" or otherwise constitutes a "business necessity". The concept of the duty to accommodate arose separately. The 1967 EEOC Guidelines on Discrimination Because of Religion required an employer "to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodations can be made without undue hardship on the conduct of the employer's business." While the theory underlying the guideline was consistent with the EEOC's position on neutral policies which adversely affect employees, it adopted a different approach than the adverse effect category. Rather than requiring the employer to prove business necessity, the employer was required to accommodate the employees religious needs. After the USSC failed to confirm the EEOC's position (*Dewey v Reynolds Metals Co.* 300 f. Supp. 709, 1 FEP 759 (W.D. Mich. 1969), rev'd and remanded, 429 F. 2d 324, 2 FEP 687 (6th Cir. 1970), aff'd mem. by an equally divided court, 402 U.S. 689, 3 FEP 508 (1971) that the prohibition against discrimination included an affirmative duty to accommodate an employee's religious needs, Title VII was amended to specifically include this duty. Thus, the category of accommodation under Title VII is restricted to accommodating religious needs. A similar statutory duty to accommodate the needs of disabled persons was introduced into the Americans with Disabilities Act of 1990 42 U.S.C.A. ss. 12101-12213 (West Supp. 1991) [hereinafter the ADA].
A major development in discrimination law was the recognition that equal treatment may result in discrimination. In *Ontario Human Rights Commission v Simpsons-Sears Ltd.*, [hereinafter *O’Malley*] the Supreme Court of Canada considered whether Simpsons Sears discriminated against Mrs. O’Malley when it terminated her employment because she refused to work a rotating Saturday shift which conflicted with her religious beliefs. The Supreme Court of Canada unanimously confirmed that proof of an intention to discriminate was not an essential element in establishing discrimination under human rights legislation. Further, the Court concluded that equal treatment, in the sense of applying workplace rules or standards equally to all employees, could result in discrimination:

...On the other hand, there is the concept of adverse effect discrimination. It arises where an employer for genuine business reasons adopts a rule or standard which is on its face

---

*11 [1985] 2 S.C.R. 536. The Supreme Court of Canada simultaneously released its decision in *Bhinder v Canadian National Railway Co.*, [1985] 2 S.C.R. 561. which involved a case of adverse effect discrimination under the Canadian Human Rights Act. Mr. Bhinder was a Sikh whose religion required him to wear a turban. His employment was terminated when he was unable to comply with the employer’s requirement that employees wear a protective safety helmet at a particular work site. While the Court unanimously affirmed that adverse effect discrimination was equally prohibited under the Canadian Human Rights Act, the members Court disagreed whether there was a duty to accommodate in light of the statutory bfoq defense. (The Ontario Code did not contain a bfoq with respect to discrimination on the basis of religion. at that time). The majority of the Court (Dickson and Lamer J.) dissenting) ruled that once the employer established that the hard hat rule was a bfoq within the meaning of the Act, there was no further duty to accommodate an individual. The dissenting justices held that in order to establish a bfoq, the employer must be able to establish that accommodating the needs of the individual or group would cause it undue hardship. The *Bhinder* decision was widely criticized and the Supreme Court subsequently reversed its position in *Central Alberta Dairy Pool*, supra note. *Central Alberta Dairy Pool*, discussed in greater detail in the text, concerned a work attendance rule which had an adverse effect on the religious needs of worker. The case arose under the Alberta Human Rights Act which contained a statutory bfoq. A majority of the Court in *Central Alberta Dairy Pool* held that Bhinder was simply wrongly decided because the statutory bfoq defense is inapplicable in cases of adverse effect discrimination. Rather, the employer must establish that accommodating the employee would cause undue hardship. The bfoq defense is only relevant in cases of direct discrimination, and once a bfoq has been established, there is no requirement to accommodate. The minority of the Court concurred in the result, but held that the duty to accommodate is part of the bfoq defense. The minority position in *Central Alberta Dairy Pool* was used to support the argument that the duty to accommodate arises in all cases of discrimination, both direct and adverse effect. Support for this positions is waning at the Supreme Court. *Large v Stratford (City)*, [1995] 3 S.C.R. 733 concerned the validity of mandatory retirement age for police officers. The Ontario *Code* at that time included a bfoq defense with respect to age, but did not include the current statutory requirement to accommodate. Again, a majority of the Court concluded that in cases of direct discrimination, the duty to accommodate did not arise, once an employer had established that the mandatory retirement age was a bfoq. It is interesting to note that Sopinka and Laforest reversed their position on this point since *Central Alberta Dairy Pool*. The minority justices, McLachlin and L’Heureux-Dube, concurred in the result but ruled that the bfoq defense includes the obligation to consider reasonable alternatives, which “opens the door to the consideration of the possibility of accommodation in deciding whether a restriction constitutes a bfoq.” (at 762). Thus, while there is still some ongoing debate at the Supreme Court whether there is a duty to accommodate in cases of direct discrimination, support for this position is waning. For a full discussion of the Supreme Court of Canada caselaw on the duty to accommodate in cases of direct and adverse effect discrimination. see A. M. Molloy, “Disability and the Duty to Accommodate” (1990), 1 C.L.L.J. 23 and S. Day and G. Brodsky, “The Duty to Accommodate: Who Will Benefit?” (1996) 75 Cdn Bar Review 433.*
neutral, and which will apply equally to all employees, but which has a discriminatory effect upon a prohibited ground on one employee or group of employees in that it imposes, because of some special characteristic of the employee or group, obligations, penalties, or restrictive conditions not imposed another members of the work force...An employment rule honestly made for sound economic or business reasons, equally applicable to all to whom it is intended to apply, may yet be discriminatory if it affects a person or group of persons differently from others to whom it may apply.\(^\text{12}\)

When a neutral workplace rule has a discriminatory effect, the rule is allowed to stand if it is rationally related to the performance of the work, but the employer must take reasonable steps to accommodate the employee, short of undue hardship.\(^\text{13}\)

1. **The Limits of Undue Hardship**

In *Central Alberta Dairy Pool*\(^\text{14}\) the Supreme Court of Canada again addressed an employer’s obligations to religious employees who were adversely affected by workplace attendance requirements. Mr. Christie was dismissed for failing to attend work when his religious holy day (which happened to coincide with Easter Monday) conflicted with a regular work day. As in *O'Malley*, the Court held that the work attendance requirement was a “neutral condition of general application” which was rationally connected to the performance of the job, but had an adverse impact on the complainant because of his religion. The Court confirmed that the employer was obliged to accommodate the religious beliefs of the complainant to the point of undue hardship, and identified some of the factors which are relevant to a determination of undue hardship:

...financial cost, disruption of a collective agreement, problems of morale of other employees, interchangeability of work force and facilities. The size of the employer's operation may influence the assessment of whether a given financial cost is undue or the ease with which the work force and facilities can be adapted to the circumstances. Where safety is at issue both the magnitude of the risk and the identity of those who bear it are relevant considerations...[t]his is not intended to be exhaustive and the results which will obtain from a balancing of these factors against the right of the employee to be free from discrimination will necessarily vary from case to case.\(^\text{15}\)

---

\(^{12}\) *O'Malley* supra note 6 at 551.

\(^{13}\) *Ibid.* at 555. The Court also concluded that the onus is on the employer to establish that it has taken reasonable steps toward accommodation of the employee’s position, short of undue hardship (at 558 - 9).


\(^{15}\) *Ibid.* per Wilson J. at 521.
In *Central Okanagan School District No. 23 v. Renaud*16 ("Renaud"), the Supreme Court of Canada confronted the issue of a union’s obligation to accommodate and elaborated on the limits of undue hardship in a unionized environment. Mr. Renaud worked as a custodian for a school board, on a Monday to Friday evening shift. The requirement to work Friday evenings conflicted with Mr. Renaud’s religion. The employer, the union and Mr. Renaud were unable to agree on a means of accommodating Mr. Renaud’s needs. The employer decided that the only practical accommodation was the creation of a Sunday to Thursday shift for Mr. Renaud, which was contrary to the collective agreement. The union held a meeting with its members to discuss the proposed shift change and the members voted to file a grievance if the employer implemented such a change. The employer did not proceed with the shift change in light of the union’s position and eventually terminated Mr. Renaud’s employment when he refused to complete his Friday night shift.

The Court found that the employer had failed to accommodate Mr. Renaud, rejecting the employer’s arguments that the threatened grievance and the effect on employee morale which would result from the violation of the collective agreement amounted to undue hardship.17 The Court acknowledged that the effect of a proposed accommodation on the collective agreement is a relevant factor in assessing potential undue hardship:

Substantial departure from the normal operation of the conditions and terms of employment in the collective agreement may constitute undue interference in the operation of the employer’s business.18

The Court confirmed that the union was a party to the adverse effect discrimination which resulted from the strict application of the shift schedule to Mr. Renaud, and thus, the union was also subject to the duty to accommodate Mr. Renaud.

---


17The Court confirmed the human rights tribunal’s finding that the cost of defending a grievance did not amount to undue hardship (*Ibid.* at 985). With respect to employee morale, the Court stated at 988:

The objection of workers based on well-founded concerns that their rights will be affected should be considered. On the other hand, objections based on attitudes inconsistent with human rights are an irrelevant consideration. I would include in this category objections based on the view that the integrity of a collective agreement is to be preserved irrespective of its discriminatory effect on an individual employee on religious grounds.

A union may become a party to employment discrimination in two ways. First, if the union participates in the formulation of the workplace rule or practice which has a discriminatory effect, it becomes “a co-discriminator and shares a joint responsibility with the employer to seek to accommodate the employee.” When the rule is a provision in the collective agreement, the union will generally be assumed to have participated in its formulation, regardless of which party pressed for the provision. While the employer can be expected to initiate the process of accommodation, the union’s duty to accommodate includes putting forward reasonable proposals and not opposing reasonable suggestions from the employer.

Second, a union may be liable even if it did not participate in the formulation of the discriminatory practice, if it impedes the employer’s reasonable efforts to accommodate. In this type of situation, the employer must canvass other methods of accommodating the employee which do not require the participation of the union, before it can call upon the union to accommodate.

The primary factor in determining whether an accommodation causes undue hardship to the union is the effect on other employees represented by the union.

The primary concern with respect to the impact of accommodating measures is not, as in the case of the employer, the expense to or disruption of the business of the union but rather the effect on other employees. The duty to accommodate should not substitute discrimination against other employees for the discrimination suffered by the complainant. Any significant interference with the rights of others will ordinarily justify the union in refusing to consent to a measure which would have this effect. Although the test of undue hardship applies to a union, it will often be met by a showing of prejudice to other employees if proposed accommodating measures are adopted. As I stated previously, this test is grounded on the reasonableness of the measures to remove discrimination which are taken or proposed. Given the importance of promoting religious freedom in the workplace, a lower standard cannot be defended. (emphasis added)

---

19 Ibid. at 990 and 992.

20 Ibid. at 990.

21 Ibid. at 992.

22 Ibid. at 991.

23 Ibid. at 991- 2. The employer can also assert that a proposed accommodation unduly interferes with the rights of other employees:

The employer must establish that actual interference with the rights of other employees, which is not trivial but substantial, will result from the adoption of the accommodating measures. Minor interference or
The Court found that the employer's proposed creation of a Sunday to Thursday shift was a reasonable accommodation and the union's refusal to agree to it amounted to a failure of its duty to accommodate. It should be noted that this proposal would have required another employee with greater seniority to work Mr. Renaud's Friday night shift. Since the Union had failed to canvass possible volunteers, the Court found that the Union failed in its duty to accommodate Mr. Renaud. The Court did not address whether another employee with greater seniority could have been required to trade shifts with Mr. Renaud.

2. Accommodation is Different Treatment, not Preferential Treatment

The essence of accommodation is some form of different treatment as a means of achieving equality. In O'Malley and Central Alberta Dairy Pool, the different treatment involved an exemption from the general work attendance requirements. In Renaud, the most reasonable accommodation available required the creation of a special shift not available to other employees. The purpose of the accommodation is to enhance equal opportunities in the workplace.

The case law of this Court has approached the issue of accommodation in a more purposive manner, attempting to provide equal access to the workforce to people who would otherwise encounter serious barriers to entry.

In interpreting the equality guarantees under the Charter, the Supreme Court of Canada
has stated that it is necessary to treat people differently in some contexts in order to achieve equality. While some measures of accommodation are readily perceived as necessary to enable disadvantaged groups to achieve equality, other measures are often perceived as preferential treatment, usually because the form of the accommodation is one which non-disadvantaged persons would like (not need) to share as well. For example, few would deny that a ramp or a braille printer are accommodations which are needed by the mobility impaired or the visually impaired in order to interact equally with non-disabled in the workplace. These are not measures that non-disabled persons need or even desire. Other types of accommodation however, such as exemptions from a Saturday shift schedule, transfer to an alternative position, or flexible working hours are desired by many workers for valid and obvious lifestyle reasons. Thus, workers are more prone to label these accommodations “preferential” treatment when these accommodations are given to members of protected groups, but denied to them. The fact that workers may resent what they perceive as preferential treatment would not be sufficient reason to refuse to implement a required accommodation.

C. Systemic Discrimination

When the cumulative effect of direct and indirect discriminatory practices operates to disproportionately exclude disadvantaged groups from employment, this is referred to as systemic discrimination.

Discrimination...means practices or attitudes that have, whether by design or impact, the effect of limiting an individual’s or a group’s right to the opportunities generally available because of attributed rather than actual characteristics...

It is not a question whether this discrimination is motivated by an intentional desire to obstruct someone’s potential, or whether it is the accidental by-product of innocently motivated practices or systems. If the barrier is affecting certain groups in a

29 In Andrews v Law Society of British Columbia, [1989] 1 S.C.R. 143, the Supreme Court of Canada considered whether the Canadian citizenship requirement for admission to the British Columbia bar infringed or denied the equality rights guaranteed by section 15(1) of the Charter and if so, whether that infringement was justified by section 1. In interpreting section 15(1), the Court noted at 165 that identical treatment may result in equality, and that “the interests of true equality may well require differentiation in treatment.”

30 The resentment argument is a variation of the employee morale argument. The Supreme Court of Canada has stated that “objections based on attitudes inconsistent with human rights are an irrelevant consideration.” Renaud, supra note 16 at 988. I draw a distinction between the resentment workers may feel when they perceive other workers to be receiving preferential treatment, and the actual interference with other workers rights. The latter, if it is significant or substantial must be taken into account in determining whether a proposed accommodation causes undue hardship.
Proof of systemic discrimination generally requires statistical evidence that a particular group is underrepresented in an employer’s enterprise coupled with evidence that the underrepresentation is the result of workplace practices that are directly discriminatory or have an adverse effect on the group.32

An employment equity plan to increase the representativeness of group discriminated against may be an appropriate remedy for proven systemic discrimination. The purpose of the employment equity plan is not to achieve any particular level of representativeness as an end in itself, but to remedy and prevent the discriminatory practices from continuing to affect the future employment opportunities of the affected group:

An employment equity program, such as the one ordered by the Tribunal in the present case, is designed to break a continuing cycle of systemic discrimination. The goal is not to compensate past victims or even to provide new opportunities for specific individuals who have been unfairly refused jobs of promotion in the past, although some such individuals may be beneficiaries of an employment equity scheme. Rather, an employment equity program is an attempt to ensure that future applicants and workers from the affected group will not face the same insidious barriers that blocked their forebears.33

D. Relevance of Identifying the Category of Discrimination

The relevance in identifying the category of discrimination is that the remedy may vary depending on the type of discrimination which is alleged. If the employer’s rule or practice is directly discriminatory, then the rule or practice must be discontinued, or the individual afforded relief, unless the employer can establish that the discriminatory criteria is a hfoq. If the discrimination arises by virtue of the application of a neutral rule which is rationally related to the employment, then the individual’s needs must be accommodated, unless the employer (or the

31 Abella Report, supra note 2, quoted in Action Travail des Femmes, supra note 6 at 1138 - 39.

32 Beatrice Vizkeley. "Discrimination, the Right to Seek Redress and the Common Law: A Century-Old Debate" (1992). 15 Dalhousie L. J. 304 at 312. In Action Travail des Femmes, supra note 6, the evidence before the Board of Inquiry established that only 4% of CN’s workforce was made up women, compared with a national average of 13% in similar blue collar occupations. The panel held that the low representation rate was due to a variety of discriminatory practices. Some of the directly discriminatory practices included channeling women into secretarial positions, rather than blue-collar positions, and harassment from male co-workers and supervisors. Examples of practices which had an adverse discriminatory effect on women included a requirement of welding experience, and the administration of mechanical aptitude tests which have the effect of excluding many women.

33 Action Travail des Femmes, supra note 6 at 1143.
union) can establish that the accommodation required would cause undue hardship. If the discrimination arises as a result of the cumulative effect of direct and adverse effect employment practices, the remedy may lie in an employment equity plan.

While the development of the law has made it necessary to draw a bright line between direct and adverse effect discrimination, in reality, the line is rather blurred. For example, in Central Alberta Dairy Pool, the Supreme Court characterized the workplace “rule” in the following terms:

...the only way to characterize the respondent’s rule would appear to be “mandatory attendance on Mondays except in case of illness or other emergencies, religious obligation not being included as an emergency for this purpose”. Stated in the obverse, the rule prohibited Monday absences due to religious obligation.

Stated thus, the rule bears a striking resemblance to direct discrimination on the basis of religion. Similarly, in the case of disability, where the employer refuses to hire or retain an employee because he or she cannot perform the duties of the job in the manner stipulated by the employer, this can be characterized as direct or adverse effect discrimination. The reason for the refusal to hire or retain the employee is the inability to do the job, which is directly related to the disability. Stated another way, the employer’s requirement that the person do the job in a certain manner is a neutral rule, which has an adverse effect on a disabled person who cannot do the job.

The simpler approach would be to assess whether the person or group alleging discrimination is experiencing a discriminatory effect associated with the protected status, whether the employer can show that it could not avoid the discriminatory effect and then to consider the most appropriate remedy which would achieve equality of opportunity in employment.

---

34 This point was made by M. D. Lepofsky. "The Duty to Accommodate: A Purposive Approach" (1992) 1 Can. Lab. L. J. at 18; Molloy, supra note 11 at 37, and Day and Brodsky, supra note 11 at 447 - 457. Day and Brodsky note that some of the drawbacks of this artificial distinction include the difficulty of making the distinction, the likelihood that the analysis of discrimination will be skewed by the available remedies, and that necessary remedies may be lacking in some cases.

35 Central Alberta Dairy Pool, supra note 9 at 501 - 2.

36 Day and Brodsky, supra note 11 at 460.
III. Disability Discrimination and the Duty to Accommodate

A. The Development of the Law Relating to Disability Discrimination

The development of the law relating to disability discrimination parallels the general development of the anti-discrimination law, albeit in an accelerated way. The first jurisdiction to include disability as a protected ground of discrimination was New Brunswick in 1976. In Ontario, disability was added as to the Code in 1982. Many of the early disability discrimination cases involved straightforward disputes about whether or not the person's disability prevented them from performing the essential duties of a particular position safely, efficiently and productively. There was little discussion about the situation of a person whose disability prevented them from performing the work, without some assistance. It was assumed that the only measure needed to enhance access to employment for disabled persons was to address the biases and stereotypical assumptions which served to exclude handicapped individuals who were capable of performing the work.

In each case, the protection [against discrimination] is subject to the individuals being able to perform the essential functions associated with the particular activity in question. Obviously an employer must be able to expect any applicant to be capable of performing the job that available...a handicapped person will be protected against rejection because he or she cannot perform tasks that are unrelated to a particular job, or constitute only a minor part of the usual responsibilities.

However, merely treating disabled persons equally with non-disabled persons is an inadequate means of achieving equality of opportunity in employment. Just as the adverse effect doctrine recognizes that ordinary and apparently neutral workplace scheduling rules can exclude religious minorities from the workplace, it must be recognized that the ordinary requirements of work can operate to exclude persons with disabilities. Virtually all productive tasks in the workplace are designed to be performed by persons whose physical and mental abilities fall within

37 S.N.B. 1976, c. 31.
39 See review of the early caselaw on handicap in Cameron, supra note 8 at para 18392 to 18409.
40 Remarks on Special Concerns of the Physically Handicapped. Robert G. Elgie, M.D., Minister of Labour, to the Canadian Association of Statutory Human Rights Agencies, June 1, 1981. Windsor, Ontario. speaking with respect to the new protection against discrimination on the basis of handicap in the Ontario Code, quoted in Cameron, supra note 8 at 18364.
the range considered normal for working age adults. Most tasks require, at minimum, an average degree of muscular strength, co-ordination, agility, mobility, vision, hearing and mental comprehension. If one or more of these senses are impaired then that person may not be able to perform the work tasks on the same equipment, in the same manner, at the same speed, or with the same level of productivity as a person without the disability. Requiring a disabled persons to fit within a world designed to meet the needs of the non-disabled, is discriminatory in the same way that requiring religious minorities to fit into a secular work or school schedule is discriminatory.

If the right to equal treatment in employment simply ended with a consideration whether the disabled person could function in the workplace in exactly the same manner as non-disabled persons, then it would not be discriminatory to refuse to hire or retain an employee who was unable to perform the tasks of the position in the workplace as designed by the employer and in the manner chosen by the employer.

The duty to accommodate was developed as a measure to ensure that those whose religious needs differed from the needs of the dominant groups in society could be allowed to participate equally in the workplace. Absent some accommodation of their religious needs, members of religious minorities would be effectively excluded from participating in some workplaces. Similarly, absent some measure of accommodation many persons with disabilities would be effectively excluded from the workplace. Thus, the concept of equality of opportunity must recognize that disabled persons will sometimes require equal treatment (in the sense of being judged based on their actual capabilities without prejudgments based on false stereotypes) and at other times will require different treatment (in the form of some accommodation of their disability, in order that their true abilities can be judged fairly).

This is the approach which has been adopted by the Supreme Court of Canada in determining whether persons with physical or mental disabilities are receiving the equal benefit and protection of the law, without discrimination under section 15(1) of the Charter. In Eaton v. Brant County Board of Education,41 the parents of a twelve year old girl with cerebral palsy appealed a decision of the Special Education Tribunal which determined that the child’s best educational interests lay in a special education class, rather than in full integration in a regular

---

school setting. The Tribunal's decision was upheld by the Divisional Court, but overruled by the Court of Appeal, which held that there is a presumption in favour of integrated education in the absence of parental consent, unless the Tribunal determined that separate education was clearly in the better interests of the child. The Supreme Court of Canada allowed the appeal and restored the decision of the Tribunal on the basis that the Tribunal had adopted the correct approach in determining the best interests of the child. The Court rejected the argument that there is a presumption in favour of integrated education. The Court found that, although the assessment of disabled children for a determination whether an integrated or segregated classroom setting was in their best interests amounted to differential treatment, it did not impose a burden or disadvantage, nor constitute the withholding of a benefit or advantage, so long as the Tribunal made the assessment in light of its obligation to accommodate the disabled child's needs as far as reasonably possible:

The principles that not every distinction on a prohibited ground will constitute discrimination and that, in general, distinctions based on presumed rather than actual characteristics are the hallmarks of discrimination have particular significance when applied to physical and mental disability. Avoidance of discrimination on this ground will frequently require distinctions to be made taking into account the actual characteristics of disabled persons. In Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143 at p. 169, McIntyre J. stated that the "accommodation of differences . . . is the true essence of equality". This emphasizes that the purpose of s. 15(1) of the Charter is not only to prevent discrimination by the attribution of stereotypical characteristics to individuals, but also to ameliorate the position of groups within Canadian society who have suffered disadvantage by exclusion from mainstream society as has been the case with disabled persons.

The principal object of certain of the prohibited grounds is the elimination of discrimination by the attribution of untrue characteristics based on stereotypical attitudes relating to immutable conditions such as race or sex. In the case of disability, this is one of the objectives. The other equally important objective seeks to take into account the true characteristics of this group which act as headwinds to the enjoyment of society's benefits and to accommodate them. Exclusion from the mainstream of society results from the construction of a society based solely on "mainstream" attributes to which disabled persons will never be able to gain access. Whether it is the impossibility of success at a written test for a blind person, or the need for ramp access to a library, the discrimination does not lie in the attribution of untrue characteristics to the disabled individual. The blind person cannot see and the person in a wheelchair needs a ramp. Rather, it is the failure to make reasonable accommodation, to fine-tune society so that its structures and assumptions do not result in the relegation and banishment of disabled persons from participation, which results in discrimination against them. The discrimination inquiry which uses "the attribution of stereotypical characteristics"
reasoning as commonly understood is simply inappropriate here. It may be seen rather as a case of reverse stereotyping which, by not allowing for the condition of a disabled individual, ignores his or her disability and forces the individual to sink or swim within the mainstream environment. It is recognition of the actual characteristics, and reasonable accommodation of these characteristics which is the central purpose of s. 15(1) in relation to disability. 42

It follows that disability, as a prohibited ground, differs from other enumerated grounds such as race or sex because there is no individual variation with respect to these grounds. However, with respect to disability, this ground means vastly different things depending upon the individual and the context. This produces, among other things, the "difference dilemma" referred to by the interveners whereby segregation can be both protective of equality and violative of equality depending upon the person and the state of disability. 43

B. Equality of Opportunity for Disabled Person, Not Equal Representation

Imposing a duty to accommodate the needs of disabled persons in the workplace serves the same purpose as other remedial measures in human rights statutes, the enhancement of equal employment opportunities. 44 It follows that the right to equal treatment in employment without discrimination on the basis of disability in human rights statutes is not a right to equal representation in employment for disabled persons. It does not grant greater opportunities for employment, ensure minimum levels of compensation or benefits, or guarantee greater security of employment. An applicant for a position or a promotion has the right to be considered fairly, without discrimination, for an employment opportunity. The guarantee of equal opportunity requires that when assessing a disabled applicant's suitability for the position, the applicant's

42 Ibid. at 272 - 3.

43 Ibid. at paragraph 69.

44 Cameron, supra note 8 at paragraphs 18390:

First, there is an objective of securing for the handicapped person equality of opportunity with respect to employment. Everyone deserves the same opportunity and chance to make the most of life, regardless of physical or mental handicap.

See also Worobetz v. Canada (Canada Post Corp.) [1995] C.H.R.D. No. 1(Cdn Human Rights Tribunal) at 32:

Although the Canadian Human Rights Act is to be interpreted in a broad and liberal manner, the object and intent of the Act, also, as previously indicated, provide for equal, not superior, opportunities for disabled persons.
capabilities must be considered in light of the availability of accommodation, not without it.\textsuperscript{45} However, the \textit{Code} does not require that a capable disabled person must be granted the position. If there are other applicants, the usual merit principle would apply, and the employer would be entitled to hire the most suitable candidate, so long as the disabled person’s handicap (and any need for accommodation) is not a factor in the decision. In the case of disabled workers, the right to equal treatment guarantees their right to remain in the workplace, commensurate with their ability to perform the work required by their employment status. However, they are subject to the same risk of lay-off, demotion or transfer for non-performance or economic reasons as other employees.

C. \textbf{Examples of Accommodation of Disability-Related Needs}

Examples of accommodation of disability-related needs which are readily identifiable measures which enhance equality of opportunity in the workplace include the modification of physical premises (e.g. the installation of an elevator, ramp, or accessible washrooms) or the provision of adaptive equipment (braille material, adaptive equipment for the hearing impaired, lifting devices for those with strength or agility limitations). The issue which is likely to be raised by these types of accommodation requests is whether the financial cost to the employer amounts to undue hardship.\textsuperscript{46} Other types of accommodation such as the alteration of job duties (assigning

\textsuperscript{45}Epolsky, \textit{supra} note 34 at 7 offers this example to illustrate the necessity to judge an applicant’s capabilities in light of the available accommodations:

If a job applicant’s abilities are appraised without taking into account his or her productivity when provided with accommodation in relation to disability, gender, or religion, an inadequate and incomplete picture of the applicant’s true capacity for productive work will not be obtained. By analogy, it would be absurd to evaluate an extremely short-sighted applicant for a job as a lawyer by first requiring that he or she do the job without wearing needed reading glasses. To do so would be to grossly underestimate his or her abilities.

\textsuperscript{46}While the primary focus of this thesis is on the conflict of rights between competing workers when accommodation needs conflicts with seniority rights, it would be inappropriate to omit the employer perspective entirely. Employers attempt to produce goods and services at the most competitive price. In an unrestrained and fully informed market, employers would theoretically base their employment decisions (hiring, promotion, compensation) on the employee’s ability to produce the goods and services. Assuming that there is a pool of qualified applicants, an economically efficient employer would select the most productive workers. Anti-discrimination legislation restraints employer decision-making by prohibiting them from taking into account certain prohibited grounds, such as race, sex, marital status etc. Such restraint should not impose any economic costs on employers, since those grounds do not affect the worker’s productivity. Disability discrimination policies which include a duty to accommodate operate differently. Some disabled persons will not be able to produce the goods and services as productively as other persons, unless their needs are accommodated. If the accommodation required imposes some financial costs on the employer which a non-disabled would not require, and if the employer is not allowed to transfer the cost of the accommodation back to the worker in the form of lower wages, then it is not an economically efficient decision to select the disabled person over the non-disabled person. In an increasingly competitive global market where many jurisdictions do not impose a similar
non-essential and perhaps less favourable work duties elsewhere), changes in work schedules (hours, shifts, locations), and the transfer to alternative positions, may impact on the working conditions of other workers and may raise non-financial allegations of undue hardship (substantial disruption of a collective agreement or significant interference with the rights of other workers).

The focus of this paper is on those forms of accommodations which are most likely to impact on the seniority rights of other workers to claim future work opportunities or maintain current working conditions.

Having set out the normative justification for requiring employers to accommodate the needs of disabled persons, in the next section I examine the empirical evidence regarding the employment barriers faced by disabled persons and the positive impact of accommodation practices on increasing their access to employment.

duty to accommodate disabled workers, those employers who must comply with the requirement will face a competitive disadvantage. From an economic perspective, it is legitimate to question whether the cost of the accommodation should be borne by the individual employer who employs the disabled worker or by society as a whole. It is beyond the scope of this paper to analyze these issues. In Ontario, the Legislature has decided that the appropriate course is to require the employer to bear the costs of accommodation, unless to do so would cause them undue hardship.
Part Two   DISABILITY AND THE DUTY TO ACCOMMODATE: THE EMPIRICAL CASE

I. Defining Disability

One of the difficulties in attempting to analyze the position of disabled persons is that disabled persons are less identifiable than other groups which are the target of anti-discrimination laws. The nature and degree of disability varies greatly among persons with disabilities, and can vary further depending on the context in which the assessment of the disabling nature of the condition is made. Some disabilities may impair a person’s ability to function in some activities of daily living, but not in others. The demands of the work may impose more difficulties on some persons with disabilities than others. For example, a worker with low back pain may be totally disabled from performing the occupation of manual labour, whereas an office worker with a similar condition may be able to perform the work, with some accommodation. The purpose of a disability-related program may affect a worker’s assessment of the degree of disability. For example, it is to a person’s benefit to be labelled as totally disabled from working or unemployable in order to qualify for disability benefits, whereas it may be beneficial to be labelled as capable of working, but unemployed in order to qualify for vocational rehabilitation assistance.\(^{47}\)

Notwithstanding these limitations of definition and counting, Statistics Canada has developed a definition of disability for census purposes.\(^{48}\) In 1991 there were an estimated 4.2


Similarly, a disabled person may claim to be “permanently unemployable” or “totally disabled” in order to qualify for disability benefits, which could jeopardize his or her subsequent claim to be able to work, with accommodation, or conversely, a claim for accommodation in order to be able to work may jeopardize the person’s entitlement to benefits. In *Worobetz*, supra note 44, the complainant alleged discrimination on the basis of disability under the *Canadian Human Rights Act*. The complainant had a mental disability and his employment as a casual mail sorter with Canada Post had been terminated because of his inability to handle the productivity and accuracy requirements of the job. During the human rights hearing, evidence was introduced that Mr. Worobetz had applied for and was in receipt of disability benefits from the Province of Alberta, for which his family doctor had certified that he was “permanently unemployable.” The employer sought to rely on this assessment to establish that the complainant was not capable of carrying out the duties of the job. The human rights adjudicator did not accept that the receipt of benefits was conclusive evidence that the complainant could not be competitively employed. However, the adjudicator did find, based on other medical evidence, that the complainant was not capable of performing the essential duties of the job in question.

\(^{48}\)Statistics Canada began collecting information on disabled persons during the 1986 census. Two questions on the 1986 long questionnaire were used to identify persons with disabilities. A further survey of selected persons with disabilities was carried out by conducting detailed interviews using the Health and Activity Limitation Survey (“HALS”). The HALS survey was repeated after the 1991 census. The HALS uses the World Health Organization’s definition of disability, which is “any restriction or lack (resulting from an impairment) of ability to perform an activity in the manner or within the range considered normal for a human being.” Adults 15 years and over were asked a number
of questions about activities which most people carry out as part of their everyday life. Those who indicated that they were limited in activities at home, school, work, or leisure because of a physical or psychological condition were included in the definition, as were persons with learning disabilities or developmental handicaps. Adults were not considered to have a disability if they use a technical aid that completely eliminates the limitation. Further, the limitation has to be of minimum six-month duration. Disabilities were rated as mild, moderate or severe, depending on the amount of impairment reported. Information from the HALS survey can be reported with respect to a number of target populations. References in this paper to disabled persons, unless otherwise indicated in the text, relate to the 2.3 million working age (15-64) disabled persons in Canada. This group must be distinguished from the category of disabled persons with work disabilities, described infra note 51.


50 Ibid at 13.

51 Profile of Persons with Disabilities (Limited at Work/Perception): Canada, Provinces and Territories. Statistics Canada. 1995, Table 1. Persons with work disabilities is a smaller subset of all disabled persons and is defined as persons aged 15 to 64 who have a long-term or recurring physical, mental sensory, psychiatric or learning impairment and who a) consider themselves to be disadvantaged in employment by reason of that impairment, or b) believe that an employer or potential employer is likely to consider them to be disadvantaged in employment by reason of that impairment. This definition is designed to co-ordinate with the Employment Equity Act definition of disability.

52 Projections of Persons with Disabilities (Limited at Work/Perception), Canada, Provinces and Territories. 1993 - 2016. January 1996. Statistics Canada, Catalogue # 91-538E at 29 - 33. This is a higher growth rate than for persons without disabilities. The authors of this report note that given data limitations and a lack of consensus in terms of theoretical and empirical explanations on disability prevalence, it is difficult to develop plausible assumptions on future trends of work disability rates. The authors estimates focus on future change in the number of persons with disabilities as a result of demographic change, while keeping the disability prevalence rates constant. Ontario’s share of the population with work disabilities will have the largest increase (between 2.3% and 4.3% - from 38.75% to between 41.04% and 43.06%).

53 A Portrait of Persons with Disabilities. supra note 48 at 9. 46% of persons aged 65 and over had disabilities, compared with 27% of people aged 55-64. 14% aged 35-54. 8% of those aged 15 - 34.

54 Selected Characteristics of Persons with Disabilities Residing in Households. 1991 HALS. Statistics Canada. Catalogue 82-555. Highlights. In 1991, 52% of the working age population had mobility disabilities and 50% had agility disabilities. 32% had other disabilities. 25% had hearing disabilities, 9% had vision disabilities, 8% had speaking limitations. These figures exceed 100% since many persons reported more than one limitation.
reporting disabilities are rated as mildly, moderately or severely disabled, depending on the amount of loss of function reported. 54% of disabled working age adults reported having a mild level of disability, while 32% had a moderate disability and 14% had a severe disability.\textsuperscript{55}

II. \textbf{Position of Disabled Persons in the Labour Force}

Persons with disabilities have lower rates of employment and participation in the labour force, and higher rates of unemployment compared to persons without disabilities. 48% of working aged persons with disabilities were employed in 1991, compared to 73% of the non-disabled population.\textsuperscript{56} Earnings from employment are the main source of income of working aged disabled persons, but their employment earnings are below those of non-disabled ($22,055 vs $25,405).\textsuperscript{57} As would be expected, persons with mild disabilities are more likely than those with moderate or severe disabilities to be employed\textsuperscript{58} and employment levels increase with level of education.\textsuperscript{59} However, even those persons with mild disabilities had a significantly lower chance of being employed than persons without a disability (62% vs 73%).\textsuperscript{60} At every level of educational attainment, disabled persons had lower levels of employment and higher rates of unemployment compared to non-disabled persons.\textsuperscript{61}

The unemployment rate of persons with disabilities is higher than of persons without disabilities. 14% of labour force participants with disabilities were unemployed, compared to

\textsuperscript{55}\textit{Ibid.} Highlights.

\textsuperscript{56}A Portrait of Persons with Disabilities. \textit{supra} note 48. Tables 6.1 and 6.2. The figures for Ontario are similar: 49.1% vs 76%. The vast majority (80%) of employed disabled persons were paid employees (as opposed to self-employed or unpaid family workers) and the majority (76%) worked full-time hours. Full time work is defined as 30 hours/week or more.

\textsuperscript{57}\textit{Ibid.} Table 7.4. In 1991, many persons with disabilities (29.7%) receive disability-related income. 6% of disabled persons were in receipt of workers' compensation and 3% collected benefits from an employer-sponsored disability insurance plan. (Table 7.5).

\textsuperscript{58}\textit{Ibid.} Table 6.3.

\textsuperscript{59}\textit{Ibid.} Table 6.4.

\textsuperscript{60}\textit{Ibid.} Table 6.3.

\textsuperscript{61}\textit{Ibid.} Table 6.4 (employment rates) and Table 6.10 (unemployment rates). At some levels (less than grade 9 and some postsecondary), men with disabilities had slightly lower rates of unemployment than men without disabilities, but the women's rates of unemployment were so much higher that as a group, disabled persons had higher levels of unemployment at all levels of educational attainment.
10% of those without disabilities. Those with mild disabilities had an unemployment rate of 12%. A higher proportion of persons with disabilities is out of the labour force entirely, meaning that they are neither employed nor unemployed and looking for work. 44% of disabled persons were not in the labour force, compared to only 19% of the non-disabled population. Many of those not in the labour force identify their disability as completely (60%) or partially (20%) preventing them from working. Whether a person considers himself/herself unemployable may be affected by his or her perception about the support and accommodation which are available to him or her.

This paper focuses the accommodation of those disabled persons who are already employed. A significant number of persons acquire their disabilities while they are employed and thus, may require accommodation in their current employment. 29% of employed disabled persons reported that they acquired work limitations while employed, either in their present employment or elsewhere. 34% of unemployed disabled persons reported acquiring the limitation while employed. Of those not in the labour force 8% reported that they were employed at the time of acquiring the limitation.

III. Barriers to Participation in the Workforce

There are a number of factors which contribute to the lower participation and employment rates of disabled persons in the workplace, including: negative societal attitudes, social policies which reflect an assumption of the disabled as incapable, ineffective vocational rehabilitation strategies, employer hiring criteria which unnecessarily screen out persons with

---

62 Ibid. at 46 and Table 6.7. In Ontario, the unemployment rate for persons with disabilities was 12% vs 8% (Table 6.8).

63 Ibid. Table 6.9.

64 Ibid. at 48.

65 Calculated from figures provided from the 1991 HALS. Public Use Microdata File. Adults and Households. Statistics Canada, 1994. Information provided over the telephone by Derek Thomas, (613) 951-2093. These calculations are based on responses to question E10 Are you limited in the kind or amount of work you could do at your present job or business because of your condition or health problem? and E11 Where were you employed when you first experienced work limitations? (Answers included present employer, elsewhere or not working). Similar questions were asked of unemployed disabled persons (E42, E44) and disabled persons not in the work force (E69, E71). It is important to note that the question does not inquire about work-related, compensable injuries, but relates to whether the person was employed at the time of the onset of the disability.
disabilities, disability income eligibility criteria which act as a disincentive to finding paid employment, occupational health and safety legislation, which directly or indirectly deters employers from hiring persons with disabilities, building code requirements which do not mandate accessibility, inaccessible transportation systems, lack of access to educational opportunities, and collective agreements which make no provision for the special requirements of disabled persons. 66 A prohibition against discrimination in employment is unlikely to effectively eliminate all of these barriers, although it may contribute to the reduction of some of them.

It is difficult to quantify the level of discrimination experienced by disabled persons in the workplace. One quarter of employment discrimination complaints filed with the Ontario Human Rights Commission allege discrimination on the basis of handicap. 67 The number of discrimination complaints which are litigated is extremely low and cannot serve as a useful proxy for the level of discrimination. 68 In the absence of reliable statistics relating to proven discrimination, alternative measures of estimating discrimination must be used. HALS surveyed the perceptions of people with disabilities with respect to their experience of work-related discrimination. 6% of employed disabled persons believed that they had been refused employment within the last five years, because of their condition. 4% believed they had been dismissed from their job; 4% believed they had been refused a promotion and 1.6% believed they had been denied access to training courses, because of their disability. 23% reported that they believed an employer would consider their condition to be a disadvantage in employment. 69 Of employed disabled persons working for pay, 32% reported that it would be very difficult or difficult for them to change jobs or to advance in their present jobs. 70 The level of reported discrimination

66 Rioux, supra note 47, at 617 - 8, and the studies cited therein. See also A Portrait of Persons with Disabilities, supra note 48. Table 6.16, in which persons with disabilities report barriers to employment.

67 In 1995/96, 28% of all employment discrimination complaints related to disability. Between 1985/86 and 1991/92, disability complaints amounted to between 34 to 50% of all employment discrimination complaints. From 1992/93, the percentage of disability complaints has remained constant at approximately 25%. Figures are derived from Annual Reports. Ontario Human Rights Commission. 1985/86 to 1995/96, inclusive.

68 In 1995/96 less than 2% of all discrimination complaints filed with the Ontario Human Rights Commission were referred to a board of inquiry. 37% were settled, 34 % were withdrawn and 28% were dismissed or not pursued. 1995/96 Annual Report. Ontario Human Rights Commission.


70 Ibid. at xiv - v.
was even higher among unemployed disabled persons, with 17% of believing they had been refused employment within the last five years because of their conditions, and 16% believing they had been dismissed from a job because of their disabilities.\textsuperscript{71}

A. Employer Attitudes Toward Hiring Disabled Persons

Disabled workers' perceptions about how employers view them is consistent with studies of employer attitudes towards hiring the disabled. Employers expressed the following concerns about hiring disabled persons: the necessity to alter job descriptions, increased insurance costs, competency concerns, dependability concerns, productivity concerns, accommodation costs, and attitude of coworkers.\textsuperscript{72}

B. Need for Accommodation

There is evidence that substantial numbers of disabled workers need some measure of accommodation in order to participate in the workplace. 33% of employed persons with work disabilities reported requiring accommodation for work. 49% of unemployed persons with work disabilities and 62% of disabled persons with work disabilities not in the workforce reported that accommodation was required in order to be able to work.\textsuperscript{73}

This evidence indicates that some of the barriers which operate to exclude disabled persons from the labour force include negative employer attitudes about the capabilities of persons with disabilities and the need for accommodation in order to be able to participate in the workplace. Thus, the statutory protection against discrimination because of disability, which includes a requirement to individually assess a disabled person’s capabilities and to provide

\textsuperscript{71}A Portrait of Persons with Disabilities. \textit{supra} note 48, Tables 6.17 - 6.20.

\textsuperscript{72}Riou. \textit{supra} note 47, at 617 - 8, and studies cited therein. See also Status Report: Persons with Disabilities. (Working Group on Employment Equity, Ministry of Citizenship, Abt Associates of Canada, 1989). Abt Associates reported at 46 - 47 that the concerns of employers are not well-founded. Studies carried out in 1973 and 1981 indicated that adjustments to the workplace were minimal. 95% of physically disabled workers had average or better safety records on and off the job: disabled workers did not want special privileges and were readily accepted by their fellow workers; job performance in 1981 was average or better compared to non-disabled peers; and attendance and turnover was comparable to non-disabled peers.

\textsuperscript{73}Calculated from Profile of Persons with Disabilities (Limited at Work/Perception), \textit{supra} note 51, Table 1. In 1991, 207,860 out of 628,435 (33%) employed disabled workers in Canada (35.5% in Ontario) reported requiring accommodation for work. 69,510 out of 142,965 unemployed disabled persons (48.6%) in Canada (53.6% in Ontario) and 320,200 out of 413,820 (62.3%) of disabled persons not in labour force in Canada (60.4% in Ontario) reported that accommodation was required in order to be able to work. The types of accommodation needed included human support, technical aid, communication services, job redesign, modified hours, accessible transportation, parking, accessible elevator, workstation, washrooms, handrails, ramps, other and not stated.
reasonable accommodation, is essential to reducing some of the barriers to employment faced by disabled persons. Accommodation measures alone are unlikely to make significant improvements to severely disabled persons who have never worked or have withdrawn from the workforce for some time. For these individuals, an equal opportunity policy is unlikely to result in increased employment, since their lack of education and work experience make it unlikely that they will be judged as the most qualified for the position in a competitive marketplace, even if the costs of accommodation are not considered. Other policy instruments which emphasize increased representativeness of disabled persons per se are likely necessary to assist these persons to gain access to the workplace.

IV. Effectiveness of Accommodation By Employers

There is little empirical evidence which attempts to assess how accommodating disabled workers affects their access to employment. The most relevant available evidence concerns workers who are injured on the job and strongly suggests that accommodation by the employer is a significant factor in helping workers remain in the workplace. A study of Ontario workers injured between 1974 and 1989 indicated that 5 out of 6 workers initially returned to work with their accident employer, and 60% of them remained at work in the long term. Employer accommodations in the form of reduced hours of work, modifications of equipment and tools, and assignment to "light work", significantly affected the return to work rates. In 1990, Ontario


75 For a discussion of various international state programs to increase employment opportunities for disabled workers, see R. S. G. Chester, "Equality and Employment: Ideas from Europe, Australia and Japan" in Research Studies for the Royal Commission on Equality in Employment (Ottawa: Supply and Services Canada, 1985) 475. For a discussion of ways to increase the incentive of employers to accommodate disabled persons in the workplace, see Collignon, Ibid. at 234 - 8.

76 Accident employer refers to the employer where the worker was working at the time of the workplace injury.

77 R. J. Butler, W. G. Johnson and M. L. Baldwin, "Managing Work Disability: Why First Return to Work is Not a Measure of Success" (1995) 48 Industrial and Labor Relations Review No. 3 452. This study was based on a sample of workers from the Ontario Survey of Workers with Permanent Impairments, a survey of approximately 11,000 Canadian workers with permanent partial impairments resulting from work-related injuries occurring between 1974 and 1989. The sample consisted of 3,398 workers who suffered permanent impairments, and who were interviewed between 3 and 15 years after the injury. Of these, 2,870 returned to work. The sample was further reduced to 1,850, due to non-responses on some questions. The study indicated that 5 out of 6 initially returned to work after an injury-related absence. Of those who returned to work, 39% remained on the job, and another 21% returned to the job after two more injury-related absences. Accordingly 60% of them successfully returned to work, either after a single
employers became subject to a statutory obligation to re-employ and accommodate workers in their pre-injury positions or in suitable alternative employment. Since 1990, the number of injured workers with longterm disabilities who returned to work with the accident employer has increased substantially. This suggests that accommodating disabled workers can substantially improve their chance of remaining employed.

Another study of Ontario injured workers concluded that some of the cost of workplace accommodation is shifted back to workers in the form of lower wages, when workers are unable to return to work with their pre-injury employer. Workers who are not able to remain with their present employer suffer an average wage loss of approximately 30%. This suggests that a

ingury-related absence, or multiple injury related absences. Various factors significantly influenced the return to work, including employer accommodations in the form of reduced hours of work, modifications of equipment and tools, and assignment to "light work" (at 465). See also Collignon. supra note 74 at 233 and the studies cited therein.

78 *Workers Compensation Act*, R.S.O. 1990, section 54. See the discussion of the re-employment obligation in Part Three.

79 Statistical Supplement to the 1994 & 1995 WCB Annual Reports. Table 21, Injured Workers Completing Rehabilitation Programs. The marked increase in number of injured workers requiring vocational rehabilitation who returned to their accident employer after the re-employment obligation, compared to the steady pace of injured workers who were able to find new employment is exhibited by the following chart:

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>same</td>
<td>2031</td>
<td>2145</td>
<td>2001</td>
<td>2123</td>
<td>3057</td>
<td>4865</td>
<td>8657</td>
<td>10211</td>
<td>9577</td>
<td>7709</td>
<td>8076</td>
</tr>
<tr>
<td>new</td>
<td>2534</td>
<td>2678</td>
<td>2867</td>
<td>3099</td>
<td>3260</td>
<td>2640</td>
<td>2148</td>
<td>2357</td>
<td>2297</td>
<td>2356</td>
<td>2430</td>
</tr>
</tbody>
</table>

The vast majority of workers who experience an injury or accident in the workplace return to their accident employer within a short period of time, without the need for accommodation or retraining. Those workers who are referred for vocational rehabilitation whose injuries result in long term impairment. It is difficult to separate out how much of the increase in workers returning to their same employer is due to the statutory obligation to re-employ and how much is due to the obligation to accommodate. It would be interesting to know what percentage of these workers return to their pre-injury job and what percentage require suitable alternative employment, but the WCB does not record that information.

80 D. Hyatt, "Issues in the Compensation of Injured Workers: Returns to Risk, Work Incentives and Accommodation." (1992) Ph.D. Thesis. Toronto: University of Toronto Centre for Industrial Relations. Hyatt's study was based on the Ontario Workers' Compensation Board's Economic Loss Survey for the years 1979 to 1988. Two types of accommodations were quantified: workplace accommodations and reduction of physical demands. Workplace accommodations included such things as reduced hours, flexible work schedule, special training, modified equipment or work station, light duties or other arrangements. Reduction of physical demands referred to whether physical demands such as heavy lifting, bending, squatting, walking, standing, carrying, climbing, reaching, sitting, repetitious handling, or other physical activities were limited or reduced. Hyatt concluded that workers who return to work with the accident employer did not suffer any loss of wages in exchange for the workplace accommodation or physical demands reduction. However, he determined that workers who returned to work with a different employer, suffered an average wage loss of approximately 30%, three quarters of which is due to the reduced physical demands and one quarter of which is due to the workplace accommodations.
statutory requirement to accommodate disabled workers can prevent some of the wage loss that occurs when disabled workers must seek new employment.81

V. Costs and Benefits of Accommodation to Employers

While it is difficult to quantify the costs and benefits to an employer of accommodating disabled workers, recent surveys of American employers who contacted the Job Accommodation Network82 reported that 20% of the accommodations implemented involved no cost, 50% of the accommodations implemented involved a cost of less than $500, 26% of the accommodations cost between $500 and $5000, and only 4% of the accommodations cost more than $5000.83 Employers estimated that they yielded an average of $34.39 in benefits for every $1.00 of accommodation costs.84 Benefits reported by employers include hiring or retaining a qualified employee, eliminating the cost of training a new employee, savings of workers’ compensation and/or other insurance costs and increased worker productivity. A 1989 study of 77 American companies employing 700,000 workers indicated that disability management programs which


82The Job Accommodation Network (JAN) is an American program initiated in 1983 with funding from the U.S. Department of Labor. The service was extended to Canada in 1993 (in Canada it is known as JANCANA) and is supported by Human Resources Development Canada. The employer contacts JANCANA (800-526-2262) and is connected with a consultant. The consultant obtains information about the employee’s functional limitations, the job and the specific tasks involved and the accessibility of the job site. The consultant makes suggestions on how the employee’s disability can be accommodated and provides the names of suppliers in the area. Follow-up surveys with American employers are regularly conducted by JAN. There is no comparable follow-up survey with Canadian employers.

83The JAN quarterly Report (January 1, to March 31, 1996). These findings are consistent with earlier American studies reporting on the costs of accommodation. See Collignon, supra note 74 for a review of the literature on the costs of accommodation up to 1986. Early American studies on the costs and benefits to employers of accommodation have focused on those employers who were required to accommodate. (Until the passage of the comprehensive Americans with Disabilities Act of 1990, only private employers receiving financial government assistance, private employers with federal contracts of $2,500 or more, and the federal government were subject to The Rehabilitation Act of 1973, which prohibited discrimination against disabled persons and required the employer to accommodate). There are limitations in all the studies of accommodation costs. Collignon notes that most studies are done on employers with over 50 employees, that while employers tend to overestimate the out-of-pocket costs of accommodation, they also tend to omit the cost of administration (in terms of the time of management, the employees and others involved in arranging the accommodation), and that the studies did not attempt to include the cost of accommodation those disabled applicants who were not hired (who may be the ones whose costs of accommodation are particularly high).

84Ibid. This is the average cumulative figure calculated from reports filed since October 1992. Using the median cumulative figure, for every dollar spent to make an accommodation, the employer received $50.00 in benefits.
feature accommodation by employers to assist disabled workers return to work, can reduce the health care costs associated with disability. 85

VI. Summary

There are a number of barriers to employment facing disabled persons. Some of those barriers, such as negative attitudes by employers and the need for accommodation in the workplace, can and have been addressed in human rights statutes, which prohibit discrimination in employment because of disability. The prohibition against discrimination addresses not only hostile discrimination against the disabled but more importantly, requires an employer to assess each disabled person’s capabilities on an individual basis and provide reasonable accommodation of his or her needs. The empirical evidence indicates that many persons become disabled while employed and significant numbers of disabled persons require accommodation in order to remain in the workplace. The evidence further indicates that accommodating employed workers who become injured in the workplace significantly increases the likelihood of their remaining employed, and prevents the wage loss which occurs as a result of employers shifting the cost of accommodation to new disabled workers.

85D. Lewin, S. Schecter "Four Factors Lower Disability Rates" (1995) Personnel J. v. 74, n. 1, p. 9 - 11. Special Supplement. Researchers found that four human resources policy variables significantly affected disability management: the higher the degree of employee involvement and participation, the lower the rates of disability; the greater the extent and use of conflict resolution and grievance procedures, the lower the rates of disability; the greater the work force stability, the lower the rates of disability; and disability management in the form of early intervention in potentially high cost cases, job modification for early return to work, training in lifting techniques, employee assistance programs, specialized facilities for the disabled and health promotion programs were related to lower rates of disability. The analysts of the study concluded that "[c]ompanies that have accommodative and supportive return-to-work practices appear to have smaller health care costs increases than other companies. In addition, the practice of actively restoring individuals to useful functioning has the additional benefit of retaining the services of potential valuable employees."

PART THREE  THE STRUCTURE OF A DISABILITY DISCRIMINATION COMPLAINT

I. Legislative Framework in Ontario Relating to the Duty to Accommodate Disabled Workers

The Ontario Human Rights Code provides that "every person has a right to equal treatment with respect to employment without discrimination because of...handicap." When a person's disability precludes him or her from performing the essential functions of the work, then it is not discriminatory to refuse to employ that person. However, before judging whether the disabled person can perform the essential functions of the work, steps must be taken to accommodate the needs of the disabled person, unless to do so would cause undue hardship to the person responsible for accommodating those needs. This duty to accommodate disabled persons is codified in section 17 of the Code:

s. 17(1) A right of a person under this Act is not infringed for the reason only that the person is incapable of performing or fulfilling the essential duties or requirements attending the exercise of the right because of handicap.

(2) The Commission, the board of inquiry or a court shall not find a person incapable unless it is satisfied that the needs of the person cannot be accommodated without undue hardship on the person responsible for accommodating those needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any.  

---

86 Code. supra note 6, section 5.

87 Ibid. section 10 "because of handicap" means for the reason that the person has or has had, or is believed to have or have had.

(a) any degree of physical disability, infirmity, malformation or disfigurement that is caused by bodily injury, birth defect or illness and, without limiting the generality of the foregoing, including diabetes mellitus, epilepsy, any degree of paralysis, amputation, lack of physical coordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment, or physical reliance on a guide dog or on a wheelchair or other remedial appliance or device.

(b) a condition of mental retardation or impairment.

(c) a learning disability, or a dysfunction in one or more of the processes involved in understanding or using symbols or spoken language.

(d) a mental disorder. or

(e) an injury or disability for which benefits were claimed or received under the Workers' Compensation Act.

88 When disability was first added as a prohibited ground of discrimination in 1981 [S.O. 1981, c. 53 (proclaimed in force June 15, 1982)] a specific defense for disability discrimination was included. Section 16 [now 17] provided that the Code was not breached by reason only that the premises lacked the amenities, or that the person was incapable of performing the essential duties attending the exercise of the right. There was no express duty to accommodate in section 16, although boards of inquiry held there was an implied duty to accommodate, at least to the extent of assigning non-essential duties elsewhere. [Cameron supra note at paragraphs 18363 - 18384 and Simms v Seetech Metal Products (1993). 20 C.H.R.R. D/477 (Ont. Bd. of Inq. - Cumming) ]. The statutory duty to accommodate disabled persons was added to the Code by S. O. 1986, s. 18(8) - (10) and became effective April 15, 1988.
A parallel obligation to re-employ and accommodate injured workers in Ontario arises under the *Workers' Compensation Act* ("WCA")\(^{89}\). An employer must offer an *injured worker*\(^{90}\) his or her pre-injury position or a comparable *alternative* position.\(^{91}\) If the worker is not capable

\[\text{Other jurisdictions which specifically incorporate a duty to accommodate into their human rights legislation are Yukon (} \text{Human Rights Act, R.S.Y. 1986, Supp., c. 11, s. 7) and Manitoba (} \text{Human Rights Code, S.M. 1987-88, c. 45, s. 9).} \]

The *Americans with Disabilities Act, supra* note 10, contains a similar obligation. Prior to the Supreme Court of Canada decision in *Eaton, supra* note 10, those Canadian jurisdictions whose human rights legislation did not contain a specific duty to accommodate disabled persons struggled to characterize any alleged discrimination against a disabled persons as adverse effect discrimination. In order to incorporate a duty to accommodate. See for example, *Worobetz, supra* note 44, at 27 - 29 and 34 - 37.

The duty to accommodate the needs of other groups has been dealt with separately under the Ontario *Code*. There have been several significant amendments relating to the duty to accommodate since the *Code* was first enacted in 1962. In the late 1970's, Ontario boards of inquiry had ruled that the *Code* prohibited adverse effect discrimination and that employers had a duty to accommodate those individuals adversely affected by neutral workplace rules and practices. *[Singh v. Security and Investigation Services Ltd* (unreported Ont. Bd. of Inq. decision, May 31, 1977, Cumming). *Ann J. Colfer v. Ottawa Board of Commissioners of Police and Ottawa Police Chief Leo J. Seguin* (unreported Ont. Bd. of Inq. decision, Jan. 13, 1979, Cumming). *O'Malley v Simpson-Sears Ltd* (1980), 2 C.H.R.R. D/267(Ont. Bd. of Inq. - Ratushny)). In March 1980, the Ontario Divisional Court overruled the existing human rights jurisprudence and stated that proof of intention was a necessary prerequisite to proving discrimination under the *Code*, and thus, unintentional discrimination was not prohibited under the existing *Code*. [O.H.R.C. v. Simpson-Sears* (1982), 36 O.R. (2d) 59 (Div. Ct.)]. That decision was upheld by the Ontario Court of Appeal[ (1982), 38 O.R. (2d) 423], which stated that intention was an essential requirement to establish a breach of the *Code*. When the *Code* was amended in 1981 section 10 [now section 11] was included, to codify the concept of constructive or adverse effect decision, and overrule the court decisions in this area. Section 10 did not specifically include a duty to accommodate, but boards of inquiry read that concept into section 10 [now section 11] [Rand et al, v. Sealy Eastern Limited, Upholstery Division* (1983) 3 C.H.R.R. D/938 (Ont. Bd. of Inq. - Cumming) at D/946-D/949]. In 1985, the Supreme Court of Canada confirmed that intention was not an essential element of discrimination, that the old *Code* did prohibit adverse effect discrimination and that employers were obliged to accommodate the religious needs of their workers unless to do so caused undue hardship. [O'Malley, supra note 11]. In 1994, section 11 was amended to confirm the duty to accommodate in cases of constructive discrimination. [S.O. 1994, c. 27, s. 65 (2)]. At the same time, the *Code* was amended to stipulate that the duty to accommodate is included in all *hfoj* defenses under the *Code*, thus effectively imposing a duty to accommodate in cases of direct discrimination as well as adverse effect discrimination. [S.O. 1994, c. 27, s. 65 (4)].

\(^{89}\) *Supra* note 78, section 54.

\(^{90}\)The *WCA* only applies to workers who suffer work-related accidents or injuries. The re-employment obligation applies to employers who regularly employ more than 20 workers, and to workers who have been continuously employed for one year and who sustained workplace injuries on or after January 2, 1990. The obligation to re-employ ceases 2 years after the date of the worker's injury, one year after the Workers' Compensation Board ("WCB") notifies the employer that the worker is medically able to perform the essential duties of the pre-injury job or when the worker reaches 65, whichever occurs earliest.

\(^{91}\) *Ibid*, section 54(4). Thus, under the *WCA* there is no obligation to return the worker to the pre-injury job; he or she may be offered a comparable job instead. However, the duty to accommodate under the *Code* requires the employer to consider the worker's ability to perform the pre-injury position, unless this would cause undue hardship. *Chamberlin v. 59927 Ontario Ltd* cob *Stirling Honda* (1989), 11 C.H.R.R. D/110 (Springate): *Re Mount Sinai Hospital and O.N.A.* (1996), 54 L.A.C. (4TH) 260 (R.M. Brown), and *Hamilton Street Railway Co.* (1994), 41 L.A.C. (4TH) 1 (Levinson).
of performing the essential duties of the pre-injury position, the employer is obliged to offer the injured worker the first available suitable position. The employer is obliged to accommodate the needs of the injured worker in the pre-injury, alternative or suitable position, unless the required accommodation would cause the employer undue hardship.

Disability discrimination complaints raise unique issues. The employer may dispute whether the condition of the person claiming the protection of the Code falls within the meaning of "handicap." Unlike many discrimination complaints on other protected grounds (such as sex and race), employers rarely deny that the reason for the refusal to hire, maintain or otherwise treat the disabled employee equally in employment is because of the person's disability. Rather, in the usual case, the employer asserts that the disabled person is incapable of performing the essential requirements of the employment, even with accommodation, or that the required accommodation would cause undue hardship. What is the scope of the employment right? What are the limits of undue hardship? In this thesis I focus on the limits of undue hardship in situations where the requested accommodation of a disabled worker interferes with the seniority rights of another worker. For the most part, those conflicts will only arise when a disabled worker seeks to be accommodated in a position other than the one he or she was holding prior to the onset of the disability. Does the guarantee of equality in employment encompass the right to be considered for other positions?

92Ibid. 54(5). Suitable employment refers to any job which the worker has the necessary skills to perform, is medically able to perform and which does not pose a health or safety hazard to the worker or any co-worker. The WCB interprets the obligation to offer suitable work as an ongoing one, which requires the employer to offer workers all suitable jobs during the relevant time period, and to offer the most suitable job. [WCB Policy No. 07-05-10].

93Ibid. 54(6). In determining whether the accommodation would cause the employer undue hardship, the WCB will have regard to the Ontario Human Rights Commission Accommodation Guidelines. [WCB Policy No. 07-05-07]. Sections 54(14) and (15) provide that the re-employment obligation supersedes the provisions of a collective agreement, if the WCA provides a greater benefit, but does not displace the seniority provisions of a collective agreement. The Workers' Compensation Appeals Tribunal has confirmed that the seniority provision prevail. [WCAT Decision Nol 173/95 (1992), 24 W.C.A.T.R. 132 (Ont.)]

94Notwithstanding the broad definition of handicap in the Code, one board of inquiry stated that not every physical impairment is a handicap within the meaning of the Code. See Ouillemette v Lily Cups Ltd. (1990), 12 C.H.R.R. D/19 at D/32 - 3.

95Part Five sets out the various conflicts which can arise between seniority systems and the duty to accommodate disabled workers.
II. The Meaning of Employment

What is the scope of the employment right of an employee who becomes disabled and unable to perform the regular duties associated with the position he or she performed prior to the disability? Does he or she have the right to remain employed, if he or she is capable of performing some work anywhere in the employer's enterprise? Is the disabled worker restricted to claiming the right to return to his or her pre-disability position? The answer lies in the meaning of the term “employment” in the Code. It is useful to understand the nature of the employment relationship at common law and under a collective agreement, before turning to the meaning of employment under the Code.

A. The Scope of the Claim to Employment at Common Law

In a non-unionized workplace, employment relationships are governed by the terms of the individual terms of contract between the employer and the employee. The terms of the contract are determined by reference to the written contract of employment, if any, the common law and the relevant employment-related legislation. A contract of employment can be terminated by dismissal, resignation, frustration, agreement or by conduct of the employer or employee which breaches the essential terms of the employment contract. In the absence of an express agreement to the contrary, the employment relationship is presumed to be for an indefinite term, and the employee can only be dismissed for cause or with reasonable notice. An employee who has been dismissed without cause or reasonable notice has been wrongfully dismissed and may bring an action for wrongful dismissal. Specific performance, or reinstatement is not available, and the employee's only recourse for the wrongful dismissal is damages for the period of reasonable notice he or she should have been given.

An employer is not obliged to maintain an employment relationship with an employee who is incapable of performing the work for which he or she was hired. Thus, incompetence is cause for dismissal. While disability or illness is not cause for dismissal, a permanent or long-term condition which renders the employee incapable of performing his or her obligations under the employment contract may constitute a frustration of the employment contract and justify the

---


97 Ibid. paragraphs 412-417. An employer must warn the employee of its concerns and allow the employee time to improve his or her performance, before dismissing for incompetence. (paragraphs 412 - 417).
termination of the relationship. The employee who is incapable of performing the functions of the employment for which he or she was hired, has no common law right to remain employed, or to claim other employment in the workplace. The scope of the worker's "employment" depends on the express and implied terms of his or her individual employment contract.

Absent an express or implied term in the employment contract, there is no obligation on an employer to provide work for the employee other than the work for which he or she was hired. Similarly, there is no obligation on the employee to perform work outside the scope of his or her employment. Thus, the employer has no right to substantially alter the duties and responsibilities of the employee's employment, or the hours of work without the agreement of the employee. Such unilateral changes by the employer entitle the employee to treat the contract at an end, and bring an action for constructive dismissal. Similarly, the employer has no right to unilaterally transfer the worker to a different geographic location, unless such transfers are an express or implied term of the employment. Conversely, the employee has no claim to duties or responsibilities or locations substantially different than the ones he or she was hired for.

**B. The Scope of the Claim to Employment in a Unionized Environment**

Once a trade union has acquired the exclusive right to represent the employees in a bargaining unit, the employer and the individual employees in the bargaining unit may no longer

---

98 *Ibid.* at paragraphs 322, 323 and 418. Temporary illness or disability does not frustrate the employment contract (paragraph 323). In the case of permanent illness or disability which renders the worker incapable of fulfilling his or her employment obligations, the employer is subject to the requirements of the Code and must accommodate the needs of the worker, short of undue hardship (paragraph 418).

99 *Ibid.* at paragraph 330. "A fundamental change in the duties of an employee amounting to demotion will constitute constructive dismissal." See also paragraph 340. If such changes are inherent in the employment relationship, then the changes would not amount to a constructive dismissal. (paragraph 341)

100 *Ibid.* paragraph 347. The employer has no right to alter the employment contract unilaterally by changing the days of work to include Sundays, where an implied term of the employment contract was that the hours of work did not include Sundays. (*Meritless v. Sears Canada Inc.* (1986), 24 B.C.L.R. (2d) 165; aff'd 24 B.C.L.R. (2d) 172 (C.A.)

101 *Ibid.* paragraphs 343 and 344 :

343 A change in the location of employment, if not bargained for at the beginning of employment or implied as a customary practice of the industry in question, will constitute constructive dismissal.

344 Where an employee is part of a national or international corporation, it is often an implied term of the contract of employment that the employee accept all reasonable transfers not involving a demotion or undue burn or hardship.

See also paragraph 406.
negotiate the terms of employment. The right to negotiate the terms of employment rests with the trade union. Once the trade union has negotiated a collective agreement for the employees in the bargaining unit, the terms and conditions of employment for those employees are determined by the collective agreement, and the individual contract of employment ceases to apply.\textsuperscript{102}

Virtually all collective agreement contain a term restricting management’s right to discipline or dismiss an employee by requiring it to show “just cause.” These provisions remove the employer’s common law right to terminate the employment relationship by giving reasonable notice.\textsuperscript{103} The arbitral jurisprudence also recognizes that the employment relationship may be terminated by resignation, or the inability of one of the parties to fulfill its obligations under the collective agreement.\textsuperscript{104}

The scope of the claim to employment in a collective bargaining environment may be broader than a claim to the position the worker was initially hired to do. Arbitrators have frequently considered an employer’s obligation to employees who were not capable of performing the functions of their jobs, whether as a result of disability or for other non-culpable reasons. There is a division among arbitrators whether an employer is obliged to offer alternative work to an employee who is incapable of performing the duties of his or her own position. One approach is that, in the absence of a specific contractual term so providing, employers are not required to offer other positions or to create special jobs for them.\textsuperscript{105} However, the prevalent approach is to

\textsuperscript{102}McGavin Toastmaster Ltd. v Ainscough (1975). 54 D.L.R. (3d) 1, 75 C.L.I.C. 14.277 (S.C.C.)


\textsuperscript{104}For example, while arbitrators have generally held that it is inappropriate to discipline an employee for non-culpable behaviour, when the employee is incapable of fulfilling his or her employment obligations the employer is entitled terminate such employees. See Brown and Beatty, supra note 103 at 7:3200 Employee Disability: 7:3210 Innocent Absenteeism and 7:3220 Inability to Discharge Employment Obligations.

\textsuperscript{105}Brown and Beatty, supra note 103 at 7:3220. text at footnote 16 states: “And although there is some division of opinion on this point, in the absence of a specific contractual terms so providing, normally arbitrators have not required an employer to employ such persons in other positions or to create special jobs for them.” Some of the cases cited in support of this statement. Hamilton Civic Hospitals (1994). 44 L.A.C. (4th) 31 (Kennedy) and Better Beef Ltd. (1994). 42 L.A.C. (4th) 244 (Welling) concern the obligation to create an alternative position, and do not rule out that there is an obligation to transfer to an existing alternative position. In both cases, the employer had tried to find suitable alternative employment. In Children’s Aid Society of Metropolitan Toronto (1988). 34 L.A.C. (3d) 296 (Brandt) at 305 the arbitrator did not specifically deny that the employer was obliged to consider alternative work, but found that the union had failed to show that such alternative work existed. In Crown Zellerbach Ltd. (1956), 6 L.A.C. 175 (Carrothers). the employer had in fact transferred the worker many times and the arbitration board found that there were simply no suitable jobs. In Raybestos Co. Ltd. (Peterborough) (1948). 1 L.A.C. 211 (Cochrane), while
require an employer to investigate the possibility of alternative work before releasing the employee for incapacity.106

Although the rationale for this obligation to consider suitable work is generally not expressed in the cases, in my view, it has its roots in a broad concept of employment, which grants the unionized worker the right to lay claim to positions in the enterprise beyond the particular position he or she was performing prior to the disability or other incapacity. In Re United Automobile Workers’ and DeHavilland Aircraft of Canada Ltd.107, the grievor was discharged for unsatisfactory work as a lathe operator. The company argued that there was no suitable work into which the grievor could be transferred. Arbitrator Laskin (as he then was) stated at 287:

I do not see that present inability to transfer the grievor must necessarily lead to a decision of discharge. It is equally compatible with that position that the grievor be recognized to have a claim to a job consistent with his ability and with his seniority, even as strictly construed under the collective agreement and supplement. I hold therefore that the arbitrator stated that there was no legal obligation to find alternative work. He also suggested that the employee had the right to be laid off, with the right to claim work under the terms of the collective agreement.

---

106 Maritime Telegraph & Telephone Co. (1984), 16 L. A. C. (3d) 318 (Cotter, Nova Scotia) at 337; Re Edith Cavell Private Hospital and Hospital Employees’ Union, Local 180 (1982), 6 L.A.C. (3d) 229 (Hope); McKellar General Hospital (1986), 24 L.A.C.(3D) 69 (Joyce- Ont.); British Columbia Hydro (1984), 14 L.A.C. (3d) 69 (McIntyre - B.C.). If there are no positions immediately available, then the employee would be placed on lay-off and attempt to exercise his or her seniority rights to claim any vacancies which might arise (Maritime Telegraph & Telephone Co. at 338 and cases cited therein: Christenson Bros. Foods Ltd. (1983), 12 L.A.C. (3d) 186 (Chertkow-B.C.); Musgrove Ford Sales (1985), 20 L.A.C. (3d) 241 (Kelleher - B. C.); Penticton & District Retirement Service (1978), 18 L.A.C. (2D) 107 (McIntyre - B. C.); National Sea Products (1990), 16 L.A.C. (4th) 65 (Kydd- N.S.).

I state that this is the prevalent view, notwithstanding the passage in Brown and Beatty referred to footnote 105. The following passages, and the cases cited in support, indicate that the prevailing view with respect to incapacity is that there is an obligation to consider the employee’s suitability for alternative work. At 8:340, footnote 5, Brown and Beatty state: “Necessarily, if an employee were so incapacitated that he would never be able to return to his former classification, and if there were no other job he was capable of performing to which he would be entitled by virtue of his seniority, then the employer could properly deny his request to return to work.” This is suggestive that there is a limited right to be considered for other positions. At 7:4422, footnote 25, the authors concede that at least in the case of employees in higher rated positions, who are unable to perform the duties of that positions, there is a right to be considered for alternative positions. At 7:3510, footnotes 14 - 18, with respect to incompetent employees, the authors state: “Generally, unless it is shown that an employee is incapable of performing any work, most arbitrators have stated that the appropriate course of action is to transfer such a person to another position, or allow her to invoke her seniority rights on some other job which she is capable of performing. In the event that she is unable to immediately claim such a position in the plant, it has been suggested that the employer ought to lay her off, or more properly, depending upon the circumstances, place her on a non-disciplinary suspension, on lay-off pending the availability of alternate work, or on sick-leave.” See also the employer’s right (and concomitant duty) to demote, rather than dismiss, an employee was is incapable of performing the functions of the assigned job, discussed in footnote infra.

107 (1964) 15 L.A.C. 284 (Laskin).
company was justified in removing the grievor from his classification, but not from any claim to continue in its service in a capacity in which he is able to give satisfactory performance. [emphasis added]

This approach to the employee’s employment status is the logical converse of the proposition that the employee has no proprietary interest in his or her job. Similarly, it is consistent with those cases which confirm management’s right to transfer or demote disabled workers or workers otherwise incapable of performing the functions of their position. This line of cases indicates that the scope of the employment right in the unionized setting is broader than the right to the continue in the particular functions of the position being performed

108 Brown and Beatty, supra note 103 at 5:2000 generally and footnote 18a in particular. Thus, the authors conclude that, subject to the terms of the collective agreement, management is free to reorganize the work procedures and methods, which includes the right to reassign work within and across classifications and to transfer workers according. In Re DeHavilland Aircraft and UAW, Loc. 673 (1982), 5 L.A.C. (3d) 147 (Palmer - Ontario), the grievor was assigned work in a different job, in the same classification after her return from her maternity leave. She grieved, seeking the right to return to her “normal duties”. The company opposed the grievance and argued that the grievor’s job should be defined as the classification. The arbitrator specifically adopted the company’s arguments and further stated: “It should be reiterated, however, that normal arbitral jurisprudence in the area states that a grievor’s job is not related to specifics, but normally falls within the general duties applied to job classifications. Consequently, it is within those types of tasks that fall within the job classification generally that rights adhere to a member of the bargaining unit.”

109 See Brown and Beatty, supra note 103 at 7:3546. footnotes 3 - 4. 6 - 11. regarding non-disciplinary demotions.

Thus, the concept of a pure, non-disciplinary demotion would be applicable where...although there is no voluntary malfeasance on the part of the employee, it is established that the tasks required in the job from which he is demoted are simply beyond his competence. Generally, it has been said an employer has the inherent authority, even in the absence of an express provision in the agreement, to effect a pure or non-disciplinary demotion where it can be established not only that the employee is unable to perform or is unsuited to his job, but as well that his inability or unsuitability stems from some incapacity or involuntary shortcoming (i.e., some mental or physical condition) over which he has no control......In this respect, the employer’s right to demote for incompetence can be seen to closely parallel its duty, which has been increasingly recognized by arbitrators. to transfer an employee who is incapable of performing all the tasks in her classification a job she can effectively do; ...Accordingly, assuming there is no restriction in the agreement arbitrators have affirmed management’s right to demote, in the non-disciplinary sense, employees whose medical condition and/or attitude inhibited their ability to discharge their duties, whose inattentiveness resulted in a series of accident over a period of time as well as one who was simply unable to perform at the level properly expected by the employer.

This management “right” to demote or transfer can also be seen as a duty to consider alternative positions. In Re Vancouver Resources Board and C.U.P.E. (1978), 19 L.A.C. (2d) 441 (Maclntyre - B.C.), the arbitrator stated at 445:

...Demotion thus emerges as partly a management right (as part of the right to dismiss), and partly as a management duty (as a limitation on the right to dismiss). Thus an employee may be found incompetent within a classification, without necessarily being incompetent in a less demanding classification and the employer may thus have the right to demote or transfer without having the right to dismiss....
at the time of the disability.\textsuperscript{110}

C. The Scope of the Claim to Employment under the Human Rights Code

The term “employment” under the \textit{Code} is not necessarily restricted to the common law or arbitral meanings of employment.\textsuperscript{111} It is trite to emphasize that human rights legislation must be given an interpretation which best advances its broad purpose of enhancing equality of opportunity.\textsuperscript{112} A broad interpretation of the term “employment” would result in increased opportunities for employees to be accommodated in, thus enhancing the overall goal of increasing employment opportunities by the removal of artificial barriers. At the same time, it must be remembered that the goal of human rights statutes is not increased representation, per se, but rather the enhancement of equality of opportunity.

The appropriate approach to determining the scope of the employment right is to consider the particular circumstances of the employee. The legislative framework\textsuperscript{113}, the terms of the

\begin{footnotesize}
\begin{enumerate}
\item In the majority of the cases, the employee’s right to an alternative position was subject to the provisions of the collective agreement. Generally, employees incapable of performing their jobs were not entitled to bump into junior positions or lay claim to vacant positions to which more senior employees could claim under the terms of the collective agreement. When analyzing the potential impact of accommodating disabled workers in alternative provisions in the workplace, it will remain to be determined whether any resulting interference with the provisions in the collective agreement amounts to undue hardship.

\item For example, in \textit{Robichaud v Canada (Treasury Board)}, [1987] 2 S.C.R. 84, the issue was whether the corporate employer could be held liable for the actions of an employee who sexually harassed a worker. The statute provided that the employer was liable for all acts of their employees “in the course of employment.” The Court rejected theories of corporate liability based in criminal or tort law as inadequate to meet the purpose of remedying discrimination in the workplace. Instead, the Court stated that “in the course of employment means “work or job-related” so as to place the “responsibility for an organization on those who control it and are in a position to take effective remedial action to remove undesirable conditions.” Similarly in \textit{Airport Taxi (Malton) Assn. v. Piazza} (1989), 10 C.H.R.R. D/6347 (Ont. C.A.), the Ontario Court of Appeal held that a complainant’s damages for a discriminatory dismissal should not be subject to the common law limitation to damages in lieu of reasonable notice in wrongful dismissal actions. The Court of Appeal restored the decision of the board of inquiry, which held that the appropriate measure of damages is the actual loss incurred by the complainant as a result of the discrimination, subject to the complainant’s duty to mitigate his or her losses by searching for alternative employment.

\item \textit{O’Malley}, supra note 6 at 546 - 7: \textit{Action Travail des Femmes}, supra note 6 at 1134 - 6.

\item In Ontario, for example, all employees have minimum employment rights as set out in the \textit{Employment Standards Act}, R.S.O. 1990 c. E.14, the \textit{Occupational Health and Safety Act}, R.S.O. 1990 c. O.1, the \textit{Pay Equity Act} R.S.O. 1990 c. P. 7. the \textit{Workers’ Compensation Act}, supra note 78, and the \textit{Code}, supra note 6. A determination of the worker’s claim to employment must take into account those minimum rights. Thus, in the case of an injured worker, the scope of the claim to employment is set out in the \textit{WCA} and includes the right to claim any suitable position in the enterprise, subject to the terms of section 54 of the Act.
\end{enumerate}
\end{footnotesize}
collective agreement\textsuperscript{114} or individual contract of employment, the past practices in the workplace, the interchangeability of workers in the workforce, the worker's prior work history\textsuperscript{115}, the position being performed at the time of the disability, and the length of employment are some of the factors which should be considered in determining the scope of the worker's claim to employment. Depending on the circumstances, an employee's claim to employment could relate to the position, the classification, the department, the bargaining unit or the enterprise.

Some commentators have suggested that equal treatment only requires that a worker who becomes disabled be accommodated in the pre-disability position, and does not require an employer to consider alternative positions in the workplace.\textsuperscript{116} This approach adopts the "narrowest interpretation" of the term employment, contrary to the general principle that the rights guaranteed in human rights statutes should be interpreted broadly and liberally.\textsuperscript{117} There is nothing in the wording of the Code generally or in section 17 specifically which restricts the requirement to accommodate disabled workers to the pre-disability position. Section 17 refers to the ability to perform the essential duties of the "right in question". In an employment complaint the right relates to equal treatment in employment. To assume that the employee's right to employment only encompasses the right to return to the pre-disability position is circular reasoning. It could be argued that if the Code required an employer to consider suitable alternative employment for disabled workers, it would not have been necessary to specifically incorporate that obligation in the WCA. While there is some overlap between the duty to re-employ and accommodate injured workers under the WCA and the duty to accommodate all disabled persons (including injured workers) under the Code, the WCA merely duplicates some of

\textsuperscript{114}Some collective agreement provide that if a workers becomes incapable of performing the functions of his or her employment, the employer shall consider the suitability of alternative work in the enterprise.

\textsuperscript{115}Has the worker previously performed other tasks? What was the nature of the position the worker was hired for?


\textsuperscript{117}O'Malley. supra note 6 at 546 - 7:

It is not, in my view, a sound approach to say that according to established rules of construction no broader meaning can be given to the Code than the narrowest interpretation of the words employed. The accepted rules of construction are flexible enough to enable the Court to recognize in the construction of a human rights Code the special nature and purpose of the enactment..., and give to it an interpretation which will advance its broad purposes. [emphasis added]
the protection already provided to injured workers under the Code, and provides an alternative (and in some ways, superior),\textsuperscript{118} mechanism of enforcement. It could not be seriously argued that, since the WCA imposes an obligation to accommodate and “re-employ” injured workers in their pre-injury jobs, this obligation does not exist under the Code.\textsuperscript{119} Similarly, the statutory provision in the WCA requiring employers to re-employ workers in suitable alternative positions does not suggest that this obligation does not otherwise exist under the Code.\textsuperscript{120}

This is not an issue which has received much attention in the arbitral or human rights jurisprudence dealing with disability discrimination. Some human rights tribunals have stated that an employer is not obliged to transfer a worker who is incapable of performing the essential functions of his or her pre-disability position.\textsuperscript{121} On the other hand, several human rights

\textsuperscript{118}One advantage under the WCA is that the WCB assumes the obligation of enforcing all injured workers’ rights. The WCB is obliged to assess the worker’s fitness of work and advise the employer when the worker is capable of returning to work. Under the Code, only those individuals who file a complaint gain the assistance of the Ontario Human Rights Commission as a means of enforcing their rights to be accommodated. Another advantage to injured workers under the WCA is the presumption that a dismissal within six months of the re-employment is contrary to the WCA [section 54(10)].

\textsuperscript{119}In some ways, the entire re-employment obligation is superfluous. All workers, including injured workers, have the right to equal treatment in employment, which includes the right not to be dismissed because of a work-related injury which can be accommodated. It is inappropriate to speak of “re-employing” the injured worker, since worker’s employment relationship does not cease by virtue of work injury. See T. G. Ison, “Rights to Employment under the Workers’ Compensation Acts and Other Statutes” (1990) 28 Osgoode Hall L. J. No. 4, 839. Ison argues that the re-employment obligation confers more disadvantages than advantages on injured workers. Re-employment “rights” are often associated with a reduction of pension benefits, which may operate to the disadvantage of some workers. The “right” to re-employment with the accident employer often becomes an “obligation” on the worker to return to the workplace (or risk losing benefits) regardless of whether this is in the workers’ best long-term interests.

\textsuperscript{120}The preferable view is that the WCA offers injured workers duplicate protection. In those circumstances where injured workers cannot claim the protection of the WCA (employer regularly employs less than 20 employees or workers has been continuously employed for less than one year) or the re-employment obligation is insufficient, the injured worker can still seek the protection of the Code. For example, the WCB has ruled that the WCA only requires employers to accommodate the needs related to the work injury. Restrictions related to non-work related injuries need not be accommodated (Reinstatement Decision # 14, march 4. 1991 (M. Madiso), cited in Ginsberg and Bickley, supra note 116 at footnote 44. Clearly, the worker could still claim the right to be accommodated under the Code.

\textsuperscript{121}In Villeneuve v Bell Canada (1985), 6 C.H.R.R. D/2988 (Hester) at para 24128 - 9, the tribunal held that the employer had no duty to provide another position for an employee disabled by varicose veins. However, once having undertaken to find him another job, the employer must do in a non-discriminatory manner. The review tribunal (((1986), 7 .C.H.R.R. D/3519) (Lemieux. Matte, Landry), overturned that part of the tribunal’s decision which found discrimination with respect to the alternate position on the basis that the complainant had never applied for the alternate position. Thus, the finding that there was no obligation to provide alternative work was not disturbed. Interestingly, the review tribunal “recommended” that the employer offer the complainant any alternative position which he was capable of performing. The review tribunal’s decision was upheld by the Federal Court of Appeal (1987), 9 C.H.R.R. D/5093. However it appears that the Commission did not argue at the review tribunal or the Court of Appeal that the duty to accommodate included the duty to consider alternative positions. In Boucher v. Canada (Correctional Service) (1988), 9 C.H.R.R. D/4910 (Miller), the tribunal held that an employer was not required to transfer a correctional
tribunals have upheld the employer's right to transfer the disabled worker, as a means of accommodating the worker's disability, if the worker is incapable of performing the essential duties of the pre-disability job, safely and efficiently.¹²²

In most of the Ontario arbitral cases dealing the accommodation of disabled workers, the parties did not dispute the employer's obligation to consider alternative positions. Instead, the focus was on whether the provision of alternative work caused undue hardship.¹²³ In the few

officer who suffered from nervous depression, but merely required to consider a request for transfer in a non-discriminatory fashion. More recently in Wrobelz, supra note 44, the complainant was assessed as having a mental disability and his employment as a casual mail sorter with Canada Post had been terminated because of his inability to handle the productivity and accuracy requirements of the job. The tribunal found it would cause undue hardship to the employer to consider relocating the complainant to another position, given the status and duration of the complainant's employment i.e. on-call casual employee for two weeks. The tribunal noted that this may not be the case in other situations. The issue of alternative work is addressed as an issue of "undue hardship" instead of an issue whether the duty to accommodate encompasses an obligation to offer alternative work. The tribunal's discussion of why it caused "undue hardship" to Canada Post to consider the complainant for alternative positions was cursory. In my view, the adjudicator was implicitly making a finding that this employee's right to equal treatment in employment did not encompass a right to be considered for alternative positions, in light of his short service and status as a casual employee.

¹²²In Rodger v. Canadian National Ry. (1985), 6 C.H.R.R. D/2899 (Lederer), the tribunal upheld the employer's right to transfer an employee who had two seizures. In Barnard v. Fort Frances (Town) (1987) 9 C.H.R.R. D/4845 (Cumming), a diabetic police officer was forced to accept clerical duties. The board found that the provision of alternative duties was an appropriate accommodation. In Chamberlin, supra note 91, a commission salesperson selling extended services, suffered an adjustment disorder and required an absence from work. Upon his return to work, his position had been filled, although the employer offered him an alternative sales commission position. The board of inquiry found that the employer should have given the complainant the opportunity to prove he could still perform his old job. The board noted, in obiter, that if the complainant had been able to perform his old job, the offer of another commission sales job would have been a reasonable accommodation. Although these cases are suggestive that the duty to accommodate does require the provision of alternative work, the issue was not squarely argued and adjudicated on that basis.

It seems likely that a transfer of a disabled employee to an alternative position on a temporary basis, in order to assist the employee to return to the pre-disability position is required by the duty to accommodate. Ginsberg and Bickley, supra note and cases cited therein. The authors note that the caselaw establishes the duty to accommodate pregnant women by temporarily transferring them for the duration of their pregnancy. (Emrick Plastics v Ontario (Human Rights Comm) (1990), 14 C.H.R.R. d/68 (Ont. Bd. of Inq.), aff'd (1992), 16 C.H.R.R. d/300 (Ont. Div. Ct.). See also Lord v Haldimand-Norfolk Police Services Board (1995), 23 C.H.R.R. D/500 (Ont - Mikus) and Quebec (Commun des droits de la personne c. Lingerie Roxma Lee) (1995), 25 C.H.R.R. D/ 487 (Queb Tribunal des droits de la personne) By extension, it seems likely that an employer would be required to temporarily transfer a disabled employee in that would assist in returning the worker to the pre-disability job.

cases in which the arbitrator was required to decide the employer's obligation to consider alternative positions in the workplace as a means of accommodation, there was no analysis of the scope of the disabled employee's employment rights. The debate has moved beyond whether the duty to accommodate requires an employer to consider existing alternative positions to whether the duty includes an obligation to create a new position.

The disabled worker's right to equal treatment includes the right to be accommodated in the workplace in accordance with the terms of his or her employment, broadly defined. That right

(Alta C.A.). The Board's discussion of the obligation to consider alternative positions in the bargaining unit was obiter and was not an issue in the appeals. cf Royal Alexandra Hospital and A.H.E.U., Local 41 (1992). 29 L.A.C. (4th) 58 (Power), where the arbitrator held that the employer was not obliged to consider the suitability of alternative positions.

It should be recognized that many of the Ontario arbitration cases involved injured workers in which case the employer was obliged to re-employ the worker in any suitable position in the workplace. Therefore, the scope of the right to employment was not an issue. Some collective agreements specifically provide that the employer will make every reasonable effort to find suitable alternative employment for disabled and/or injured workers. This may also have played a role in those cases where the obligation to consider alternative employment was not disputed.

124 In Re Metropolitan Toronto (Municipality) and C.U.P.E., Loc. 79 (Lekoushff)(1994). 46 L.A.C. (4th) 110 (Fisher), the arbitrator found that the employer had no obligation to give a disabled worker preference for a vacant position outside the bargaining unit as a form of accommodation. On the other hand, in Re West Park Hospital and O.N.A.(1996). 55 L.A.C. (4th) 78 (Emrich), the employer argued that the duty to accommodate did not include an obligation to transfer a disabled worker outside the bargaining unit, but did not dispute that accommodation required considering the disabled employee for the single classification of nurses within the bargaining unit. The employer had offered disabled worker an alternative position outside the bargaining unit, but argued that it was not obliged to do so under the Code. The union argued that the employer was obliged to further accommodate the worker by extending the protection of the collective agreement to the disabled worker as long as she held the position outside the bargaining unit. The board of arbitration held that the provision of available suitable work outside the bargaining unit was included in the duty to accommodate (at 111), but the majority held that the extension of the collective agreement to a non-bargaining unit position would cause undue hardship to the employer. In Thunder Bay (City) (Grandview Lodge) and S.E.I.U., Local 268(1992). 27 L.A.C. (4th) 19 (Joyce) at 204. the arbitrator held that the employer must consider alternative employment.


The cases refer interchangeably to the concepts of reconfiguring existing positions, providing alternative positions and creating new positions. While the line between these concepts is blurred, for the purpose of this paper, I refer to an existing position to mean the position as designed by the employer before attempts to modify it to accommodate a disability are attempted. Existing positions include both the position the disabled worker was doing at the time of disability and other positions in the workplace. There can be no doubt that the duty to accommodate includes the obligation to reconfigure the existing, pre-disability position. The provision of an alternative position refers to a transfer of the worker to a position other than the one held immediately prior to the onset of the disabling condition. In my view, if there is an obligation to consider a disabled worker for an alternative position, this would include the duty to consider whether this existing, alternative position could be modified to accommodate the disability. The creation of a new position refers to a position which did not exist prior to the issue of accommodating a particular disabled worker. The new position could be created out of a bundle of tasks which were previously associated with various other positions or could be composed of entirely new functions which the employer did not previously undertake.
may be as broad as the enterprise, or as narrow as the pre-disability position, depending on the legislative framework, the terms of the collective agreement or individual contract of employment, the past practices in the workplace, the interchangeability of workers in the workforce, the worker's prior work history, and the length of employment.
PART FOUR SENIORITY

I. The Benefits of Collective Bargaining

In contrast to the non-unionized workplace where employees must negotiate the terms of their employment contracts individually, once a trade union gains the right to represent a group of employees, the trade union negotiates the terms and conditions of employment on behalf of those employees. The process of negotiation between the trade union and the employer, referred to as collective bargaining, generally results in the terms and conditions of employment being agreed to and embodied in a collective agreement. Whether or not an individual employee becomes a member of the trade union, he or she is covered by the terms of the collective agreement.

In 1997, approximately 34% of Canadian workers were covered by a collective agreement.126 Workers covered by collective agreements generally earn higher hourly wages, and have greater benefits than employees who negotiate individual contracts of employment.127 For disabled workers whose disabilities result in frequent or prolonged periods of absenteeism, unionized workplaces offer the additional benefit of high rates of short term and long term disability plans. 29% of Ontario collective agreements covering 41% of Ontario unionized workers offer short term disability plans. 77.5% of unionized employees in Ontario (64% of collective agreements) are covered by long-term disability plans.128 37% of Ontario collective

---

126 The Labour Force Survey (a monthly household survey about the labour force conducted by Statistics Canada) now reports information about unionization of paid employed workers (self-employed and unpaid family workers are not included in these figures). In May 1997, 3,598,100 out of 11,491,300 paid employed Canadian workers were members of a union (31.3%). 3,933,00 paid employed workers were covered by a collective agreement (34.2%) (Telephone Conversation with Statistics Canada, July 1997). D. Galarneau, "Unionized Workers" (Spring 1996) Perspectives 43 (Statistics Canada Catalogue # 75-001-XPE) reported that the unionization rate in Canada has remained relatively stable from 1986 to 1990, ranging from 31% to 33%. The unionization rate of Ontario workers in 1992 was 31.6% (Annual Report of the Minister of Industry, Science and Technology under the Corporations and Labour Unions Returns Act, Part II - Labour Unions, 1992. This is an occasional publication and Statistics Canada has no release date for 1993 figures).

127 Galarneau, ibid. at 47 - 49. The information from Galarneau's study is based on two household surveys which have collected information on employment and union membership: the Survey of Union Membership of 1984 and the Labour Market Activity Survey from 1986 to 1990. Unionized workers are also more likely to be covered by a retirement plan.

128 Ontario Ministry of Labour, Office of Collective Bargaining Information, Agreement and Employee Count, Employer Contributions to Long Term Disability Insurance Plan & Employer Contribution to Weekly Sickness and Accident Indemnity Insurance Plan, January 1995. These figures refer to those collective agreements in which the employer contributes toward the plans. There may also be short term and long term plans which are fully funded by the employees.

Agreement and Employee Counts from the Ontario Ministry of Labour are based on a representative sample of 3,494
agreements, covering 54% of employees include provision for prescription drugs. In addition to the financial benefits associated with unionization, collective bargaining offers employees the opportunity to negotiate for greater security of employment, by restricting management’s unilateral control over the workplace. As noted above, virtually all collective agreements restrain the employer’s ability to dismiss an employee without just cause, thus giving the employees a greater security of employment than many employees at common law. Another significant benefit of collective bargaining is the protection offered by a seniority system. At common law, employers are free to allocate work opportunities and benefits in any manner they choose, subject to the terms of the employees’ individual contacts of employment. Employment contracts rarely require an employer to consider the employees comparative length of service when making employment decisions relating to shift preferences, vacation periods, transfers, promotions, or reductions of the workforce. Thus, employers are free to retain or promote recently hired employees over employees who have been employed for many years, and likewise make other employment decisions without regard the employees’ years of service. With the advent of a trade union, management’s right to manage the workplace becomes restricted by the terms of the collective agreement. One of the basic provisions which most trade unions negotiate is a requirement that the employer recognize the employees’ relative length of service when allocating limited work opportunities.

Collective agreements in Ontario (out of approximately 9,000). Private sector agreements covering less than 200 employees are not included in the sample, and public sector agreements covering less than 10 employees are not included, thereby weighting the sample more heavily on the public sector side. Also, teachers organizations and construction industry organizations are not The most recent complete coding of Ontario collective agreements took place in January 1995.

129 Ontario Ministry of Labour. Office of Collective Bargaining Information. Agreement and Employee Count. ibid. Employer Contributions to Special Health Ins. Plans - Prescription Drugs. These figures refer to those collective agreements in which the employer contributes toward the plans. Many persons with disabilities report having disability-related expenses which are not reimbursed, such as prescription/non-prescription drugs. “A Portrait of Persons with Disabilities”. supra note 48. Table 7.7. This may be an area where unions could target further through collective bargaining.

130 K. G. Abraham and J. L. Medoff. “Length of Service and Layoffs in Union and Nonunion Work Groups” (1984) 38 Industrial and Labor Relations Review 408. A 1981 mail survey of 429 American companies revealed that very few nonunion employees are covered by written policies which give preference to senior workers at layoff. However, as discussed infra, non-unionized workplaces often do give preference to employees based on length of service.
Seniority is one of the most important and far-reaching benefits which the trade union movement has been able to secure for its members by virtue of the collective bargaining process.\textsuperscript{131}

Seniority is considered such an integral part of any collective agreement that an employer's resistance to the union's proposed seniority clause has been held to amount to an "unwillingness to engage in a serious attempt to effect an agreement", thereby entitling the union to first contract arbitration under the Ontario \textit{Labour Relations Act}.\textsuperscript{132}

The importance of seniority to the trade union movement has been recognized by the legislature of Ontario through the granting of limited exceptions to protect seniority systems in the \textit{Workers Compensation Act}, the \textit{Pay Equity Act}, the \textit{Employment Standards Act} and the recently repealed \textit{Employment Equity Act}.\textsuperscript{133}

\section*{II. Seniority Systems}

Seniority is an ordering principle used to allocate benefits, job security and work opportunities on the basis of length of service.\textsuperscript{134} The theory underlying seniority systems is that employees with the longest record of service will have the greatest job security in the context of a reduction in the workforce and the greatest potential for advancement with respect to promotion.\textsuperscript{135} The extent to which a particular seniority system achieves this goal depends on the

\textsuperscript{131}\textit{Tung-Sol of Canada Ltd} (1964), 15 L.A.C. 161 at 162 (Renville).

\textsuperscript{132}\textit{Nepean Roof Truss Limited}, [1986] O.L.R.B. Rep 1005 (Abella) at paragraph 22:

In today's labour relations climate, and given the significance to the labour movement of this basic principle [seniority rights] the company ought to have known that the union could not readily accept a broad merit clause in the absence of a seniority rights provision. The protection of seniority rights is such a fundamental part of the scheme of modern collective bargaining outside the construction industry that the company's refusal to grant it as a general principle, with or without a merit component, could only be interpreted in this case as an unwillingness to engage in a serious attempt to effect an agreement.

\textsuperscript{133}\textit{Employment Standards Act}, supra note 113, s. 32(1)(a); \textit{Pay Equity Act}, supra note 133, s. 8(1)(a); \textit{Workers Compensation Act}, supra note 78, s. 54(14) and (15); \textit{Employment Equity Act}, supra note 7, s 11(3) and (4), since repealed. For a complete review of seniority exemptions in other provincial and federal legislation, see P. Nash & L. Gottheil, "Employment Equity: A Union Perspective" (1992) 2 Can Lab L. J. 49 at 56 - 60.


\textsuperscript{135}Brown & Beatty, supra note 103 at 6:0000.
specific provisions of the collective agreement governing the accrual of seniority, the application of seniority, and the qualifications to the seniority principle, such as the skill and ability requirement.\footnote{136}

It is important to distinguish between the \textit{principle} of seniority and the \textit{practice} of seniority. The \textit{principle} of seniority is to allocate job related rewards on the basis of length of service with the employer. The \textit{practice} of seniority in an individual workplace is governed by the seniority rules in the collective agreement governing the accumulation and application of seniority, and the qualifications to the seniority principle.

\section*{A. Accumulation of Seniority}

Seniority is not necessarily synonymous with length of service with the employer. Seniority only accrues within a seniority unit. Although it is possible for a seniority unit to encompass an entire bargaining unit\footnote{137} or even more than one bargaining unit, it more common to find more than one seniority unit within a single bargaining unit.\footnote{138} The most common categories of seniority units are skill-based units and location-based units.\footnote{139} An employee who moves from one bargaining unit (or seniority group) to another generally loses his or her seniority and must begin accumulating seniority again in the new unit.\footnote{140}

The collective agreement will generally specify how seniority will be calculated. In the absence of clear language in the agreement to the contrary, the employee continues to accumulate

\footnote{136}\textsuperscript{136}Generally, the collective agreement will qualify the right of a worker to lay claim to a work opportunity on the basis of his or her seniority by the requirement that he or she have the necessary skills and ability to perform the work opportunity claimed. This is discussed further in this chapter at section II.B. Applications of Seniority.

\footnote{137}\textsuperscript{137}When a trade union seeks to organize a workplace, it need not seek to represent all the employees of the employer, but may seek to represent any group of employees of sufficient size and cohesiveness so that it is feasible to collective bargain on their behalf. Such groups or units of employees are known as bargaining units. The bargaining unit may be as broad as the entire enterprise or the plant, or as narrow as a single category of employees. There may be more than one bargaining unit at the same worksite, and the separate units may be represented by different trade unions. At some workplaces, all employees of the employer may be represented by one trade union in a single bargaining unit. At other workplaces, there may be several trade unions representing several different bargaining units, in addition to some groups of employees who are not represented at all.


\footnote{139}\textsuperscript{139}Ibid. at 10 - 11.

seniority credits while he or she is employed in the relevant seniority unit, regardless of whether he or she is actively at work.\textsuperscript{141} Thus, seniority continues to accrue when the employee is on vacation, absent due to illness, on maternity leave or during temporary lay-offs. However, it is not uncommon for collective agreements to provide that seniority will not accumulate, or will be lost after specified periods of absence.\textsuperscript{142} In addition, collective agreements often provide that part time employees acquire seniority based on the number of hours worked, rather than years of service with the employer.\textsuperscript{143} To further complicate matters, seniority may be calculated differently, depending on the application of the seniority. For example, for the purpose of determining the number of weeks vacation entitlement, the person’s years of service with the employer may be the relevant seniority date. In cases of promotion, years of service in a specified occupational group may be used, whereas, for the purpose of determining who shall be laid off, what may count for that same employee is the number of years of service in the bargaining unit.

\section*{B. Application of Seniority}

There are two basic applications of seniority: competitive seniority and benefit seniority. Seniority is used in a competitive sense when two or more employees compete for a limited number of opportunities such as overtime, shift selection, transfer, promotions, recalls or lay-offs, and preference is accorded, at least in part, based on length of service. Benefit seniority (sometime referred to as service) determines a worker’s level of entitlement to benefits such as vacation or severance pay, based on length of service.\textsuperscript{144}

The collective agreement will determine how strong a role seniority will play in any employment opportunity. It is rare that a collective agreement would provide that competitive seniority shall be the sole factor in determining a work opportunity, since management usually

\textsuperscript{141}Brown and Beatty, \textit{supra} note 103 at 6:1110.

\textsuperscript{142}In Part Six I discuss the results of a survey I conducted of selected workplaces who have negotiated special provisions to assist disabled workers to remain in or return to work. According to this survey, 75\% of respondents’ collective agreements contained “deemed termination” clauses, whereby the employment of employees was terminated after a stipulated length of absence. 72\% of respondents reported that employees lost seniority after a prolonged absence and 69\% reported that employees ceased accumulating seniority after a prolonged absence. See Table 2.


\textsuperscript{144}Dulude, \textit{supra} note 138 at 8 reviews the myriad types of employment opportunities in which competitive and benefit seniority have been applied.
reserves the right to require that the employee possess, at a minimum, the basic qualifications for the position to be filled. The two most common types of clauses are "sufficient ability" clauses and "equal ability" clauses. In a sufficient ability clause, the senior applicant will get the job, so long as he or she possesses the minimum qualifications for the position. In an equal ability clause, the senior employee will only succeed if he or she is relatively equal to the other candidates. The weakest type of seniority clause is one in which seniority is simply one factor which the employer may consider among others.

While the type of employment opportunities to which seniority may be applied as a factor is unlimited, the most common situations in which competitive seniority is likely to conflict with the accommodation of disabled workers involves lay-off, recall, transfers, promotions and shift selections. Lay-off refers to the situation where an employer is reducing the number of workers for economic reasons (rather than dismissal for cause situations). Trade unions strive to negotiate provisions which provide that employees will be laid off in reverse order of seniority, so that the most junior employees will be laid off first, ("last in, first out"). Employers generally recognize the importance of this principle to trade unions, but seek to minimize its impact with skill and ability requirements. 91% of Ontario collective agreements stipulate that seniority plays a role in lay-off. In 72% of collective agreements seniority is the sole or primary factor considered in lay-off. If the position which is eliminated is held by a senior employee, the collective agreement may provide for a system whereby the senior employee may take the position of a more junior employee, who may in turn claim the position of a more junior employee (this is known as "bumping"). The senior employee must possess the basic skills and ability for the position. Less than half of Ontario collective agreements permit bumping. Virtually all collective agreements which permit bumping contain some restriction on the method of bumping (such as a requirement that the employee must have a minimum length of service, that the employee can bump only into jobs or units in which the employee had previously worked, or that the employee can bump only

---

145 I have chosen to refer to these types of clauses as "equal ability" clauses, rather than competitive clauses, as they are more commonly called, in order to avoid confusion between the terms competitive seniority vs benefit seniority and sufficient ability clauses vs competitive clauses.

146 Ontario Ministry of Labour, Office of Collective Bargaining Information, Agreement and Employee Count, supra note 128. Role of Seniority in Lay-off. The Ministry records the weight accorded to seniority using four factors: sole factor, primary factor (sufficient ability clause), secondary factor (equal ability clause) and equal factor.
within or into specified jobs or units). Bumping increases administration costs (including for example, learning costs, record-keeping costs), while strict restrictions or extremely narrow seniority units can create situations where long service employees are laid off while very junior employees in other units are kept on.

Employees who are laid off will generally continue to maintain an employment relationship with the employer for a specified period of time, the most important incident of which is the right to be recalled to work on the terms set out in the collective agreement. Trade unions attempt to negotiate provisions whereby the most senior employees will be recalled to work before more junior employees ("last out, first in" rule), while employers attempt to protect their ability to recall workers based on skill, ability and production needs. 88% of Ontario collective agreements provide that seniority shall play a role in recall. Again, the skill and ability requirements plays a more subordinate role here, as 78% of collective agreements provide that seniority is the sole or primary factor in recalls.

Transfers and promotions arise when the employer creates a new positions or an existing position becomes vacant. Most Ontario collective agreements regulate the filling of vacant positions in the bargaining unit. 86% of Ontario collective agreements contain provisions requiring employers to post vacancies. Posting provisions are usually accompanied by a provision which grants seniority some role in the filling of the vacancies, both transfers (62%) and promotions (78%). Unlike the primary role played by seniority in lay-off and recall

---

147 Ontario Ministry of Labour, Office of Collective Bargaining Information. Agreement and Employee Count. Bumping Provisions. supra note 128. 57.07% of collective agreements contain no provision with respect to bumping: 0.29% of agreements prohibit bumping altogether. 41.42% restrict bumping in some way and the remaining 1.2% of agreements permit unrestricted bumping.


150 Ontario Ministry of Labour, Office of Collective Bargaining Information. Agreement and Employee Count. supra note 128. Role of Seniority in Transfer. Transfer refers to permanent transfer within the bargaining unit from one job to another job carrying the same or lower grade or rate of pay.

151 Ontario Ministry of Labour, Office of Collective Bargaining Information. Agreement and Employee Count. supra note, 128. Role of Seniority in Promotion. Promotion refers to movement to, permanent transfer to, or to fill vacancies in higher-paid or more responsible job within the bargaining unit.
situations, seniority more often plays only a secondary role in transfers and promotions.\textsuperscript{152} Another area in which seniority will be used as a factor to determine eligibility is in choice of work shift.\textsuperscript{153}

The breadth of the seniority unit, the strength of the seniority clauses and the situations to which seniority will be applied as a factor, are a product of the collective bargaining strength of the trade union and the employer and the nature of the employment. In an enterprise where shift work is the norm, and regular day shifts are rare, employees are likely to require their trade union to bargain strongly to make seniority the primary factor in shift selections. In a workplace with highly specialized work tasks, seniority units are likely to be narrow and skill and ability is likely to play a stronger role than seniority in work assignments.

III. Legal Status of Seniority

Seniority is a product of collective bargaining, and seniority rights have no legal force outside the collective agreement. Unions negotiate the use and application of seniority in the workplace and they can renegotiate those rules. In \textit{Hémond v Coopérative Fédérée du Québec},\textsuperscript{154} the Supreme Court of Canada commented on the legal nature of seniority rights.

\textsuperscript{152}In transfers, seniority is the sole factor in less that 2\% of collective agreements, in 20\% of collective agreement it is the primary factor; in 37\% of collective agreements it is the secondary factor; in less that 1\% (\textbullet.14\%) of collective agreement it is an equal factor. In promotions, seniority is the sole factor in 1\% of the cases; in 21\% of the cases it is the primary factor (sufficient ability clause); in 51.5\% of cases it is the secondary factor (competitive clause); and in less than 1\% (\textbullet.2\%) of cases it is an equal factor. Agreement and Employee Counts. Promotion. \textit{supra} note 151 and Transfer. \textit{supra} note 150.

\textsuperscript{153}The Office of Collective Bargaining does not record the role seniority plays in shift selection. The responses to my survey indicated that 42\% of respondents reported that seniority was a factor in shift preference. I also sought information on the role of seniority in lay-offs, recall, transfers and promotions. The survey responses tended to overestimate the percentage of agreements in which seniority played a role, compared to the information available from the Office of Collective Bargaining. See Appendix A for a discussion of the methodology of the survey and Table 3 for survey responses on the role played by seniority.

\textsuperscript{154}[1989] 2 S.C.R. 962. The narrow issue in this case concerned the jurisdiction of the Court to determine the rights of the employees under a collective agreement. The application and interpretation of collective agreement are determined by arbitrators. Questions of applicability of a collective agreement are preliminary matters which must be determined by the Courts. The Superior Court declined to hear the application on the basis that the issue involved the application and interpretation of the most recent collective agreement. The Quebec Court of Appeal held that the employees raised a preliminary issue respecting the applicability of a collective agreement and therefore the Courts had jurisdiction over the issue. The Court of Appeal held that the applicable collective agreement was the one in effect at the time the employees departed from the bargaining unit. The Supreme Court of Canada agreed with the Superior Court that the issue was one of the application of a collective agreement, that only one collective agreement could be in effect at one time, and therefore the issue of the proper seniority credits should be determined by an arbitrator, applying the most current collective agreement.
Three long term members of a bargaining unit were promoted out of the bargaining unit to become supervisory personnel with the employer. At the time of their departure, the collective agreement provided that if they returned to the bargaining unit within a specified period of time, they would be credited with seniority equivalent to their length of service. In time, the employees sought to return to the bargaining unit with all their years of service with the employer intact. In the meantime, the collective agreement had expired and a new collective agreement negotiated. The terms of the new agreement provided that employees who returned to the bargaining unit could retain a maximum of five years seniority credit. As a result the employees lost credit for many years of service (nine, twelve and twenty-two years respectively). The employees sought a declaration in the Quebec Superior Court that their seniority entitlement be determined under the terms of the collective agreement at the time they departed from the bargaining unit, arguing that their seniority credits became "vested rights" which could not be negotiated away by the trade union. The Supreme Court of Canada held that there can be only one collective agreement in effect at one time, and that the employees' seniority rights must be determined under the collective agreement in force at the time they returned to the bargaining unit. The Court rejected the argument that seniority rights can become "vested" rights, holding instead that seniority rights have meaning only under the collective agreement and that seniority rights are subject to the negotiation of the parties.\(^{155}\)

IV. Justification for the Use of Seniority and Reasons for Respecting Seniority Rules

There is an ongoing debate about whether giving preference in employment based on length of service is efficient from a management perspective. It has been argued that seniority rights "reduce rewards for merit; prevent management from promoting better qualified workers and retaining them on layoffs; discourage workforce mobility and flexibility; cause able ambitious young workers to leave or avoid jobs; results in a workforce which is older, less dynamic, and more resistant to technological change and cause disruptions in business operations and training

\(^{155}\)Ibid. at 974-5. Unions do not lightly negotiate away seniority rights of collective agreements. Labour Relations Boards have stated that they will closely scrutinize the actions of a union which reduce the value of previously negotiated seniority rights. In Part Six I discuss whether a union which alters existing seniority rights will violate its duty of fair representation.
costs when bumping is used.\textsuperscript{156} One the other hand, it has been argued that seniority increases work stability\textsuperscript{157}, which reduces management costs associated with hiring and training new employees.\textsuperscript{158} To the extent that there is some positive correlation between productivity and experience,\textsuperscript{159} the use of seniority is an administratively convenient method of allocating work opportunities.\textsuperscript{160} Even if there is some loss of individual productivity, the gain in employee morale may result in increased productivity.\textsuperscript{161} It is interesting to observe that many non-unionized employers often apply de facto seniority preferences even though they are not legally obliged to do so\textsuperscript{162}, and even if seniority does not coincide with productivity.\textsuperscript{163}

\textsuperscript{156}Dulude. \textit{supra} note 138 at 22. summarized the literature and the arguments against the use of seniority. 

\textsuperscript{157}Galarneau. \textit{supra} note 126 at 48 - 9 reports that union members work for longer periods for the same employer than do non-unionized workers. For the period of the study (1984 - 1990) unionized workers had worked on average 8.8 years with the same employer compared to 5.0 years for non-unionized workers. 


\textsuperscript{159}Rees. \textit{Ibid}. at 154. Contra Fallon and Weiler. \textit{Ibid}. at 56 dispute the argument that length of service is a reliable indicator of worker productivity. citing recent research which shows that younger employees are more cost efficient in light of the higher compensation packages associated with older workers. 

\textsuperscript{160}Summers and Love. \textit{supra} note 134 at 902. 


\textsuperscript{162}R. B. Freeman and J. L. Medoff. \textit{What do Unions Do?} (New York: Basic Books, 1984) Length of service plays a strong role in lay-off, even in non-union firms. although the protection of older workers is clearly stronger in unionized workplaces (at 123 - 125, Table 8-1). Length of service plays a role in promotions both in union and non-union firms. although it is a significantly greater factor in unions at 127 - 128. 

D. Q. Mills. "Seniority Versus Ability in Promotion Decisions" (1985) 38 Industrial and Labor Relations Review 421. In a 1982 telephone survey of 247 managers of American companies employing more than 250 persons, 74% of managers reported that they "normally consider length of service with the company when selecting an individual for promotion." (at 423) Surprisingly, the study did not indicate that unionization was a significant factor in the use length of service, although the manager's perception that he or she was required to promote the senior employee was a significant factor. It seems likely that such a perception is significantly correlated with a requirement to promote the senior employee. 

Abraham and Medoff. \textit{supra} note 130. A 1981 mail survey of 429 American companies revealed that a significant number of senior nonunion hourly workers are protected against some forms of job loss. 97% of the union groups surveyed and 86% of the nonunion groups had seniority protection during layoffs. The authors posit at 96 that the three possible motivations for nonunion firms to adopt these seniority preferences are: "avoiding unionization: maintaining the morale of the work force so that short-term efficiency is not impaired; and preserving the firm's reputation as a fair employer so that prospective new hires are not deterred from joining the firm."
scope of this paper to explore the impact of seniority rules on the efficient operation of the workplace. I take as my starting point the fact that Ontario workers are entitled under the law to collectively bargain and negotiate seniority provisions and that they have done so. The focus of this paper is on the reasons why employees choose seniority as the means of resolving competition between workers for limited work opportunities, and whether and to what extent this choice should be respected when it conflicts with the duty to accommodate disabled workers.

A. Objective Measurement

The most commonly cited rationale for the use of seniority is that it provides an objective, easy to administer, "bright line" test to resolve decisions in which the interests of employees are in competition. This objective measurement function serves three underlying purposes: it reduces the likelihood of managerial arbitrariness or favouritism. 164 it provides unions with an instrument to determine its position in case of dispute among its members165 and it reduces competition between members, thereby increasing union solidarity.166

(Seniority) is a key bargaining goal of unions because it allows workers some control in the workplace. It is an objective standard by which decisions are made about job opportunities such as promotions, transfers, training, layoffs and recalls, choice of shifts and vacation preference. It protects workers from being subject to the whims and personal bias of employers. It also avoids competition between workers and so increases

K. G. Abraham and J. L. Medoff. "Length of Service and Promotions in Union and Nonunion Work Groups" (1985) 38 Industrial and Labor Relations Review 87. A 1981 mail survey of 429 American companies revealed that "seniority plays a significant role in many nonunion promotion decisions. even though there are few written provisions specifying that it should." (at 417) "[T]he implicit advancement rights afforded senior employees are both more prevalent and stronger for union hourly than for non-union hourly work groups" (at 417)

163Quinn, ibid. at 423. 41% of managers surveyed who stated that they felt required to use length of service to determine promotions said they passed over a candidate with better current performance and 33 percent said they passed by a candidate with greater potential.


165Cooper & Sobol, ibid. at 1604 - 05; Summers & Love, supra note 134 at 902.

166K. MacLeod, supra note 164 at 9-10.
solidarity in the union. 167

1. Check on Managerial Discretion

One of a union's major goals in negotiating a collective agreement is to restrict an employer's discretion to set the terms and conditions of the workplace. Requiring that the employer allocate work opportunities on the basis of seniority, rather than on the criteria (presumably merit) which management which otherwise choose, is the primary method of restricting management's discretion to dictate who gets the work. There is little consensus between unions and management on how to set "merit" criteria, there are few purely objective measurements of merit, and in any event, it is impossible and probably inefficient to objectively assess all possible applicants for all work opportunities. Thus, it is inevitable that management must exercise discretion in distributing work opportunities. In such circumstances, there is ample opportunity for biases and person favouritism to come into play in the everyday allocation of overtime, work assignments, promotions, layoffs, recalls and other opportunities. Seniority provisions do not completely constrain managerial discretion, since most seniority clauses permit management to judge the worker's skill and ability to some degree. However, seniority provisions can and do restrain the way management distributes the work.

2. Check on Union Discretion

In any circumstance where management allocates a work opportunity to one worker over others, the passed over members may turn to their union to challenge the justness of the work distribution.

...seniority provides union leadership with an instrument for determining its position in case of a dispute among its members and thereby permits the union to avoid making an ad hoc decision to assert one worker's claim rather than another's. From the point of view of the employee the effect of seniority in regulating the union's position is not unlike its effect in regulating the decisions of management. 168

Just as seniority clauses do not completely fetter management's discretion, because of skill

---


168 Cooper and Sobol, supra note 164 at 1604 - 5.
and ability restrictions, neither no they entirely constrain union discretion when the union must decide which of competing members to support in a dispute about the proper distribution of work. Although seniority cannot act as a complete check on union or management discretion, it offers employees a means of limiting their otherwise unrestricted power over employees.

3. **Enhances Union Solidarity**

In addition to regulating the conduct of management and union officials, seniority rules help maintain solidarity among members. Competition between workers is inimical to the solidarity workers need in order to effectively collectively bargain for the mutual benefit of all members of the bargaining unit. While the use of seniority as an ordering principle does not eliminate this competition, as there will always be challenges between successful and unsuccessful applicants, it does reduce some of it.

Unions view seniority as a fair and equitable alternative to the competitive and aggressive behaviour that pits workers against one another when competing for jobs and promotions. There is a logical, orderly progression up job ladders so employees are better able to plan their career paths, and are willing to pass on their task-knowledge to those on the job-ladder behind them. The existence of seniority provisions provides a legitimacy and purpose to the existence of the union which monitors the administration of the seniority system.\(^{169}\)

Normally, seniority is used as an objective means of resolving competition between workers who have a relatively equal stake in the process, apart from their seniority record (and their personal skills and qualifications). For example, when seniority is used as a deciding factor in filling vacancies in a bargaining unit, the usual situation is that two workers, who are already employed in the unit, will be competing for the privilege of moving to an alternative, preferred position. In lay-off and recall situations, all employees face the same stake, access to employment.

**B. Fairness**

There are other means of objectively determining who shall be awarded limited work opportunities without invoking subjective measures of merit. Lotteries and queuing are two classic examples of wealth and merit neutral systems of allocating scarce goods.\(^{170}\)

\(^{169}\)K. MacLeod, *supra* note 164 at 10.

\(^{170}\)M. J. Trebilcock, "An Introduction to the Economic Approach to Law" in *Alternative Approaches to Legal Scholarship. Casebook*. 1995F. Trebilcock summarized the basic spectrum of choices available for making modern societal choices in situations of scarce resources can be summarized as follows: market. lottery. queuing. voting and
service of employment is preferable to those alternatives because it bears a stronger relationship to the opportunity which is being allocated (work).

Using length of service with the employer to allocate work opportunities appeals to most people's sense of fairness in the same way as queuing does. Assuming that everyone has an equal opportunity to join the employment queue to accrue seniority, then length of service seems a fair method of allocating scarce work opportunities. Conversely, allowing someone to jump the queue, (thereby disregarding someone else's place in line or length of service) strikes most people as unfair. The belief that length of service deserves preferential treatment in employment is so pervasive that many non-unionized employers often apply de facto seniority preferences even though they are not legally obliged to do so, in part because their employees believe that it is the fairest criteria for determining advancement.

C. Seniority is an Earned Benefit

Once workers have agreed among themselves and negotiated successfully with the employer that their workplace will be governed by specified seniority rules, then employees come to view their accumulated seniority credits as an earned benefit which forms part of their overall administrative (merit) systems. In a market system, scarce resources allocated to the highest bidder. In a lottery system, resources are allocated randomly. Queuing, or first come, first served is seen as wealth neutral and more advantageous to those who can afford the time. Voting systems would involve the participants devising some form of democratic system to vote on the allocation of the resources. An administrative merit system involves first a determination of merit and then design of a system to administer the merit criteria. Trebilcock attributed this discussion of the spectrum of choices to G. Calabresi and P. Bobbit, Tragic Choices (New York: Norton, 1978)

171 The assumption that everyone has an equal opportunity to join the employment queue and accrue seniority is the highly contested assumption which lies at the heart of the ongoing debate between whether seniority rights should be fully protected when lay-offs have a disproportionately negative effect on members of disadvantaged groups. In light of undisputed past discriminatory hiring practices, many groups in society did not have an equal opportunity to join the employment queue and acquire seniority fairly. Thus, it has been argued that the seniority of the current workers is tainted by past discrimination and therefore not worthy of full protection. One aspect of the debate is whether the persons who would benefit from affirmative action programs which grant them protection from lay-off should gain the benefit of taking away the "tainted" seniority credits of more senior employees, when these beneficiaries were not the same persons who were denied their place in the employment queue.

172 Rees, supra note at 152; Elster, supra note at 75 - 6 asserts that the analogy of seniority and queuing is spurious. "To devote one's life to a task is meritorious only when it involves forgoing other activities that would have been more satisfying personally. But most workers do not have any such alternatives." Elster appears to overlook that many workers consciously decide to stay with their current employer and forego other opportunities elsewhere because of the value of their earned seniority credits.

173 Mills, supra note 162. The author concluded at 425 that "people advance in an organization in part because of better performance, and in part because managers believe that other employees see seniority as the fairest basis for advancement."
compensation package. Seniority credits affect workers’ economic security and workers rely on them to make financial commitments. This earned benefit aspect of seniority has been expressed in various ways: “...seniority enables an employee to acquire valuable interests by his work, to capitalize his labor and obtain something more than a day’s wages for his continued production.”

Once a seniority regime is established, an employee working under it knows that in return for staying (rather than accepting or even looking for better jobs elsewhere), he is improving his relative ranking in the system. In a real sense, the added seniority credit for each period worked represents an intangible but crucial aspect of the return on the employee’s labor (albeit one he cannot "spend" but rather must invest with the firm).

The characterization of seniority credits as earned benefits best illustrates the sense of injustice workers feel when work opportunities are not allocated in accordance with agreed upon seniority rules. When a work opportunity is given to person with less seniority over the claim of a worker with greater seniority, then it is as if the senior worker’s seniority credits were taken away and given to the junior worker.

1. Affects Economic Interests

Seniority is inextricably linked to economic security.

More than any other provision of the collective agreement, including union security provisions under existing law, seniority affects the economic security of the individual employee covered by its terms. In industries characterized by a steady reduction in total employment the employee’s length of service is his principal protection against the loss of his job.

Years of seniority determine access to overtime opportunities, lateral and vertical transfers

---

174 Swinton, 1992, supra note 164 at 136 put it this way. “The "longer service employee is regarded as earning more favourable treatment through demonstrated loyalty to the workplace and acquired on-the-job experience." See also Sheppard, supra note 164 at 7; K. MacLeod, supra note 164 at 9 - 10; Fallon & Weiler, supra note 158 at 58.

175 Summers and Love, supra note 134 at 903.

176 Fallon & Weiler, supra note 158 at 58.

177 Summers and Love, supra note 134 at 904 expressed it this way:

Because seniority is an ordering principle, the core of seniority rights is the expectation that the order will be observed when choices between employees are made. To disregard the order of seniority by giving priority to a junior over a senior worker will be viewed as taking rights away from one person and giving them to another.

which may be accompanied by increases in wages and benefits, and access to employment (and thus, access to wages and benefits) in cases of lay-off and recall. Not complying with seniority rules, or taking away seniority credits, affects economic interests.

2. Reliance Interest

Seniority rules allow employees to predict their future employment position with respect to transfers, promotions, lay-offs, and recalls. While there are many variables which will affect an employee's career path (place on the seniority list, the number and timing of vacancies and lay-offs, the vagaries of the bumping system, the viability of the enterprise) workers can and do assess their relative level of job security in light of their "seniority credits" in order to make life choices. Workers rely on their perceived position in the enterprise as a result of their relative seniority ranking to make financial commitments, such as the purchase of a home. Workers may also rely on their relative seniority ranking to obtain preferred positions and shifts.

Interfering with established seniority rules affects these reliance interests.

The earned benefit rationale assumes that "seniority" tends to reflect "length of service". Although unions cannot always achieve this goal, they are generally supportive of seniority rules which conform to the basic principle that those with the longest "record of service" with the employer deserve the greatest job security and greatest opportunity for advancement. Unions generally support provisions which maximize seniority accrual and oppose provisions which detract from the accumulation of seniority, and generally support the exercise of seniority rights on an enterprise-wide basis, rather than on a narrower bargaining unit, departmental or classification basis. To the extent that seniority rules depart from the principle of "length of service", (and of course many do, as relatively few workplaces operate on a enterprise-wide seniority list with unrestricted bumping rights), then the seniority system will not protect the years of service which workers have "earned" through faithful service with one employer. The failure of the seniority system to fully protect some members' years of service does not negate the limited

---


180 D. MacLeod, supra note 167 at 32.

181 Dulude, supra note 138 at 11 - 12. Dulude notes that there are frequent exceptions to this union preference for broader based seniority units, and that above all, unions favour the status quo because of the impact on employees to any changes to existing seniority units.
protection it does offer to most members.

The fact that seniority credits can be altered, reduced or even eliminated through further collective bargaining does not detract from the earned benefit analogy. The reality is that unions do not tamper lightly with seniority provisions, in light of the difficulties in justifying the reduction of earned benefits for some workers. And even if unions can and do negotiate different seniority provisions in future agreements, this does not detract from the value of the seniority credits the employee holds during the term of the collective agreement. The fact that seniority can be changed during the next round of collective bargaining does not justify failing to enforce the existing seniority rights between workers.

D. Protection of Older Workers

It has been argued that seniority systems are needed to protect older workers.182 It is feared that as older workers become less productive, their net worth to the employer will decrease and the employer will discard them. It is seen as unfair that vulnerable older employees who have given many years of faithful service should lose their employment in favour of younger, more productive workers. In my view, the protection of older workers is a poor justification for strict adherence to seniority rules. While there is a correlation between seniority and age, the match is so inexact that using seniority as a means of protecting older workers is very ineffective. Many older workers do not have the length of service with one employer to give them the benefits of seniority. Relatively few workers have worked long enough with one employer to fall within the category of “faithful retainer.”183 Seniority systems will operate to protect the 40 year old worker

182 J. Cleveland, “Implementation of Affirmative Action Programs in the Current Workplace Context” in Research Studies for the Royal Commission on Equality in Employment (Ottawa: Supply and Services Canada, 1985) at 372. Nash and Gottheil, supra note 133 at 54; Elster, supra note 164 at 75 - 76; D. MacLeod supra note 167 at 32 - 33. MacLeod argued that the impact of lay-off on older workers is especially great because in addition to the loss of earnings associated with loss of employment, older workers may find it more difficult to obtain medical or life insurance coverage, may have greater financial commitments, may find it more difficult to find employment and may lose pension entitlement.

183 Dulude, supra note 138 at 49 points out that the justification of protection of the older worker who has devoted long years of service is applicable only to segment of the population claiming seniority protection:

The most striking aspect of this “old-faithful-employee” defense is that it applies to a very small part of the workforce: in 1991, 54 percent of paid workers had been with their current employers for less than five years, including 58 percent of the women and 50 percent of the men (Belkhodja 1992, 24). No recent information is available for longer work tenure, but a 1981 study found that 16 percent of both female and male workers had spent from ten to nineteen years with the same employer, while 5 percent of the women and 19 percent of the men had the same employer for twenty years or more (Ormstein 1983, 15). Assuming that at least ten years is necessary to qualify as a “substantial part of one’s life,” this means that the proportion of employees with long...
with 20 years service over the more vulnerable 60 year old worker with 15 years service. While protection of older, vulnerable workers is a valid societal objective, it does not serve as a convincing rationale for the use of seniority per se, since seniority rules more often than not will operate in favour of workers who are neither old, vulnerable and who do not have especially long service.

To summarize, workers collectively bargain for seniority rules because they want to assert some control over the allocation of scarce work opportunities. Seniority provides an objective means of determining claims of competing workers. While there are other objective ways of allocating limited goods, in the employment context, length of service appeals to many employees as the fairest “objective” criteria. Once a seniority system has been adopted, employees come to view their years of service or seniority credits as an earned benefit, which affects their economic security and upon which they can rely to make important financial life decisions. Taking away workers seniority credits and giving them to another employee can be seen as “taking rights away from one person and giving them to another.”

E. Nature of the Employment Opportunity

While the reasons for requiring strict adherence to seniority rules are applicable to all employment opportunities, “the value of the right and the insistence on following the order of seniority strictly vary greatly, however, depending on the particular employment right that seniority is ordering.” Commentators have often drawn a distinction between the application of seniority rules in the context of lay-off and recall compared to other applications such as overtime, shift selection and promotions. The most impassioned arguments for strict adherence to the seniority principle are made in context of lay-off and recall, because in those instances an employee's ability to earn a living is at stake. The impact of interfering with seniority varies

faithful service who deserve the protection of seniority rules amounts to approximately 21 percent of female and 35 percent of male workers.

184 Summers and Love. supra note 134 at 904.

185 Summers and Love. supra note 134 at 904.

186 Sheppard. supra note 164 at 8 draws a distinction between lay-off and recall versus promotion or hiring. Fallon and Weiler. supra note 158 at 64 - 5 draw a distinction between lay-off and recall versus hiring, and note that promotion falls somewhere in between. Summers and Love. supra note 134 at 904 treat the spectrum of employment opportunities as a continuum, with the importance of seniority increases as it applies to overtime, shift selection, promotions and at the zenith, lay-off and recall.
depending on whether seniority operates to protect an employment opportunity actually held compared to one aspired to. This intuitive sense of relative injustice may be related to the "endowment effect" that makes people value an object in their possession more highly than the same object when not in their possession. Closely related to this effect, there is a tendency for any status quo to harden into a property right." In addition, there are actual difference between a job one holds and one which is merely aspired to. "[A] job that one actually occupies goes together with job-specific skills, relationship with colleagues, and other attributes that add to its value." This varying value which may be placed on the importance of maintaining strict adherence to existing seniority rules has implications for reconciling the duty to accommodate disabled workers with adherence to seniority rules.

IV. Similarities Between Seniority Systems and the Duty to Accommodate

While the focus of this paper will be on the circumstances in which seniority systems conflict with the duty to accommodate, it is important to recognize that both policies are measures which are designed to enhance the employment opportunities of workers. From the employer's perspective, anti-discrimination legislation and seniority provisions both check management's otherwise unrestricted right to determine who gets the work. Anti-discrimination legislation restricts management’s discretion by prohibiting certain factors from being considered, and in the case of disability, by imposing a positive obligation on the employer to accommodate the worker’s needs. Seniority systems, although they are negotiated and agreed to by the employer, rather than imposed by the state, also restrict management's discretion in allocating employment opportunities. Seniority provisions operate primarily by requiring the employer to consider the factor of length of service to varying degrees. They also operate to prohibit the employer from considering other factors which are not specified in the collective agreement (such as skill and ability). When the duty to accommodate conflicts with seniority provisions in a collective agreement, from the employer’s perspective, the situation is one of competing restrictions on its discretion to manage the workplace. While the employer will often have a

187 Elster. supra note 164 at 38 - 9 suggests that this justifies the different approaches to the use of seniority in layoffs versus promotion and hiring.

188 Elster. supra note 164 at 38-9.
preference for which of the restrictions it must follow (for example, in the case of disabled workers, it is in an employer’s economic self-interest to choose the least costly accommodation, such as transfer to an alternative position which the employee can perform without any other changes, over a costly modification to the employee’s work station to maintain him or her in the present position), the conflict does not operate to give the employer greater flexibility. Management’s flexibility, or dilemma, lies in the choice of competing restrictions.

From the employee’s perspective, both anti-discrimination legislation and seniority provisions are intended to enhance an employee’s access to employment opportunities and compensation, by reducing management’s discretion to make employment decisions which are arbitrary or discriminatory. In a situation of limited work opportunities, expanding one person’s opportunities inevitably restricts someone else’s. Both seniority systems and anti-discrimination laws affect who gets the work. Seniority operates directly, by making seniority a factor in who gets the work, and anti-discrimination legislation operates indirectly, by ensuring that certain factors do not determine who gets the work. Since both systems involve competing workers, some workers will see their employment opportunities expanded and others will not.

Whether an individual benefits from the application of a seniority system depends on their position on the seniority list. While seniority rules operate in the same way to insulate all employees from management discretion, workers with greater seniority will gain more advantages from the seniority system than junior workers. That is the theory underlying the use of seniority. Workers accept this as fair because they believe that they will, in time, acquire the seniority credits to allow them to share the advantages of the senior worker.

Anti-discrimination laws similarly operate to protect all employees from discrimination on prohibited grounds (all employees have a race or colour, gender, age, disability status, marital status, etc). Those individuals or groups who are most often discriminated against by employers

---

189 When I assert that employees benefit differently under a seniority regime, I am not referring to the fact that individual employees (especially those on the bottom rungs of the seniority ladder) may believe they would fare more favourably without the restrictions of seniority (either because of their belief in their capabilities or their relationship with those in authority). Rather, I am referring to the fact that seniority systems are designed to benefit workers with greater seniority at the expense of those with lesser seniority.

190 Swinton, 1985. supra note 140 at 289. Swinton, 1992, supra note 164 at 139 and Swinton, 1995, supra note 6 at 732. For a critique of the assumption that women workers have an equal opportunity to acquire seniority, see Dulude. supra note 138 at 28 - 33. Dulude argues that because women’s career patterns involve greater movement in and out of the work force, as well as a higher rate of part time work, as a result of child care responsibilities, they do not acquire seniority credits equally with men.
(non-whites, women, the elderly, the disabled, common law couples, etc) will see their opportunities expanded while those who are not discriminated against (young, white, able-bodied male workers), will not. Unlike seniority, those groups may never get their turn to benefit (they will become older, and they may become disabled, but they will never become non-white or female) if they do not experience employer discrimination. Similarly, many employees will not get the benefit, will not be offered the accommodations they may wish to have (transfer to a preferred shift or assignment)\(^{191}\), because they do not experience the lack of those accommodations as discriminatory. While many workers do perceive the fairness of the unequal benefits offered by seniority systems, not all employees view the uneven benefits accorded by anti-discrimination laws as fair.

V. **Conflict Between Seniority Systems and the Duty to Accommodate**

Since seniority systems and human rights legislation both operate to constrain management discretion to act in an arbitrary or discriminatory manner, seniority systems assist in the prevention of direct discrimination. "Seniority is a neutral system that is colour-blind, gender-blind, and age-blind"\(^{192}\) and thus can function to ensure that those factors are not taken into account by management, to the detriment of groups traditionally discriminated against.

A pure seniority system empowers workers to exercise their seniority for opportunities such as training, job shadowing, entering apprenticeship programs and job posting. With a clear seniority list, a worker knows she is eligible for an opportunity. Any intrusion of discriminatory factors into the selection of the worker is quickly revealed and can be handled through the grievance arbitration process.\(^{193}\)

By the same token, the nature of seniority systems is such that it will engender conflicts with the duty to accommodate. The essence of the seniority system is that the parties have agreed in advance which factors may be taken into account (length of service, and to varying degrees, skill and ability) and by implication, have agreed that \textit{all other factors} (such as net productivity of the employee, relationship with the employer, number of dependents, or disability-related needs)
may not be taken into account. By definition, then seniority systems prohibit an employer from taking into account employees' disability-related needs. Since seniority systems prohibit employers from taking the need for accommodation into account, and relief from the adverse effects of discrimination requires an employer to take a disabled worker's disability-related needs into account, conflict is inevitable.
PART FIVE   CONFLICTS BETWEEN THE ACCOMMODATION OF DISABLED WORKERS AND SENIORITY RIGHTS

I. Conflicts Between the Accommodation of Disabled Workers and Seniority Rights

Conflicts between seniority systems and the accommodation required by a disabled employee can arise in two ways. First, the provisions of the collective agreement respecting seniority may discriminate (directly or indirectly) against a disabled worker and the accommodation required by the employee involves modification to or exception from the collective agreement. The union shares the duty with the employer to find a suitable accommodation. While the employer is not obliged to select the form of accommodation which is least disruptive to the collective agreement, the availability of less intrusive forms of accommodation is a relevant factor in determining whether the parties acted reasonably in attempting to accommodate the worker. In the second scenario, although the terms of the collective agreement may not have a discriminatory effect, the accommodation needed by the worker cannot be implemented without violating the seniority provisions. In this case, the employer must canvass other methods of accommodating the employee which do not require the participation of the union, before calling upon the union to grant an exception to or modification from the seniority provisions of the collective agreement. Conflicts can arise with respect to the accrual of seniority or the application of seniority, and accommodating a disabled worker will affect other employees' working conditions and compensation levels. In this chapter I set out a series of examples to illustrate the different ways accommodating disabled workers can interfere with the seniority rules in a collective agreement. In the following chapter I examine how unions and employers have dealt with these conflicts through the negotiation of special clauses directed at disabled workers. In the final chapter I address the normative arguments for the resolving these conflicts.

194 *Renaud*, supra note 16 at 992.

195 *Renaud*, supra note 16 at 992.

196 *Renaud*, supra note 16 at 993.
A. Accumulation of Seniority

1. Competitive Seniority

a. Date of Hire Seniority Systems

The collective agreement provides that seniority accrues from the date of hire but ceases to accumulate after one year of absence. A disabled worker who is absent for a year and a half because of disability loses six months seniority credits. When she applies for a promotion for which she is qualified, she loses out to an employee who moved ahead of her on the seniority list as a result of the lost seniority credits. She grieves alleging that the loss of six months’s competitive seniority is discriminatory.

b. Hours Worked Seniority Systems

The same agreement provides that part-time workers accrue seniority based on hours worked and there are separate seniority lists for part-time workers and full-time workers. As a result of a disability-related absence, a disabled worker is unable to work her usual hours and accordingly falls behind other workers on the part-time seniority list. She grieves that she should be credited for competitive seniority while absent due to disability.

197 Throughout these examples, I will refer to the disabled worker as a female worker and workers affected by the accommodation as male workers.

198 These were essentially the facts in Thorne v Emerson Electric (1993) 18 C.H.R.R. D/510 (Ont bd. of inq.). The human rights board of inquiry ruled that the clause in the collective agreement constituted adverse effect discrimination against the complainant because of her disability and ordered the employer and the union to rectify the complainant’s seniority date to include the period of disability-related absence. The board also found that the complainant was discriminated against when she lost out on the promotion she applied for as a result of the discriminatory reduction of her seniority. The board held that the employer should have promoted Ms. Thorne to a comparable job or paid her suitable compensation and remitted the matter to the parties to resolve, in light of the board’s finding of discrimination. Most arbitrators have found that discounting disability-related absences in the calculation of competitive seniority is discriminatory and that the appropriate accommodation is credit the employee with seniority for the period of the absence. Orillia Soldiers Memorial Hospital (1996), 58 L.A.C. (4th) 72 (Mitchnick); Re Porcupine and District Children’s Aid Society and Canadian Union of Public Employees, Local 2196 (1996) 56 L.A.C. (4th) 116 (R. Brown); Re Victorian Order of Nurses (Algoma Branch) and O.N.A. (1996) 56 L.A.C. (4th) 235 (Low). Contra Re Metropolitan General Hospital and O.N.A. (1995). 48 L.A.C. (4th) 291 (Kennedy).

199 These were the facts in Re Golden Manor Home for the Aged and Ontario Nurses Association (1996) 53 L.A.C. (4th) 353 (Davie). The arbitrator found that the accumulation of credits based on hours worked was not directly discriminatory, but had an adverse effect on disabled workers who experienced disability-related absences and were therefore unable to accumulate seniority credits in the same manner as non-disabled workers. The arbitrator held that the appropriate accommodation was to credit the grievor with the competitive seniority she would have accumulated but for her disability-related absences. The arbitrator noted this would impact on other employees (since seniority is a relative concept and crediting the grievor with seniority might raise her above other employees on the seniority list), but noted that neither the employer nor the union alleged that this impact on other employees caused undue hardship.
2. **Benefit Seniority**

In each of the above examples, the disabled worker also claims that she should be credited with benefit seniority\(^\text{200}\) during the disability-related absence.

B. **Application of Seniority**

1. **Impact on Future Working Opportunities**

a. **Hiring and Promotion Systems**

An employer’s workplace is divided into several seniority units, each with its own seniority list. Each seniority unit contains several job classifications and progress from one classification to another is linear (a job or career ladder). The only access to the workplace is through entry level positions at the bottom of each job ladder. Those positions are associated with more arduous physical tasks and less preferred working hours. Progression or promotion to other positions higher on the job ladder are determined by seniority.\(^\text{201}\) An applicant with a hidden disability is offered a position with the employer but it is subsequently discovered that she is unable to perform the physical tasks associated with the entry level positions, although she has the skill and ability to perform the tasks associated with an upper level position. The disabled employee files a human rights complaint when the employment offer is rescinded, alleging that the employer’s hiring practices discriminate against her because of disability. She seeks to be placed

---

\(^\text{200}\) Arbitrators have generally held that it is not discriminatory for an employer to withhold or reduce benefits (such as vacation pay, employer premiums for health and welfare benefits) when a worker is absent due disability. [See for example, Re Versa Services Ltd. and Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employee Union, Local 647 (1994) 39 L.A.C. (4th) 196 (R. M. Brown); aff’d by the Divisional Court February 7, 1995 and Re Stelco Inc. and U.S.W.A. Loc. 1005 (Johnson) (1995) 38 C.L.A.S. 69 (Gray). Contra Re Clarendon Foundation (Cheshire Homes) Inc. and O.P.S.E.U. Loc. 593 (1996) 58 L.A.C. (4th) 270 (Craven)]. Adopting a similar reasoning, where compensation issues such as vacation entitlement with pay, wage rate and so are tied to seniority or service, arbitrators have held that it is not discriminatory to discount disability-related absences in the calculation of benefit seniority. Orillia Soldiers Memorial Hospital, supra note 198; Porcupine and District Children’s Aid Society, supra note 198; Golden Manor, supra note 199. Contra Re Riverdale Hospital (Board of Governors) and C.U.P.E., Loc. 79 (1993). 39 L.A.C. (4th) 63 (Stewart); Victorian Order of Nurses, supra note 198 and Thomson v. 501781 Ontario (Fleetwood Ambulance Services) (1996) O.H.R.B.I.D. No. 35 (Ontario bd of inq.)

\(^\text{201}\) A similar argument has been made that rigid job or career ladders with separate lines of progression and separate seniority units discriminate against women, because women are often channeled into those ladders which have limited promotional opportunities. Transferring to another occupational group with greater promotional advantages results in loss of seniority and relegation to the lowest level of the job ladder. For a discussion of this issue see Cleveland, supra note 182 at 377 - 91; Swinton. 1985. supra note 140 at 291 and Dulude, supra note 138 at 39 - 47. Swinton. 1995. supra note 6 at 736 - 46 suggests that the appropriate accommodation in cases where narrow seniority units constructively discriminate against women who seek more desirable positions (in terms of pay or promotional opportunities) in other seniority units is to recognize employer-wide seniority of all employees.
in one of the positions on the career ladder which she is physically capable of performing.

In a related example, a disabled employee wishes to advance in the workplace, but is unable to perform the physical tasks of the next position on the job ladder. She applies for a position higher on the job ladder which she is capable of performing, but is denied the position because she had not progressed through the lower position. She also files a complaint alleging that the employer’s system of promotion discriminates against her because of disability.

b. Shift Selection

A worker develops a sleep disorder which prevents her from working during the night shift. Shift preferences are determined strictly by seniority and the disabled worker is far down on the list of employees waiting in line for the next available day shift. The employer places the worker in the next available day shift position and the union files a grievance on behalf of the employee who was passed over.

---

There are relatively few disabilities which require accommodation in the form of a shift change. The cases in which workers have requested a shift change involved employees whose religion prevented them from working Friday evening and Saturday day shifts. Shifts which do not involve those hours are also desired by non-religious workers for lifestyle reasons. In each of the decided cases, shift selection or alternative positions which involved regular days were allocated based on seniority, and the religious employees did not have the required seniority to bid on the desired shifts or positions. To date, human rights tribunals and the Courts have stopped short of requiring employers and unions to accommodate religious employees to these preferred shifts in violation of the seniority rules. In Renaud, discussed supra note 16, the Supreme Court of Canada found that the union had failed in its duty to accommodate Mr. Renaud because it failed to canvass members who might volunteer to switch shifts with Mr. Renaud. In Roosma v. Ford Motor Co. of Canada (No. 4) (1995), 24 C.H.R.R. D/89 (Ont. Bd of Inq.) the accommodation requested was exemption from Friday night shift work, which for reasons discussed at length in the decision, was found not to be possible. The option of transferring to another position which did not involve Friday evening shifts was rejected by the board. A close reading of the decision suggests that even if the religious workers had been permitted to transfer to positions which accommodated their religious needs, they would have been bumped by more senior disabled employees, pursuant to a clause in the collective agreement giving older/disabled workers preference for certain positions. The case may have turned on its unique facts in which the duty to accommodate disabled workers and duty to accommodate religious workers conflicted, and was resolved by allowing seniority to dictate. See paragraphs 357, 359, 368. In MacEachern v. St. Francis Xavier University (1994) 24 C.H.R.R. D/226 (N.S. Bd of Inq.) the human rights board of inquiry ruled that the employer could not accommodate the complainant’s religious need to be absent on Friday evenings without undue hardship. The employer did not propose any specific transfer to another position which would not have involved those shifts, and therefore the board did not address the issue whether it would cause undue hardship to transfer the complainant into a position over the claim of a more senior worker. The union’s refusal to give a blanket waiver of seniority rights in order to allow the employer to place the disabled worker at its convenience was found not to violate the union’s duty to accommodate. The Board noted that the union had indicated its willingness to consider any proposed transfer on the merits (at paragraph 1190). In Drager v. I.A.M. & A. W. (1994) 20 C.H.R.R. D/119 (B.C. Council of Human Rights) the human rights Council concluded that the employer could have accommodated the employee’s absences through the use of overtime, call-back and the relieffian position, and therefore the union was not required to accommodate by waving the seniority provisions respecting shift selection.
c. Transfer to a Vacant Position Within the Bargaining Unit

A worker becomes disabled (or a disabled worker becomes further disabled) and is unable to continue performing the functions of her position safely. Attempts to modify her position so that she can perform it safely and productively fail and the worker faces the loss of employment or lay-off unless an alternative position is provided to her. There are other positions within the bargaining unit which the worker could perform, but the employer is required to post all vacancies. The agreement provides that where the applicants are relatively equal in ability, seniority shall prevail. The employer places the disabled worker in the position without posting it and the union grieves. The disabled worker’s seniority level is too low to allow her to successfully compete for any of the positions she is capable of performing.\(^{203}\)

2. Impact on Current Working Conditions: Bumping

A disabled worker cannot be accommodated in her own position and there are no vacancies available or likely to become available in the bargaining unit which the disabled worker can perform. The disabled worker could perform the work of several workers junior to her, and the employer displaces a junior worker in order to accommodate the disabled worker. In one situation, the junior worker is transferred to another position. In another example, the junior worker is laid off, with recall rights. In a third variation, there is no suitable work for the complainant held by junior workers, and the employer displaces a senior employee and transfers him to the complainant’s position, with no loss of compensation.\(^{205}\)

\(^{203}\)If there are no suitable positions which are available or likely to become available, an alternative accommodation would be to maintain the worker’s employment relationship in a similar fashion as in a lay-off situation, with a right to be considered for suitable positions which become available. How long the worker can maintain this employment status would depend on the circumstances of the case, including the terms of the collective agreement regarding recall periods.

\(^{204}\)In Union Carbide, supra note 123, the arbitrator held that the employer was justified in waiving the job posting/vacancy provisions of the collective agreement in order to place a disabled worker. This case, which was decided before the Supreme Court of Canada decision in Renaud, did not discuss why the interference with the coworker’s seniority rights was justified. In Re Boise Cascade Canada Ltd. and U.P.I.U., Loc. 1330, (1994) 41 L.A.C. (4th) 291 (Palmer), the employer had waived the posting/vacancy provisions of the agreement in order to place a disabled worker, thereby denying another worker with greater seniority the right to claim the vacancy. The arbitrator found that the disabled worker was being accommodated in a satisfactory manner in his previous position, and therefore the transfer was not required to accommodate him.

\(^{205}\)In Re Canada Post Corp. and C.U.P.W. (Lascelles) (1993) 33 L.A.C. (4th) 279 (Adell) [hereinafter Canada Post (Lascelles)], the employer bumped the grievor from his position in an effort to accommodate a disabled worker. The employer argued that the action was justified by a combination of the duty to accommodate and a provision in the collective agreement giving preference to disabled employees for suitable vacant positions. The
3. Impact on Ability to Maintain/Regain Existing Employment Status
   a. Protection Against Bumping

   The employer reorganizes the workplace and eliminates positions. A senior worker whose position is eliminated exercises his bumping rights to displace a junior disabled worker. The disabled worker is unable to perform the duties of the positions held by the junior workers she would be eligible to bump and is laid off. The worker grieves that her position should have been protected from bumping, since the senior worker could have bumped another junior worker. 206

---

206 In Re Loch Lomond Villa Inc. and New Brunswick Government Employees Union, Local 5 (1996) 53 L.A.C. (4th) 193 (Collier), the grievor had an arthritic condition which impeded his ability to perform some tasks. He posted into a full-time position in the laundry department, pursuant to a special clause in the collective agreement. Subsequently, the employer eliminated full-time positions in the laundry department, and since the grievor had the least seniority among the full-time employees, his position was eliminated. The grievor’s disability prevented him from performing other full-time positions outside the laundry department, so he exercised his right to bump into a part-time position in the laundry department and filed a grievance seeking to be placed back in the full-time position he previously held. The Board found that the grievor was laid off as a result of the reduction of the workforce and the application of the seniority provisions of the collective agreement, and held that the lay-off was not discriminatory. The dissenting member accepted the argument that the bumping provisions of the collective agreement had a more prejudicial effect on the grievor, noting that “[t]he very fact this grievor (due to his infirmity) is unable to exercise his seniority (as would a
In a related example, the disabled worker is unable to bump a more junior worker because she lacks the skills to perform those positions.

b. Recall Rights

Following a lay-off, the next two workers in line for recall are a non-disabled worker and then a disabled worker. The employer recalls the disabled worker back to work ahead of the more senior worker because one of the few positions she is capable of performing becomes available. If she is not recalled to this position, it is unlikely that a position she is capable of performing would become available for some time. The more senior worker is called to work two weeks later and grieves the loss of two weeks compensation and seeks to be placed in the position given to the disabled worker as an accommodation.

c. Transfer of Seniority Credits Across Bargaining Units (or Seniority Units).

There are no suitable positions for the disabled worker within the bargaining unit. There is work which the disabled worker could perform in another bargaining unit, but the bargaining units are represented by separate trade unions and separate collective agreements which do not provide for inter-unit transfers. The employer transfers the disabled worker into a suitable vacant position in the other bargaining unit, in violation of the posting/seniority provisions, but declines

---

healthy employee) to another full-time position. By its very nature has a greater and more prejudicial effect upon him.” The dissenting member held that he should have been accommodated, but did not discuss how this might impact on the seniority rights of other employees. In Canada Post, Payak, supra note 26, the employer protected a disabled worker's position (which had been provided to him as an accommodation) during a plant-wide open bid. Had the job not been protected, a senior grievor would have displaced the disabled employee. The union argued that the employer could not protect the disabled worker's job, and that other jobs could have been found for the disabled employee if the employer undertook the search. The employer argued that protecting the worker's position from bumping was a further accommodation. The arbitrator concluded that the employer acted reasonably in protecting the disabled worker's position from bumping, even though the seniority rights of the grievor were violated under the terms of the special agreement for a plant-wide open bid. The arbitrator noted that the interference was with the special agreement, but did not undermine the collective agreement itself. The normal operation of the collective agreement would not have jeopardized the individual's accommodation. With respect to the impact of accommodation on other employees, the arbitrator held that while the senior employee was inconvenienced in being denied the position of his choice, this type of interference did not amount to undue hardship. In Corner Brook (City) v. C. U. P. E., Local 768 et al. (1996), 138 Nfld & PEIR 271 (Nfld. C. A.), the employer reorganized its workplace, triggering the bumping procedure in the collective agreement. The employer sought to protect the position of a disabled employee because it believed that his disabilities prevented him from exercising his right to bump into any other position occupied during after employees. The union filed a grievance on behalf of a senior worker who was not permitted to bump into the disabled worker's position. The arbitration board upheld the grievance but declined to deal with the issue whether the proposed displacement constituted adverse effect discrimination, on the basis that it was premature to decide that issue before the disabled employee had been displaced. The Newfoundland Court of Appeal remitted the matter back to the arbitration board to consider whether the circumstances of the reorganization constituted adverse effect discrimination and whether the disabled employee should have been accommodated by protecting his job.
to recognize her fifteen years of service, with the result that the disabled worker moves to the bottom of the seniority list in the new unit. The members of the receiving unit grieve the failure to post the vacancy and fill it with a member from within the unit. The disabled worker grieves the loss of her seniority.\footnote{In \textit{Greater Niagara (Winter)}, supra note 123, one union represented employees in two bargaining units (a technical unit and the clerical unit) at the same hospital. The employees in the units were covered by separate collective agreements, and hence separate seniority lists. The union agreed to waive the posting and seniority provisions within the clerical bargaining unit to permit a disabled worker to transfer into the clerical unit, but did not agree to allow the disabled employee to bring her seniority with her. The arbitrator ruled that accommodation did not require permitting a disabled employee to bring her seniority with her. The significant factors referred to by the arbitrator included the adverse affect on other workers in the receiving unit, in a situation where lay-offs were imminent; the concern of the receiving unit that the sedentary nature of the work done there would make it attractive to other disabled claimants; and the fact that the unit had already waived the posting/vacancy provisions of the collective agreement. Since the union and employer agreed to the transfer of the disabled worker across bargaining units, this case offers no guidance on the issue whether an opposed transfer would amount to a significant interference with the rights of other workers.} In the next section I examine how unions and employers have dealt with these conflicts in the negotiation and administration of their collective agreements.
PART SIX  NEGOTIATION AND ADMINISTRATION OF THE COLLECTIVE AGREEMENT

The hallmark of the union's role in the workplace is the right and the duty to collectively bargain on behalf of members of the bargaining unit. From a labour relations standpoint, the preferred method of reconciling the conflict between the duty to accommodate and seniority rights of workers would be for employer and the union to negotiate provisions in the collective agreement which permit them to accommodate disabled workers in a manner which recognizes the particular characteristics of their workplace. In this part I examine how unions and employers have attempted to address the needs of disabled workers through negotiations and how they have dealt with issues of seniority.

I. Disabled Worker Clauses

There is a history of unions and employers negotiating special provisions to give disabled employees preference for positions within the bargaining unit. In 1996, approximately 35% of Canadian collective agreements covering 500 and more employees contained provisions to assist handicapped workers to remain in the workplace. This has remained relatively unchanged since 1987.

In Ontario in 1995, 36% of Ontario collective agreements, covering 51% of employees covered by collective agreements contained a "handicapped worker provision", which is defined by the Office of Collective Bargaining as a provision "which stipulate[s] that there will be . . ."

---

208 B. Adell. "The Rights of Disabled Workers at Arbitration and Under Human Rights Legislation" (1992) 1 Can. Lab. L. J. 46 at 53 footnote 27. cites the New York State Dept. of Labor. Handicapped Worker Provisions in Union-Management Agreements (1968) at 5 - 6. reporting that "71% of agreements negotiated by the United Automobile Workers and 50% of those negotiated by the United Mine Workers had provisions giving special rights or benefits to handicapped workers. The proportion was markedly lower for all other unions."


210 Provisions in Collective Agreements. Disabled Workers Clauses. Workplace Information Directorate. Human Resources Development Canada. 1987. Although the Workplace Information Directorate (WID) began coding collective agreement information on computer in 1985. a consultant with the WID advised me that 1985 figures would not be reliable, because of the small number of collective agreements coded in that year. The fact that there has not been a significant increase in the negotiation of disabled worker clauses is significant, since it indicates that unions were motivated to negotiate these provisions. prior to the recent statutory requirements to accommodate disabled workers. Adell. supra note 208 at 53. suggests that the original impetus for disabled worker clauses may have arisen as a result of the needs of returning war veterans.

special consideration given to handicapped workers in order to retain (rehire) them in the company's work force". (I will refer to these provisions as "disabled worker clauses"). These clauses are found in both private sector collective agreements (46%, covering 58% of employees) and public sector agreements (34%, covering 45% of employees). 213

Collective agreements covering larger bargaining units are significantly more likely to contain protection for disabled workers. 35% of employees protected by a disabled worker clause are employed in a bargaining unit containing over 500 employees. By comparison, only 11% of employees in medium-sized bargaining units (between 200 to 500 employees) are protected by a disabled worker clause. Only 5.4% of employees in small bargaining unit (less than 200 employees) are protected by a disabled worker clause. 214

The type of "accommodation" contemplated by the disabled worker clause varies widely. At one end of the spectrum are modified work plans for temporarily injured workers. At the other end of the spectrum are detailed clauses permitting disabled employees to bump across seniority units and offering them protection from bumping by able-bodied employees.

II. Mail Survey of Selected Ontario Workplaces 215

In order to obtain more information about the content of these disabled worker clauses and their impact on seniority provisions, I conducted a mail survey of selected workplaces where the union and the employer had negotiated some form of disabled worker clause. I mailed 560 surveys to unions and employers whose collective agreements contained a "handicapped worker provision" as coded by the Office of Collective Bargaining. The response rate was approximately nine to eleven per cent, depending on the questions answered. 216 The responses came

---

212 In addition, many collective agreements contain "no discrimination clauses. Approximately 13% of Ontario collective agreements contain "no discrimination" clauses which specifically prohibit discrimination on the basis of "handicap." Ontario Ministry of Labour, Office of Collective Bargaining Information, Agreement and Employee Count. supra note 128. "Anti-Discrimination for Physical Handicap".


215 Appendix A contains a detailed summary of the methodology, the responses, and copies of the survey mailed to unions and to employers.
disproportionately from employer respondents. While information from employer respondents is informative, the low response rate from unions is disappointing, as the union is the significant player in most issues relating to modification of seniority rights. Nonetheless the responses indicate some general trends, with respect to the content of the disabled worker clauses, the potential areas for strengthening those clauses, and the factors which facilitate accommodation of disabled workers.

A. Accumulation of Seniority

75% of survey respondents indicated that their collective agreement contained deemed termination clauses, whereby workers who were absent for a stipulated period of time were automatically terminated. 72% of the respondents indicated that seniority was lost after a prolonged absence and 69% indicated that seniority ceased to accumulate after a prolonged absence.\(^\text{217}\) In light of recent Court decisions which have held that deemed termination clauses discriminate against disabled employees who experience disability-related absences\(^\text{218}\), it may be that many unions and employers are not enforcing those provisions against disabled workers. My survey did not address whether or how the parties attempted to accommodate disabled workers who lose seniority as a result of disability-related absences. However, a review of the arbitral jurisprudence in this area\(^\text{219}\) indicates that unions have consistently taken the position that disabled workers who have been absent due to disability should not lose either competitive or benefit seniority.

B. Protections Negotiated for Disabled Workers\(^\text{220}\)

---

\(^{217}\) In light of the low response rate, there is a significant likelihood of response bias. In other words, the respondents may not fairly represent the sample group, in the sense that those who answered may have a tendency to be especially sympathetic to the issues raised in the survey.


\(^{219}\) Reviewed in Part Five. footnotes 198 and 199.

\(^{220}\) The sample clauses used in this section were provided by the Workplace Information Directorate which codes all Federal collective agreements and those Provincial collective agreements covering more than 500 employees. They are not necessarily Ontario collective agreements. Further, they do not correspond with the respondents to the survey, because survey respondents were guaranteed confidentiality of their survey responses. For further examples of clauses protecting disabled workers. see Contract Clauses, (March 1992) 16 Lancaster Labour Law Reports No. 3 and
Survey respondents were asked whether the disabled worker clause in their collective agreement encompassed the following types of accommodations, and were also asked whether or not they supported that form of accommodation.

1. **Transfer to suitable alternative vacant position within the bargaining unit**

   If a regular employee for certified health reason is unable to perform the work in his regular job he will be reclassified according to his seniority and capability to perform work in another classification if it exists within the Bargaining Unit.

Purolator Courier Limited and The Canada Council of Teamsters

The Company will make every effort possible to locate a suitable position for an employee deemed physically incapable of performing his regularly assigned duties. Should an employee be reclassified as a result, he will be paid at the then existing rate of his new classification. In the event that no position can be identified to accommodate the employee, he will:

1. be placed on lay-off (medical leave of absence without pay), or
2. qualify for participation in any of the employee benefit programs to which he is entitled to and a participating member, or
3. qualify for Workers' Compensation if his incapacity resulted from on-the job illness or injury.

Loomis Courier Service and The Canadian Brotherhood of Railway, Transport and General Workers

Most of the respondents to the survey indicated that the disabled worker clause in their collective agreement provided for the transfer of a disabled worker to a suitable, alternative vacant position in the bargaining unit (84%). Union respondents strongly supported (86%) the retention of such a clause or strengthening the clause to include such a provision. Fewer employer respondents (68%) supported this type of provision, but there was still strong support.

The limitation in this type of clause is that it allows the placement of disabled workers in *available* positions. A position is not considered available if the collective agreement provides

Sack and Poskanzer, supra note 143 at 19.4.
that the employer shall post all vacancies. Thus, these clauses will not provide much room for accommodation, unless the parties specifically provide that the posting provisions of the collective agreement may be waived.

2. Waiver of Posting/Other Provisions

11.09 Disabled Employees - The Parties may waive the provisions of Articles 11.02 and 11.05 [posting requirement] by mutual agreement of the joint Union-Management Committee in order to place a disabled employee into a vacancy when he is unable to perform his regular job because of a permanent physical disability or medical condition.

Cameco Corporation, Port Hope Ontario and United Steelworkers of America, Local 13173

Seniority rules may be relaxed when it is necessary to provide for the placement of disabled employees

Westcoast Energy Inc. and Canadian Pipeline Employees' Association

A number of respondents indicated that their collective agreements provided for the waiving of posting requirements (44%) or other provisions (28%) in order to place disabled workers. 54% of the union respondents supported the waiving of the posting requirement in order to place disabled workers, while 73% of employers supported this solution. Employers did identify the posting requirement as a barrier and suggested that waiving the requirement would aid in placing disabled workers.

3. Bumping

Junior employees

17.01 If an employee as the result of an occupational injury or illness becomes physically handicapped to the extent that he is unable to perform his regular work and providing proof is available in the form of information from the W.C.B., the employee may invoke his Company Seniority to obtain a job which he is able to perform when his seniority is greater than that of the employee occupying the job. The period of physical incapacity must be estimated by the Board to be in excess of six months before the terms of this

---

221 Union Carbide, supra note 123. See also Re Rocmaura Inc. and C.U.P.E., Loc. 1603 (1990) 16 L.A.C. (4th) 220 (N.B. - Stanley)

222 In my survey I did not distinguish between posting provisions and provisions providing that the vacancy will be filled based partly on seniority. However, given the close relationship between posting and filling vacancies with seniority, I am assuming that the respondents who indicated support for waiving the posting requirement had in mind that the vacant position would be used for placing a disabled worker.
A clause may be applicable. Where these terms do not apply, the Company will endeavour to provide employment in any suitable job opening which is available. In addition to the foregoing, the Company will continue the past practice of working jointly with Union officials to give preferential consideration to employees who have a health related need for special placement. (Article 17.02 provided similar protection with respect to non-occupational injuries and illnesses)

Rio Algom Limited United Steelworkers of America, Local 5417

Any employee

Where an employee has been partially disabled as a result of an "accident" or "industrial disease", within the meaning of the Workers' Compensation Act of the Northwest Territories, incurred in the course of his/her employment by the Company, he/she shall, notwithstanding anything in this Article [the rest of the article deals with the calculation of seniority and the primary role of seniority in promotions, demotions, transfers and layoffs], be given preference over other persons or employees for employment by the Company in any job for which, in the opinion of the Company, he/she has the necessary ability and efficiency, whether or not a vacancy exists. The Company may, in its discretion, extend this privilege to an employee partially disabled from any other cause. If an employee is the incumbent of a job before the job is made available by the Company under the Article for partially disabled employees, he/she shall, on being replaced in that job by a partially disabled employee, have his/her rate of pay maintained at a rate not less than the rate of the job from which he/she was moved without impairment of his seniority.

Miramar Con Mine, Ltd and United Steelworkers of America Local 802

Few collective agreements provided that disabled workers could bump a junior employee to obtain a suitable alternative position (25%). Union respondents were quite supportive (75%) of including such protection in the collective agreement, while employer support for the right to bump junior employees was limited (31%). Concerns were expressed about the junior employee losing his or her employment and the disabled worker's ability to perform the alternative work.

4. Transfer to Another Seniority Unit

An employee, because of health reasons, must seek work in another seniority unit, and if qualified for such work in the new unit, shall be allowed to use his seniority in his present unit to bump into the new unit. Such employee, who has been medically certified unable to work in his present seniority unit and has bumped into another seniority unit shall be given seniority status in the new unit from his last date of hire in the Company.

Footnote 233: I did not come across any examples of unions negotiating for the transfer into another bargaining unit. This type of provision would require the participation of the second trade union, if the bargaining units were represented by different trade unions.
An employee may only exercise such bumping option, outlined above, only once within the employee's history with the Company.

Canadian Freightways Limited and Western Canada Council of Teamsters

5. **Transfer outside the bargaining unit**

Should there be no available position within the bargaining unit, the Company will investigate upon evaluation of the employee's qualifications, the possibility of relocation into suitable employment that may become available outside the bargaining unit. The local chairperson shall be advised of the results of the investigation.

Voyageur Colonial Limited and CAW Canada Local 4573

Less than half the clauses provided for transfer to positions *outside* the bargaining unit (45%). Unions strongly supported a provision to allow disabled employees to transfer to suitable, alternative vacant positions outside the bargaining unit (79%), while employer support for such a provision was low (29%). It is not clear whether the union support was predicated on the assumption that the disabled worker would retain bargaining unit protection while employed outside the bargaining unit.\(^{224}\)

6. **Protection Against Bumping**

No Limitations

When mutually agreed between the proper officer of the Company and the Representative, an employee who has become unfit to follow his usual occupation may be placed in a position covered by this Agreement which he is qualified to fill, notwithstanding that it may be necessary to displace an able-bodied junior employee to provide suitable employment for him. An employee placed in another seniority group will accumulate seniority in such group only from the date he starts work therein.

An employee placed in a position under the provisions of this Article shall not be displaced

---

\(^{224}\)In *Re West Park Hospital and O.N.A. (1996)*, 55 L.A.C. (4th) 78 (Emrich), the majority of the arbitration board concluded that it would amount to undue hardship to the employer to continue to apply the provisions of the collective agreement to a position excluded from the bargaining unit which was provided to a disabled employee as an accommodation. However, the collective agreement specifically contemplated the transfer of a disabled nurse to an excluded position without suffering loss of seniority, service or benefits, and the arbitration board held that provision of the collective agreement should have been applied to the disabled worker. In *Re Interlink Freight Services and Transportation Communications Union (1996)*, 55 L.A.C. (4th) 289 (M. G. Picher), the arbitrator held that an employee who was provided with a position excluded from the bargaining unit as a form of accommodation of his disability did not continue to retain the protection against dismissal except for just cause, while holding that position.
by an able-bodied employee so long as he remains in such position. Should he subsequently recuperate, he shall be subject to displacement, in which case he shall exercise his seniority rights in the seniority group from which he came with his former seniority standing.

Northumberland Ferries Limited and The National Automobile, Aerospace and Agricultural Implement Workers Union of Canada Local 4508

Protection from bumping (except in case of lay-off of senior employee)

16.1 When mutually agreed between the proper officer of the Company and the Regional Vice-President of the Brotherhood, an officer who has become unfit to follow his usual occupation may:
(a) displace a junior employee in his own seniority group for whose position he is qualified, or
(b) be placed, when mutually agreed between the proper officer of the Company and the Regional Vice-President of the Brotherhood, in another position, notwithstanding that it may be necessary to displace an able-bodied officer to provide suitable employment for him.

16.2 In dealing with incapacitated officers, seniority shall govern in respect of preference of shift and employment.

16.3 A rehabilitated officer placed on a position shall not be displaced by an able-bodied officer so long as he remains on such position, except when a senior officer is otherwise unable to hold a position in his seniority group. Should he subsequently recuperate, he shall be subject to displacement in which case he shall exercise his seniority rights.

Marine Atlantic Inc. and The Canadian Brotherhood of Railway, Transport and General Workers

Very few collective agreements protect a disabled worker from being bumped by an able-bodied worker (except in case of lay-off)(24%)\textsuperscript{225}, although union respondents were strongly supportive of such protection (92%). Employer were less supportive of this type of protection (42%). Even fewer collective agreements provided enhanced protection against lay-off (10%) or enhanced recall rights (7%).

\textsuperscript{225}This number may be skewed by poor drafting. The question was posed whether the disabled worker was protected from bumping by able-bodied workers (except in case of lay-off). The question was intended to inquire whether the disabled worker could bump a more junior employee into another position (but not cause lay-off). Some respondents indicated that bumping only occurred in lay-off situations and therefore indicated that the question was inapplicable.
7. Training

The Company will use its best efforts to find employment for employees who are not over the normal retirement age but who have been incapacitated by age, disease or occupational accident. The employee will be given the opportunity and training to learn a new job or trade if necessary, in order to be placed somewhere within the Company.

Royal Oak Mines Inc. Giant Mine and Canadian Auto Workers Local 2304

Only 32.5% of the clauses provided for training for an alternative position. Union respondents universally supported this type of provision (100%) while employer respondents indicated conditional support (69%). Employer respondents stipulated that the duration of the training period and the cost must be reasonable, and that the employee must have relevant experience and be otherwise suitable for the training.

8. Light Duty Positions

(a) Management and Union will mutually agree to a number of current regular positions as light duty jobs to be used for the placement of employees who have permanent disabilities or limitations. The Union will be provided with a list of such postings when they become vacant. The incumbents in these positions who are there by reason of their disabilities or limitations will only be subject to bumping if there are not other positions occupied by more junior employees which the bumping employee is capable of performing.

(b) Management will retain the right to eliminate any or all such designated light duty positions in the event such positions become redundant as a result of tech change or automation. Management will inform the Union of any of these changes.

Cape Breton Development Corporation and District No. 26 United Mine Workers of America

When hiring specially trained Employees for work in warehouse or tool crib, preference will be given to older or handicapped Employees.

Construction Labour Relations Association of B.C. and United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry Local 170

Approximately half the collective agreements provided that light duty jobs would be made available to accommodate disabled workers, both temporarily disabled (55%) and permanently disabled workers (44%). Union respondents universally supported this type of provision while employers were not as enthusiastic about this type of provision. Only 53% of employers supported the provision of light duty jobs being set aside for temporarily disabled employees.
There was even less employer support for the provision of light duty jobs for permanently disabled employees (25%).

C. Factors which Affect Accommodation

A small number of respondents indicated that the collective agreement provisions relating to disability were only available for work-related injuries or that there were different provisions for non-work related injuries. Most clauses provided the employer with a discretion\(^{226}\) (72%) to accommodate the disabled worker, and union consent was generally not required, except when modification to the collective agreement was involved. Some collective agreements provided for a joint management union committee to discuss appropriate accommodation and decide upon suitable alternative work\(^{227}\)

Many employers rated the disabled workers clauses (or, in some cases, workplace practice or policy) as effective or very effective (65.5%) with respect to assisting employees with a temporary disabilities, but fewer rated the clause as effective or very effective with respect to assisting employees with permanent disabilities (52%). Many unions rated the disabled workers clauses as effective or very effective (69%) with respect to temporary disability, but fewer rated them as effective or very effective with respect to permanent disability (54%)

Some of the factors which respondents cited as contributing to the effective accommodation of disabled workers included: flexibility in the disabled worker clause, good labour-management relations, the requirement for discussion, and education and training. A larger workforce made it easier to accommodate, as it provided a larger pool of alternative positions and the impact on other workers was not as noticeable. In workplaces with relatively low-skilled positions it was easier to move workers around, without extensive retraining.

Some of the factors which impeded the ability to accommodate disabled workers included: physically demanding work, a large number of disabled workers, high skill requirements, low vacancy rates and an unsympathetic attitude from non-disabled workers. Both union and employer respondents generally believed that high seniority workers would resent accommodation of disabled workers if it affected their jobs or their entitlement to preferred positions.

\(^{226}\)Notwithstanding the permissive language in the disabled worker clause, which provided that the employer "may" assign workers to a vacant position, arbitrators have suggested that the obligation is to "make every reasonable effort to do so" \textit{Re Canada Post Corp. and C.U.P.W. (Milligan)} (1993). 38 L.A.C. (4th) 1 (M. G. Picher).

\(^{227}\)Consent and/or joint discussion with union required in 38% of collective agreements.
In summary, more than one-third of Ontario collective agreements already contain some provision giving disabled workers special consideration to retain them in the workforce. Some of those provisions limit the seniority rights of other workers (waiver of posting/other provisions, bumping, protection from bumping, light duty positions). There is also evidence that union representatives\(^{228}\) are in favour of strengthening those clauses in ways which would restrict the strict application of seniority in order to place disabled workers in suitable positions in the workplace. One of the significant factors which impedes their willingness to do so is their concern for the seniority rights of other workers.

**III. Duty of Fair Representation (DFR)**

Unions are subject to a statutory duty to represent all employees in the bargaining unit in a manner that is not arbitrary, discriminatory or in bad faith.\(^{229}\) In Ontario, the statutory DFR applies both to the negotiation of collective agreements and the administration of collective agreements. Does a union which negotiates provisions which alter existing seniority provisions or agrees to an accommodation of a disabled worker which interferes with existing seniority rights violate its DFR to those employees whose rights have been diminished?\(^{230}\)

\(^{228}\)It must be noted that the level of union support for the various types of accommodations was based on a small number of union respondents. See Appendix A.

\(^{229}\)Labour Relations Act, 1995, S.O. 1995, c. 1 s. 74. Ontario was the first jurisdiction to pass legislation imposing a statutory DFR in 1970 (Labour Relations Amendment Act, 1970 (No. 2) S. O. 1970, c. 85 s. 23). Seven other Canadian jurisdictions have since adopted similar statutory provisions. (Canada Labour Code, R. S. C. 1985, c. L-2, s. 37; Labour Relations Code, S. A. 1988, c. L-1.2 s. 151(1); Labour Relations Code S.B.C. 1992, c. 82, s. 12: Labour Code, R. S. Q. 1977, C-27, s. 47.2, en. 1977, C. 41, S. 28; Trade Union Act, R.S.S. 1978, C. t-17. S. 25.1. En 1983, C. 81, S. 8: Labour Relations Act, R. S. M. 1987, c. L10, s.20; Labour Relations Act, R. S. N. 1990, c. L-1, s. 130(1). It is interesting to note that neither the Alberta or the Newfoundland DFR specifically prohibits "discriminatory" treatment by a trade union. In Alberta, the legislation refers to the right of an employee to be "fairly represented". In Newfoundland, it is an unfair labour practice for the trade union to "fail to act in good faith." In the absence of a statutory provision, the Supreme Court of Canada has imposed a common law DFR on trade unions. Canadian Merchant Service Guild v. Gagnon (1984), 9 D.L.R. (4th) 641; Gendron v. Supply & Services Union of the Public Service Alliance of Canada, Loc. 50057 (1990), 109 N.R. 321. In Leung v. A.U.P.E. (1994), 17 Alta L. R. (3d) 773 (Alta C. A.), leave to appeal to S.C.C. refused (1994). 18 Alta L. R. (3d) xlii, the Alberta Court of Appeal confirmed that since the Public Service Employee Relations Act does not contain a statutory DFR, there is a common law DFR.

\(^{230}\)Will a union breach its DFR to the disabled employee if it does not negotiate such provisions or agree to a requested accommodation? The DFR prohibits the trade union from acting in a discriminatory manner in the representation of its members. In my view, the OLRB has appropriately adopted an approach of assessing whether the trade union's representational service was discriminatory, but will not inquire into whether the employee experienced employment-related discrimination. Whether the union is a party to employment-related discrimination by failing to accommodate a disabled workers' needs is more appropriately dealt with by a human rights board of inquiry or an arbitrator interpreting the Human Rights Code.
A. The Negotiation of the Collective Agreement

Unions are subject to a minimal level of scrutiny with respect to collective bargaining. Labour Boards have generally given unions a wide discretion to decide how to balance the competing interests of members of the bargaining unit during negotiations:

They have a broad discretion to fashion bargaining demands which may disregard the wishes of individuals or minority groups; trade off items thought appropriate, including individual grievances; and agree to terms that adversely affect individuals or groups of employees. What the duty demands is a modicum of procedural not substantive fairness, and while the views of employees in the unit should be canvassed, they need not be followed.231

One of the earliest cases dealing with a union’s authority to alter existing seniority rights through collective bargaining was the American case of Ford Motor Co. v. Huffman.32 The Selective Training and Service Act of 1940 gave veterans the right to their pre-military service jobs regardless of seniority, and credited them with constructive seniority for their years of military service. Ford and the United Auto Workers negotiated a provision over and above what was required by the law, and credited employees who had not worked for Ford before the war with constructive seniority for military service. The plaintiff was a veteran who was laid off as a result of the constructive seniority credited to another veteran. The Supreme Court confirmed that exclusive representation rights impose on unions a corresponding duty to represent all members, but gave the union wide latitude in exercising its discretion in negotiations:

Compromises on a temporary basis, with a view to long range advantages, are natural incidents of negotiation. Differences in wages, hours and conditions of employment reflect countless variables. Seniority rules governing promotions, transfers, lay-offs and similar matters may, in the first instance, revolve around length of competent service. Variations acceptable in the discretion of the bargaining representatives, however, may well include differences based on such matters as the unit within which seniority is to be computed, the privileges to which it shall relate, the nature of the work, the time at which

---

231 T. Christian, "The Developing Duty of Fair Representation" (1991), 2 Lab. Arb. Y.B. 3 at 17 and cases cited therein. K. J. Bentham, The Duty of Fair Representation in the Negotiation of Collective Agreements (Kingston: Industrial Relations Centre, Queen's University Press. 1991) at 39 concludes that this minimal level of scrutiny is appropriate:

The premise of our system of collective bargaining is that the individual rights of employees vis-a-vis their employers are best espoused and protected through collective action. The realization of the economic and social goals of trade unions demands that collective rights be given recognition, legitimacy and priority. A heightening of the standard of fair representation in the context of negotiations would erode collective strength and bode ill for the ability of trade unions to protect either individual or collective rights.

it is done, the fitness, ability or age of the employees, their family responsibilities, injuries received in the course of service, and time or labor devoted to related public service, whether civil or military, voluntary or involuntary.\textsuperscript{233} (emphasis added)

Notwithstanding this early judicial support for granting unions a broad discretion in altering existing seniority rights, Canadian Labour Relations Boards have stated that they will closely scrutinize the way a union deals with "vested" seniority rights, whenever a majority of the bargaining unit transfers to itself work opportunities previously enjoyed by a minority. In those circumstances, the union must show some "objective justification" for the change.\textsuperscript{234} In the case of \textit{B. C. Distillery Company Limited},\textsuperscript{235} the union negotiated a collective agreement which granted seven employees superseniority, because of their diligent service on the picket line during a strike. Since the company was planning to shut down and recall only a small number of workers, this superseniority gave these seven members (who did not otherwise have the requisite seniority) greater job security than under previous collective agreements. Several members of the bargaining unit filed a DFR complaint against the union. The B. C. Labour Relations Board acknowledged that the union might have been able to establish an objective justification for the change in seniority rights, on the basis that it was "not unfair to reserve some of [the jobs] for those people who persistence made a contract settlement possible for everyone else."\textsuperscript{236}

However, the union did not make that argument, but relied on the fact that the majority of the bargaining unit had voted in favour of the collective agreement. The Board found that the mere agreement of the majority did not justify the change in seniority rights.\textsuperscript{237}

\textsuperscript{233}Ibid. at 338 - 339.


When established seniority rights are changed, the bargaining representative should be required to show some practical justification beyond the desire of the majority to share the job opportunities theretofore enjoyed by a smaller group.


\textsuperscript{235}Ibid.

\textsuperscript{236}Ibid. at 384.

\textsuperscript{237}The B.C. Labour Relations Board ultimately dismissed the DFR complaint on the basis that the complainants had not suffered any damages as a result of the union's actions since they had accepted a severance package.
In *Dufferin Aggregates*, the union amended a job security provision in the collective agreement during the term of the agreement. Initially, the agreement prohibited layoffs, but mandated work-sharing if there was a reduction in available work. Subsequently, the majority of the employees in the bargaining unit voted to amend the agreement so that layoffs would be permitted as long as they were carried out in reverse order of seniority. Five employees who were laid off pursuant to the new term in the collective agreement alleged that the union had violated its DFR. Although this case involved a change to a "work sharing" provision, the Board stated that the situation was analogous to a change in a seniority provision, because it affected job security. The Board reviewed the major cases on the DFR and seniority and concluded that when the majority of the union transfers to itself work opportunities previously enjoyed by a minority, the union must establish some objective justification for the union’s action. In this case, the objective justification was that the diminishing workload made worksharing worthless and the choice to protect senior workers over junior workers was reasonable. It should be noted that even in this most dramatic expropriation of the job security rights of the most junior employees, the Ontario Labour Relations Board stated that it would show deference to the authority of the union to determine competing interests between members:

The appropriate standard to be adopted by this Board is not unlike that expressed by the court in the judicial review of the decisions of arbitrators: the Board should ask not whether the decision is right or wrong or whether it agrees with it - rather it should ask whether it is a decision that could reasonably be made in all the circumstances, even if the Board might itself be inclined to disagree with it. Used in this sense “reasonable” must mean by the rational application of relevant factors, after considering and balancing all legitimate interests and without regard to extraneous factors.

There have been few challenges to a union’s authority to negotiate and enforce provisions which limit the rights of members of the bargaining unit in favour of disabled workers. In *Cyr v Mine Mill Union, Loc. 598*, a non-disabled employee challenged a policy between the union and the employer giving special consideration to disabled workers. Under the collective agreement, employees bid for posted jobs which were awarded on the basis of seniority and

---

238 *Supra* note 234.

239 *Dufferin Aggregates* *supra* note 234 at 45, paragraph 37.

ability. The union and the employer had a longstanding agreement to waive these requirements for a limited number of jobs which were made available for disabled workers who would otherwise be unemployed. At time of hearing, there were 90 such jobs out of a bargaining unit of 1,700 employees. Cyr filed a grievance concerning the policy which was not set out in the collective agreement. The union abandoned the grievance after the third stage. Cyr then filed a DFR complaint, which was dismissed by the Board.

Nor is there anything illegal about the union's agreement with the company that compliance with the job posting provisions of the agreement would be waived in the case of certain job openings suitable for disabled workers. In my view this is a perfectly reasonable and laudable effort by the union and the employer to recognize and accommodate the needs of these disadvantaged individuals. The effect may be to confer a benefit to which they might not be entitled under the strict terms of the collective agreement, but this is not the kind of invidious "discrimination" to which section 68 of the Labour Relations Act is directed. The seniority provisions itself "discriminates" on the general sense that it gives a greater chance of promotion to persons with more years of service, and if the union is entitled, as it is, to create certain rights for senior employees through the collective bargaining process, it is equally entitled to limit those rights where there are good collective bargaining reasons for doing so. Such reasons clearly exist here, and I see no reason to interfere with an aspect of "the bargain" which has been in place for decades and is clearly acceptable to the union and its members.

In Humphreys v. Service Employees Union, Loc. 204,241 the collective agreement between the Canadian National Institute for the Blind and the union provided that applicants for job vacancies would be considered on the basis of merit, ability, experience and seniority. The agreement also provided that preference would be given to registered blind persons over sighted persons in transfers, promotions, demotions, layoff and recall. In a competition between Mr. Humphreys (a sighted employee) and Mrs. Devey (a visually impaired employee with greater seniority) for a vacancy, the employer selected Mr. Humphreys. The union filed a grievance on Mrs. Devey's behalf, alleging that the collective agreement required the employer to award the position to the visually impaired employee over the sighted employee whenever their interests were in competition. Mr. Humphreys filed a complaint against the Union alleging that it had breached its DFR in failing to represent his interests at the arbitration. The Board found that the union had not breached its DFR in choosing to represent Mrs. Devey's interests over Mr. Humphreys. The union's interpretation of the collective agreement was not arbitrary. Further,

---

the clause in the collective agreement giving preference to blind employees over sighted employees did not amount to discrimination (within the meaning of the DFR) against sighted employees, and therefore the union’s enforcement of that clause was not discriminatory.

While both cases concerned challenges to provisions or policies which had been in place for some time, (rather than recent changes to existing seniority rights) they indicate that the OLRB is likely to respect the collective decision by a majority of the bargaining unit members to limit their own seniority rights in favour of disabled workers.

There are compelling reasons why unions should address the potential conflict between their duty to accommodate disabled workers and the seniority provisions in their collective agreements. First, given the importance of seniority to unions, they will want to have maximum involvement in the process of balancing the rights of disabled members and the seniority rights of other members. The negotiation table is the primary forum for asserting the union’s interest in the seniority principle. Collective bargaining allows the parties to tailor the clause to the particular circumstances of their workplace. The extent to which waiver of posting/vacancy provisions, preferential filling of vacancies by disabled persons, bumping of junior employees, inter-unit transfers, protection from bumping, and privileged access to specified positions are suitable for a workplace is best judged *at first instance* by the parties most familiar with the workplace and the needs of the employees.

Second, by addressing the need to modify seniority provisions in the collective agreement, the parties can reduce the potential for resentment and complaints of unfair representation:

To the extent that parties can define their respective obligations through the negotiating process for the collective agreement, the potential for conflict when a particular fact situation arises is reduced. Sentiments of retaliation or resentment towards the individual employee with a disability is also minimized if rights and obligations are spelled out in *advance*. If those rights can be seen as collectively bargained for the protection of all employees rather than an inconvenience occasioned by the disability of one employee, obligations will be substantially objectified.  

---

242 E. McIntyre, "The Duty to Accommodate: A Union Viewpoint" (1996/97) Lab. Arb. Y.B. 277 at 287. McIntyre at 287 suggested that unions should attempt to negotiate the following provisions:

1) an anti-discrimination clause which either adopts or exceeds statutory standards;
2) an explicit recognition of the duty to accommodate to the point of undue hardship which specifically provides that employees who have sustained or developed disabilities shall be returned to work;
3) a provision allowing the parties to waive posting, classification and other provisions of a collective agreement to achieve accommodation;
4) a requirement to consult with the union prior to the reinstatement of employees with disabilities;
5) a special process for the resolution of reasonable accommodation disputes.
B. Administration of the Collective Agreement

Unions will be called upon during the administration of the collective agreement to make tough decisions about whether to uphold the seniority provisions of the collective agreement or to uphold the right of a disabled worker within the unit to be accommodated. Will a union's decision to support the disabled worker's need for accommodation despite its interference with the strict terms of the collective agreement, or its impact on other workers breach its DFR to the workers whose seniority rights are affected?

It is accepted that a union will occasionally be placed in the difficult position of supporting the grievance of one employee at the expense of another. So long as such decisions are made in good faith, the disadvantaged employee cannot complain of unfair representation.\textsuperscript{243}

Where the trade union adopts an interpretation of its collective agreement which favours one worker or group of workers over another, the Labour Relations Board does not determine whether the union's interpretation is correct. The Board merely assesses whether the interpretation adopted by the trade union is reasonable in the circumstances.\textsuperscript{244}

Where the duty to accommodate conflicts with the terms of the collective agreement, there will be little dispute that the strict terms of the collective agreement favour the affected coworker.\textsuperscript{245} The difficult issue is whether the duty to accommodate under the \textit{Human Rights Code} requires the terms of the collective agreement to give way in favour of the disabled worker. In a case where the union supports the interests of the disabled worker over another worker in

\textsuperscript{243}Christian. \textit{supra} note 231 at 23.

\textsuperscript{244}Christian. \textit{supra} note 231 at 22:

The issue is not whether the union was right or wrong in its decision not to proceed with a grievance but whether it duly considered the matter - indeed, the union has a right to be wrong. If the union can show it has come to a reasoned decision that a grievance is unlikely to succeed, it will have discharged its duty. In deciding not to advance a grievor's claim, a union must have a reasonable explanation of how it arrived at an interpretation of a collective agreement or avoid an impression of arbitrariness.

\textsuperscript{245}There are examples of unions waving the strict terms of the collective agreement provisions relating to seniority for valid labour relations reasons. For example, in \textit{Rayonier Canada (B.C.) Ltd. and International Woodworkers of American, Local 1-217 et al.}, [1975] 2 C.L.R.B.R. 196 (B.C.L.R.B. Weiler) the terms of the collective agreement appeared to require employees to return to work when recalled, or lose all their seniority. However, the Union and the employer had adopted a practice of waiving that requirement and allowing recalled workers to turn down short-term recalls if they had found longer-term work elsewhere, without losing all their seniority. A worker who felt disadvantaged by this procedure argued that the union should have enforced the strict terms of the agreement against a senior worker, with the result that the senior worker would have lost all his seniority. The B.C. Labour Relations Board ruled that it was not a breach of the DFR for the union to agree to procedure it did.
order to comply with the Human Rights Code, the Labour Board is unlikely to engage in an
analysis whether the Code requires the union to adopt the position it did or whether the resulting
interference with the coworker's rights amounted to undue hardship within the meaning of the
Code. Rather, the Labour Board is likely to assess whether the union's position is reasonable. In
light of the evolving nature of the human rights jurisprudence in this area, the OLRB has given
unions considerable leeway in their handling of the human rights aspects of grievances. For
example, in Huronia District Hospital\[46], the OLRB held that in light of emerging caselaw on
whether "deemed termination" clauses were discriminatory, the union could not be faulted for
deciding to pursue a grievance on behalf of a disabled employee who had lost her employment
pursuant to such a clause. The OLRB is likely to exhibit a similar deference to unions who take
the position that the Code does require some interference with strict seniority rights.

In conclusion, the function of Labour Relations Boards in assessing DFR complaints by
bargaining unit members is not to determine whether the union struck the correct balance between
the rights of disabled workers and the rights of other workers in the negotiation or administration
of the collective agreement. Rather, Labour Relations Boards will only assess whether a union's
actions are rational (not arbitrary, discriminatory or in bad faith) in light of their obligations to
accommodate disabled workers under human rights legislation. The DFR is not likely to (nor
should it) dictate when the limits of undue hardship under human rights legislation are reached.
Those limits must be determined in first instance, by the union and the employer, will be subject to
review by human rights tribunals and arbitrators, and ultimately the Courts.

Unions and employers have indicated a readiness to negotiate special provisions for
disabled workers which reduce the conflict between the duty to accommodate disabled
workers and the seniority provisions of the collective agreement. They have also exhibited a
willingness to waive seniority provisions in circumstances where the collective agreement conflicts
with the need for accommodation. However, unions and employers are justly concerned not only
with their obligation to accommodate the needs of disabled workers, but also with their
obligation to ensure that non-disabled workers will not be burdened unfairly with the
consequences of such accommodations. In the final chapter, I address the normative arguments for permitting
some interference with seniority provisions in order to accommodate the needs of disabled workers.

\[246\] [1990] O.L.R.D. No. 2002 (Herlich) at paragraph 33. The Ontario Divisional Court has since endorsed the
prevailing view among arbitrators that deemed termination clauses are discriminatory. See cases at footnote 218.
PART SEVEN  RESOLVING THE CONFLICT

I.  The Duty to Accommodate and the Limits of Undue Hardship

In each of the conflicts outlined in Part Five, the accommodation requested by the disabled worker interfered with the strict terms of the collective agreement regarding seniority, with varying impacts on other employees. Some impact on other workers is inevitable as human rights legislation operates to expand the work opportunities of those groups who are discriminated against. When human rights legislation is used to rectify a directly discriminatory refusal to hire or transfer a person because of a prohibited group (race or sex) by placing the person in the position they would have held, but for the discrimination, this remedy is considered appropriate, regardless of the impact it may have on other workers who aspired to that position.\textsuperscript{247} Remediing the effects of the direct discrimination places both parties in the position they would have been, but for the discrimination. In cases of adverse effect discrimination, the duty to accommodate also seeks to rectify the discriminatory effect which the neutral rules of society have on some groups. By increasing the opportunities of some workers through the duty to accommodate, this inevitably impacts on the limited pool of work opportunities available for other workers and in some cases, impacts on other workers current working conditions. Can workers reasonably be expected to accept these impacts resulting from interference with seniority rules, in order to accommodate a disabled coworker? The right to equal treatment in employment is not absolute.

The Code must be construed and flexibly applied to protect the right of the employee who is subject to discrimination and also to protect the right of the employer to proceed with the lawful conduct of his business. The Code was not intended to accord rights to one to the exclusion of the rights of the other.\textsuperscript{248}

...To what extent, if any, in the exercise of his religion is a person entitled to impose a liability upon another to do some act of accept some obligation he would not otherwise have done or accepted?...How far, it may be asked, may the same requirement be made of fellow employees and, for that matter, of the general public?\textsuperscript{249}

\textsuperscript{247} In Karumanchiri v. Ontario (Liquor Control Board) (1987), 8 C.H.R.R. D/4076; aff'd (1988). 9 C.H.R.R. D/4868 (Ont. Div. Ct); further reasons at (1988), 27 O.A.C. 246 (Div. Ct.), the board of inquiry found that the complainant had been discriminated against by the employer because of race, when the employer appointed someone less qualified to his position of Director of Laboratory Services. The board of inquiry ordered that the complainant be given the promotional opportunity, even though this resulted in the displacement of the incumbent, who had received the position as a result of the employer's discriminatory actions.

\textsuperscript{248} O'Malley, supra note 6 at 552 - 3.

\textsuperscript{249} O'Malley, supra note 6 at 553 - 4.
In cases of direct discrimination, the limit of the right to equal treatment is reached if the differential treatment can be justified as a bfoq. In cases of adverse effect discrimination, the limit on the right to equal treatment is reached when the accommodation required causes undue hardship to the union or the employer. Similarly, there must be limits on the burden the state is willing to impose on coworkers. When a proposed accommodation significantly or substantially interferes with the rights of other workers, the limit on the right to equal treatment has been reached. 250

II. Some Interference with Seniority Rules is Justifiable

When an accommodation required by a disabled worker interferes with the normal operation of the collective agreement respecting seniority, is the interference with coworkers’ rights significant, simply because of the importance of the seniority principle to workers and unions? In my view, this would be an inappropriate response to the conflict between seniority rights and the duty to accommodate, for it would effectively permit employees (through their union) and employers to contract out of the obligations imposed by human rights legislation. It is not the interference with the seniority rules which should bar a requested accommodation, but rather, the actual impact on other workers. When the impact on other workers’ working conditions is significant or substantial, the limit of undue hardship has been reached. This approach to the accommodation of disabled workers does not undermine the essential function of seniority as an objective measurement to resolve competitions between comparatively placed workers. Further, accommodating workers in the calculation of seniority enhances, rather than undermines the fairness principle.

A. Impact of Accommodation on Managerial and Union Discretion

Workers negotiate with their employer to have work opportunities allocated on the basis of seniority to constrain management (and to a lesser degree, union) discretion to prefer one worker over another on arbitrary or discriminatory grounds. Does the duty to accommodate reintroduce an unacceptable degree of managerial or union discretion in allocating limited work opportunities? Will the duty to accommodate be used to mask management or union favouritism or arbitrariness, in determining who gets accommodated and at whose expense? First, the conflict between the duty to accommodate and the provisions of a seniority system does not grant the

250 Renaud, supra note 16 at 991 - 2. and at 984 - 5.
employer greater managerial discretion to allocate the work according to its own preferences. It merely forces the employer to choose between two competing restrictions: the restrictions imposed by human rights legislation or the restrictions imposed by the seniority system. Second, should the employer fail to treat disabled workers in an evenhanded fashion or fail to canvass alternative accommodations which would not interfere with coworkers’ seniority rights, this can be challenged by the union. In cases where the union and the employer cannot agree whether a requested accommodation unduly interferes with another workers’ seniority rights, these issues can be resolved by arbitration. The union, arbitrators (or human rights tribunals) and ultimately the Courts, serve as a watchdog for the members, to ensure that disabled workers are treated evenly, that alternative accommodations which do not impact on seniority rights have been canvassed, and that the accommodation which is implemented does not cause undue hardship to other workers. Thus, granting exceptions to seniority rules to accommodate disabled workers does not undermine the use of seniority as a means of checking managerial arbitrariness.

Similarly, unions will have to make choices in determining whether to support the interests of a disabled worker or to uphold the rights of the senior worker, when those conflict. Unions have always played a monitoring role in ensuring that seniority is given the appropriate weight and in challenging those decisions which do not appropriately respect the seniority rules. Unions have always had to make difficult choices between members, choices which are not entirely constrained by the seniority provisions of the collective agreement, because of the skill and ability qualification in many competitive seniority situations. In my view, the potential for union arbitrariness is not significantly increased by requiring them to assess on a case by case basis whether a proposed accommodation significantly interferes with the rights of another employee.

B. Impact of Accommodation on Union Solidarity

Any interference with seniority rights may cause resentment among workers who view this as "special treatment" of disabled workers, which in turn is likely to decrease union

---

251 McIntyre. supra note 242 at 283:

It has been the experience of unions that other employees will sometimes react negatively to efforts to accommodate employees with disabilities. This is particularly true where the disability is not readily perceptible as in the case of a back injury or stress-related disabilities. Accommodated employees returning from modified duties frequently encounter a degree of hostility ... from employees who resent having to assist the disabled employee or object to giving up the light portion of their duties; these sentiments are frequently associated with suspicions of possible malingering.
solidarity. However, where the resentment is based on the perception that the accommodation is a form of preferential treatment, and not based on an objective demonstration of actual impact on other workers’ rights, this is essentially an "employee morale" argument.\textsuperscript{252} The Supreme Court of Canada has already addressed this type of reaction and stated that "objections based on attitudes inconsistent with human rights are an irrelevant consideration."\textsuperscript{253} One labour practitioner has suggested that this type of reaction should be addressed through joint management-union educational effort "directed creating an accommodating environment which will foster an understanding of the issues and reflect the mutual commitment of the parties to achieving the goals of equality and dignity."\textsuperscript{254}

C. Impact of Accommodation on the Fairness Principle in the Accumulation of Seniority

The choice of length of service as a fair means to resolve competition between employees assumes that everyone has an equal opportunity to accrue seniority. Correcting discriminatory accrual provisions enhances, rather than undermines the fairness principle which underlies the use of length of service as the preferred objective measure to resolve disputes between competing workers. While rectifying a seniority rule which discriminates in the calculation of seniority may affect someone else’s seniority ranking, the fairness or validity in respecting workers’ seniority rights only arises after seniority has been calculated in a non-discriminatory manner.

For example, when an employer discriminates against an applicant by refusing to hire him or her because of a prohibited ground, the appropriate remedy is to place the person in the position he or she would have been in, but for the discrimination. This would include an offer of employment and compensation for the wages and other benefits lost. In a unionized workplace the remedy would also include giving the person the seniority status they otherwise would have had but for the discrimination.\textsuperscript{255} Such an order undoubtedly affects those employees who drop

\textsuperscript{252}See my discussion in Part One, section II.B.2. Accommodation is Different Treatment, not Preferential Treatment.

\textsuperscript{253}Renaud. supra note 16 at 588.

\textsuperscript{254}McIntyre. supra note 242 at 283.

\textsuperscript{255}Cremona v. Wardair Canada Ltd. (No. 2) (1991) 16 C.H.R.R. D/32 (Cdn H.R. Trib.); Little v. Saint John Shipbuilding (1980). In Gerdeau v. British Columbia (Council of Human Rights) (1993), 93 C.L.L.C. 17.029 at 16.284, the British Columbia Supreme Court confirmed the Council’s authority to “make an order requiring an employer to hire a person who it found had been discriminated against, even if that hiring would otherwise be a breach
down on the seniority list because of the constructive seniority awarded to the victim of discrimination. This impact is justifiable because, but for the discrimination against the complainant, those employees would not hold their current place on the seniority list. Similarly, in circumstances where the calculation of seniority was found to be directly discriminatory, human rights tribunals have not refused to remedy the effect of discrimination because it might affect the seniority standing of other employees. For example, in Quebec (Comm. des droits de la personne) v. Brasserie Labatt Ltd256, a seniority rule which accorded preference to employees hired on the same day based on date of birth was found to be discriminatory because of age. The Tribunal ordered the employer and the union to determine the complainant's place on the seniority list in a non-discriminatory manner, which undoubtedly would have affected the place of other employees on the list.

Thus, to the extent that the constructive seniority places the disabled worker in the position he or she would have been in, but for the discriminatory provisions of the collective agreement, this form of accommodation enhances, rather than undermines the fairness principle underlying the use of length of service as a means of resolving competitions between workers.

D. Reduction of Earned Seniority Credits in the Application of Seniority Rules

Seniority rights are the product of collective bargaining. Employees agree among themselves that they wish to allocate limited work opportunities based on seniority and then seek the agreement of the employer to participate in that regime. Workers seek seniority protection in areas which have personal and financial significance (overtime, shift selection, transfers, lay-offs and recalls). Employers resist the restriction seniority systems impose on their ability to manage the work. Since collective bargaining is a give and take process, whenever workers successfully negotiate with the employer that seniority shall play a role in the allocation of a workplace opportunity, they give up some other benefit (higher wages, for example) in return for that agreement on the employer’s part.

Workers earn seniority credits only because of the a priori agreement between the employees (through their union) and the employer that they shall do so. When seniority rules are not followed, employees lose some of the value of their seniority credits, with varying impacts on their economic and reliance interests. The injustice workers feel in this devaluing of their seniority credits lies in the breach of the agreement by the employer (and also by the union if it agrees to the accommodation and by the worker who is seeking the accommodation). A benefit for which they have paid an implicit price has been taken away. From this perspective, any interference with collectively bargained seniority rights could be viewed as undue hardship to the union. This is not to say that the members may not individually volunteer to switch shifts or assignments with the disabled worker, or collectively confer on the union the authority to make principled exceptions, or negotiate clauses which modify the seniority rules in the case of disabled workers. But, where the individual worker or the union decline to waive the seniority right in question, does the importance of upholding the parties' agreement outweigh the importance of achieving equality in employment for disabled persons?

While there are compelling reasons for respecting and enforcing agreements between private parties, there are circumstances where society will not uphold these agreements. One area where the state will not enforce a private agreement between parties is when it would be contrary to public policy to do so. The Supreme Court of Canada has long held that a collective agreement between an employer and employees cannot act as a bar to the rectification of discrimination. This principle was first expressed in Ontario Human Rights Commission v. Etobicoke (Borough of), which involved a challenge by two firefighters against their forced

---

257 Unions have an obligation to canvass that possibility. Renaud, supra note 16 at 988 - 9.

258 For example, the employees could agree to a clause in the collective agreement which granted the union the authority to waive any provision in the collective agreement in order to accommodate a disabled worker.

259 [1982] 1 S.C.R. 202 at:

Although the Code contains no explicit restriction on such contracting out, it is nevertheless a public statute and it constitutes public policy in Ontario as appears from a reading of the Statute itself and as declared in the preamble. It is clear from the authorities, both in Canada and in England, that parties are not competent to contract themselves out of the provisions of such enactments and that contracts having such effect are void, as contrary to public policy.

In Insurance Corporation of British Columbia v. Heerspink, [1982] 2 S.C.R. 145 at 158 the Supreme Court of Canada first enunciated the principle that no one can contract out of human rights legislation in the context of an insurance contract. In Winnipeg School Division No. 1 v. Craton, [1985] 2 S.C.R. 150, the Court confirmed that
retirement at age sixty. The mandatory retirement provision was embodied in a collective agreement and the employer argued that that should serve as sufficient evidence to establish a bfoq defence. The Court rejected this argument, on the basis that the Code was enacted for the general benefit of the community and it would be contrary to public policy to permit parties to contract out of the Code through the collective bargaining process. The argument was raised again in Renaud, when the employer argued that the principle that the parties cannot contract out of the Code is not applicable in cases of adverse effect discrimination. The Supreme Court rejected this argument, although they acknowledged that "[s]ubstantial departure from the normal operation of the conditions and terms of employment in the collective agreement may constitute undue interference in the operation of the employer's business."

While there is no prohibition on unions and employers agreeing to neutral terms which inadvertently and indirectly discriminate against disabled persons, or which may incidentally impede the accommodation of their needs, it would contrary to public policy to allow them to rely on that agreement, in and of itself, to refuse to rectify the discriminatory effects of the agreement. When unions and employers negotiate seniority provisions they are agreeing in advance that when stipulated work opportunities do arise (preferred shifts or vacancies or recalls) or when work opportunities are narrowed (lay-offs), those limited work opportunities should be allocated only to stipulated groups (within the bargaining unit or seniority unit) and that seniority shall be one of determining factors in allocating those opportunities. Conversely, the parties are also agreeing in advance that other employees (those outside the unit) and other factors (net productivity, personal relationship with employer or disability-related needs) will not be considered. Thus, seniority systems amount to an implicit agreement between the union and the employer that a worker's disability-related need for accommodation will not be taken into account, regardless of the particular circumstances of the affected workers. While the employees undoubtedly paid a price in return for this implicit agreement, it should not be a bar to the implementation of a required accommodation. To suggest otherwise, would be to allow employees and employers to determine the scope of the employer's obligation to accommodate. In 86% of unionized Ontario parties cannot contract out of the Code through a collective agreement.

260 Renaud, supra note 16 at 986.

261 Renaud, supra note 16 at 987.
workplaces, employees have already obtained the agreement of their employer that vacancies shall be posted, thus potentially prohibiting the employer from using vacancies as a means of accommodating disabled workers.262

This is not to say that all requested accommodations must be implemented regardless of the impact on other employees. My point is simply to emphasize that the interference with the seniority system (the agreement not to accommodate), in and of itself, is not a sufficient reason to refuse to implement the accommodation. Rather, what should be considered is the actual impact on the affected coworkers.

Further, it should be remembered that seniority is normally used as a means of resolving competition between workers who face relatively equal work risks or opportunities, apart from their seniority record (and their personal skills and qualifications). When determining shift selection, seniority is intended to determine which employee shall get a preferred shift, not whether one employee will remain in the workplace while the other will be laid off. In filling vacancies, seniority is used to determine which of two employees will move from their current position into the vacant position, not whether one will transfer and the other will be laid off. In layoffs and recalls, competing employees face the same stake of loss of access to employment, commensurate with their seniority level. Competitive seniority credits are intended to be used in favour of senior workers to resolve disputes when the job interests (in terms of work opportunity) of the competing workers are equal.

Where a disabled employee who requires accommodation is involved, the parties are not be competing for the same job interest. The disabled employee may be facing loss of employment while the competing employee may be facing the prospect of transferring to a more advantageous position or remaining in his or her original position. Declining to use seniority as an ordering principle when the job interests at stake are so uneven, does not undermine the normal operation of seniority to resolve competitions between more equally placed workers.

IV. Conflicts Revisited

In this section I analyze each of the conflict situations previously identified in part five. Do the provisions of the collective agreement respecting seniority discriminate (directly or by

262See text accompanying footnote 149 in Part Four, section II.B.
adverse effect) against the disabled worker? Does the requested accommodation require an exemption form or modification to the collective agreement? Is it possible to accommodate the disabled worker's needs to enable him or her to achieve equality of opportunity? How does the requested accommodation burden other workers? Is the impact of the accommodation on the affected coworkers justifiable?

A. The Accumulation of Seniority

Do collective agreement provisions which provide that seniority shall cease accumulating after a stipulated period of absence discriminate against persons with disabilities? Discounting seniority during disability-related absences constitutes prima facie adverse effect discrimination against those disabled workers who are absent for disability-related reasons, because it imposes a burden, loss of seniority, not imposed on other members of the bargaining unit who do not experience disability-related absences.²⁶³

Is it possible to accommodate disability-related absences in a seniority system, given the nature of seniority accrual? Or is attendance at work crucial to the accrual of seniority? The answer depends on the nature of the seniority system in question, as well as the purpose of the seniority application.

1. Competitive Seniority
   a. Date of Hire Seniority Systems

When seniority is used to determine claims between competing employees, then the type of seniority system will determine whether attendance at work is a crucial aspect of the system. Most agreements provide either that seniority accrues from date of hire (or date of entry into the seniority unit) or based on hours worked. In date of hire seniority systems, seniority continues to

²⁶³ In assessing whether the disabled worker is receiving equal treatment with respect to the accrual of seniority, is the appropriate comparator group the bargaining unit (or seniority unit) as a whole, or those employees in the unit who are absent for similar periods of time? If the comparator group is the smaller subset of employees who are absent, then disabled employees are not treated any differently than other employees who are absent and the duty to accommodate the absence would not arise. In Gibbs v. Battlefords and District Co-operative Ltd. [1996] 3 S.C.R. 566, the employer's long-term disability plan imposed stricter conditions on the receipt of benefits for mental disabilities than for other disabilities. The Supreme Court of Canada stated that in determining the appropriate comparator group, the purpose of provision which is alleged to be discriminatory must be considered. The Court held that the appropriate comparator group was all employees who were covered by the benefit plan and that it was discriminatory to impose stricter conditions with respect to mental disabilities. Applying this approach, the purpose of the seniority or service provisions is to determine compensation levels or to allocate limited work opportunities among competing workers on the same seniority list. Thus, it is appropriate to consider whether the employee is being treated equally in comparison to all employees in the same seniority unit.
accrue "throughout the period that [the employee] is employed in the relevant seniority unit, regardless of whether she is actively working through that period. Thus, unless otherwise provided by the agreement, an employee would continue to accumulate credits during periods of vacation, illness, maternity leave and lay-off, at least of a temporary duration." \(^{264}\) For example, a senior employee who takes six weeks vacation accrues seniority at the same rate as a junior employee who takes only two weeks vacation. Workers who work one hundred hours overtime accrue seniority at the same rate as employees who do not work overtime. In these systems, hours worked is not necessarily synonymous with seniority. Thus, attendance at work is not an indispensable feature in the accrual of seniority which is to be applied in a competitive sense. The fact that the parties may negotiate provisions which detract from the general principle of accrual of seniority based on date of hire, such as discounting absences because of jury duty or extended vacations or paid leaves of absence, does not undermine the characterization of the system as a date of hire seniority system. Having chosen a date of hire system, the parties are prohibited from enforcing provisions which discriminate directly (seniority shall not accumulate during disability-related absences) or indirectly (seniority shall not accumulate after an absence of one year). The accommodation needed by the disabled worker is an exemption from the collective agreement to enable her to continue to accumulate seniority during the disability-related absence. This accommodation allows the disabled worker to accumulate seniority in a like manner as non-disabled workers, that is, from date of hire, subject to non-discriminatory exceptions in the collective agreement.

There are limits to the length of absence that can be accommodated in a seniority system, just as there are limits to the length of absence which can be accommodated in the employment relationship itself. When the worker's absence becomes so prolonged that it undermines the employment relationship, then the employer may terminate the relationship\(^{265}\) and hence, the

\(^{264}\)Brown and Beatty, supra note 103 at 6:1110.

\(^{265}\)Brown and Beatty, supra note 103 at 7:3210. An employer may terminate the employment relationship for innocent absenteeism, if the employee's past record of attendance combined with the future prognosis of the employee's capability to report for work on a regular basis render the employee unable to discharge his or her employment obligations in the future. There is no specific length of absence which justifies termination. The size of the enterprise, the interchangeability of the workers, the employer's capacity to tolerate absenteeism, the availability of long-term disability plans, and the nature of the employee's condition are all factors which should be taken into account in determining whether the employment relationship has been undermined. In light of the duty to accommodate under the Code, employers are no longer able to rely on deemed termination clauses to terminate employees because of prolonged absences. (See cases cited at footnote 218). Rather, the employer must establish on a case by case basis the essential
accrual of seniority.

b. Hours Worked Seniority Systems

In seniority systems which provide that seniority accrues based on hours worked, attendance is a crucial aspect of the system. Seniority does not accrue if the worker does not attend work, regardless of the reason for the failure to attend work (vacation, short-term illness, etc). What is needed to accommodate disabled workers whose disability prevents them from attending work and accruing seniority credits, is an accommodation which would enable them to attend work. For example, the worker could be given extra hours to make up for the hours of work which were lost during the disability-related absence. Crediting the worker with seniority for hours not worked does not enable the worker to meet the essential requirement of attendance.

Since the discriminatory effect arises from the collective agreement, the union shares the duty with the employer to search for a reasonable accommodation. In each case, the accommodation will affect other workers on the same seniority list. Allowing the disabled worker to accumulate seniority during disability-related absences will affect her place on the seniority list, which will affect her competitiveness in every future competition for overtime, shift selection, transfers, promotions, lay-offs and recalls. Granting the disabled worker extra hours to accumulate the lost seniority credits will decrease the number of hours available for other workers and may contravene specific provisions in the collective agreement governing the assignment of hours. Are these impacts on other workers justifiable?

Crediting the disabled worker with constructive seniority in a date of hire accrual system rectifies the discriminatory impact of the seniority accrual provisions of the collective agreement, in the same way that constructive seniority rectifies the effect of a directly discriminatory refusal to hire on the basis of race or sex or age. The impact on other workers’ relative seniority position is justified because it merely places them in the position on the seniority list they would have been in had the discrimination not occurred. Offering the disabled worker extra hours to maintain her relative seniority ranking similarly does not interfere unjustifiably with other workers’ seniority elements of innocent absenteeism, and the worker’s capacity to return to work must be judged in light of the availability of accommodations which the employer is obliged to provide.
rights, since it simply enables the disabled worker to maintain her place on the seniority list.\textsuperscript{266}

\section*{2. Benefit Seniority}

Benefit seniority or service is used to determine eligibility for and level of benefits such as vacation entitlement, severance pay, wage rates and so on. This affects the employee's compensation level, but not affect the employee's access to the workplace (lay-offs or recalls) or to work opportunities within the workplace (overtime, shift selection, transfers and promotions).

Is attendance a crucial requirement in the calculation of benefit seniority? The \textit{Code} does not guarantee minimum levels of income or compensation for disabled employees. It merely guarantees that employees will be compensated in an equal manner with other employees. Where employees are unable to perform the duties of their position the \textit{Code} does not require that employer's continue to pay their wages.\textsuperscript{267} Performance of productive job functions is an essential requirement for the payment of wages. Similarly, some benefits can be considered part of the employee's overall compensation package, and like wages, are tied to the performance of the work. Whether a particular benefit such as vacation entitlement with pay can be characterized as additional compensation (in addition to wages) for work performed will depend on the particular terms of the collective agreement.\textsuperscript{268} If the benefit can be characterized as additional earnings for

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{266} Depending on the particular circumstances, there may be difficulties in assigning the disabled worker extra hours to make up the lost hours, without significantly impacting on other rights of coworkers (for example, a right to a minimum number of hours). It may be that the extra hours will have to be made up over a period of time, so as to minimize the impact on other workers. In some circumstances, the impact on other workers' present working conditions may be too onerous to justify. See the discussion below of the distinction between impact on future work opportunities and current working conditions.

\item \textsuperscript{267} If the employer pays other employees wages when they are absent from work ie during periods of short-term illness, then it would be discriminatory to withhold the same level of payment for disabled employees who are absent on the same terms. There is no obligation on employers to provide income replacement benefits for employees who are absent for prolonged periods because of disability, although many employers do voluntarily provide such benefits.

\item \textsuperscript{268} It seems likely that most seniority systems based on hours worker will also tie benefit levels to hours worked. In date of hire seniority systems, whether benefits are tied to performance of work usually depends on whether the phrase "service or "period of work is used. Sack and Poskanzer, \textit{supra} note 143 at 13-6:

In measuring seniority for the purposes of benefit entitlement, there is a difference between the terms "service" and "period at work". Arbitrators have usually construed the term "service to mean the entire period of employment, whether or not the employee was actually working throughout such period, unless otherwise provided: Regina General Hospital (1991), 21 L.A.C. (4th) 249 (McLeod). On the other hand, the phrase "period of work" has been construed to mean time during which the employee was actually at work. The difference is important. If the word "service" or "employment" is used, then absences due to vacation, temporary illness, and even strike are included in calculating seniority, unless they are specifically excluded: Kingston Regional Ambulance Service (1992), 22 L.A.C. (4th) 193 (Watters). On the other had, if the phrase
\end{itemize}
\end{footnotesize}
work performed, then the employer is not discriminating in declining to compensate the disabled worker who does not perform the work. Attendance is an essential requirement of the accrual of benefit seniority and the accommodation, if any is possible, must be directed at assisting the worker to attend work. Conversely, if the benefit in question is not tied to the performance of work, then attendance at work is not an indispensable feature of the accrual of benefit seniority. In the latter case, crediting the worker with benefit seniority during disability-related absences would be appropriate accommodation. Unlike the case of competitive seniority, this form of accommodation does not affect other workers, but does affect the employer who will likely oppose the additional benefit seniority credits on the basis that it increases its financial liability.

**B. Application of Seniority**

Ideally, disabled workers could be accommodated in their pre-disability position through modifications to ensure accessibility, the alteration of their work duties or equipment, the provision of assistive devices, or the restructuring of the work process. When these options do not reach the desired end of enabling the disabled worker to perform the work tasks of his or her position productively and safely, (or if the cost would cause the employer undue hardship), the question of the disabled worker’s suitability for an alternative position/shift arises. Any movement of a disabled worker from his or her pre-disability position will impact on other workers present or future working conditions. Non-compliance with seniority rules can interfere with two features of the seniority system. First, seniority systems provide that stipulated work opportunities must be offered only to members of the bargaining unit (or, specified seniority unit). Where a proposed accommodation involves hiring or transferring a disabled person from

---

"period at work" is used, then such absences are not counted in the calculation of seniority, unless they are specifically included: see Falconbridge Nickel (1971), 22 L.A.C. 243 (Weiler)

269 While accommodating a worker in his or her own position is less likely to impact on other workers, there will still be some effects. The re-assignment of the disabled worker’s non-essential (and probably more arduous) duties will impact on the working conditions of other workers. In Canada Post (Godbout), supra note 205, the arbitrator concluded that it was not possible to accommodate the complainant because there was no productive position in the workplace the worker was capable of performing. In coming to this conclusion, he stated at 324 that “I also have difficulty with the notion of potentially stripping co-workers of the more sedentary aspects of their working day where the rest of their work, day in and day out, is a relatively heavy labouring nature. It is not much of a stretch to foresee morale problems developing.” A straightforward exemption from an unwelcome shift, may result in other workers having to accept that shift more often. In MacEachern, supra note 202 the religious accommodation requested by the complainant, a stationary engineer, was exemption from a Friday evening shift. The alternate shift schedules would have had the effect of reducing the weekend time off of the three other engineers, which the board of inquiry found amounted to an undue hardship (at D234 - 5).
outside the bargaining unit or seniority unit, then this privileged access to work opportunities is lost. Second, seniority systems provide that among the members of the stipulated group, seniority shall play a determining role. All of the accommodations identified in the examples in part five interfered with this feature of seniority systems. In some of the examples, the proposed accommodation impacts on other workers' future employment conditions (denial of a preferred shift or position). In the other examples, the proposed accommodation impacts on other workers' current working conditions (bumping) or existing employment rights (right to bump into a position to maintain access to employment, right to recover a pre-existing status through recall rights, relative seniority ranking).

1. Impact on Future Work Opportunities

The conflicts arising out exceptions to strict hiring and promotion systems, interference with the shift selection and transfer to a vacant position within the bargaining unit raise similar considerations and will be discussed together at the end of this section.

a. Hiring and Promotion Systems

Do strict entry level hiring systems discriminate against a disabled person who is unable to perform the functions of the entry level portions because of disability? The employer's refusal to hire the employee into the lowest level position is not discriminatory, since she is not capable of performing the functions of that position, even with accommodation. Can the employer's refusal to consider the applicant for inside positions be considered discriminatory, in light of the employer's internal organizational structure which gives privileged access to those positions to current employees? A broad approach to defining the employment right of applicants might encompass the right to be considered equally with respect to employment in the enterprise generally, rather than for the particular positions which the employer specifically recruits for. If this broader definition of employment is adopted in hiring situations with strict entry level barriers, then the employer's hiring practices have a prima facie discriminatory effect on disabled persons who are unable to perform the functions of the entry level positions. If the experience gained through performance of the entry level functions is essential for the

---

270 This broader approach to defining equality in employment hiring is likely to be contested. An employer could argue that the Code does not dictate which positions the employer must offer to outside applicants and which positions the employer may choose to limit to inside workers. The employer is free to make that initial decision, and having done so, the right to equal treatment in hiring is limited to all eligible applicants equally, without discrimination because of disability with respect to the entry level positions only.
performance of higher level positions, then this would be a defence to the *prima facie* discrimination. If on-the-job experience in the entry level position is not essential to performance of upper level positions, then a possible accommodation of the disabled worker is to hire her into a higher level position which her disability allows her to perform. This accommodation would interfere with the collective agreement provisions requiring all vacancies above the entry level to be posted and filled by a bargaining unit (or seniority unit) member, based in part, on seniority. This impacts on all workers in the seniority unit who are denied the opportunity to compete for the transfer or promotion, and must wait a longer period of time for the opportunity to progress up the job ladder.

In the promotion example, the *prima facie* discrimination lies in the barrier posed by the strict progression up the job ladder. If on-the-job experience is not essential to the performance of those positions higher on the job ladder, then allowing the disabled worker to skip the next level of job classification and compete for a level she is capable of performing would be a form of accommodation. Accommodating the disabled worker would not require placing her in the higher position, it would merely involve allowing her to compete for the promotional opportunity on the same terms and subject to the same seniority criteria as other workers, without having passed through the immediately lower position. This form of accommodation does not interfere with other workers seniority rights.

b. Shift Selection

In the shift selection scenario, there is no allegation that the seniority provisions regulating access to shift selection are discriminatory. Rather, the accommodation needed interferes with the rules in the collective agreement which provide that shifts shall be assigned on the basis of seniority. Accordingly, the employer is obliged to canvass all reasonable accommodations which do not require the union’s assistance, before calling upon the union to accommodate the worker’s needs. Assuming that there is no accommodation possible which would enable the worker to remain on the night shift, and the worker is facing lay-off unless she can be accommodated in a day shift position, the impact of the accommodation on the most senior coworker is that he is denied the right to move to the day shift at that time and must wait for the next available day shift. All the other workers must wait a correspondingly longer period of time before their turn for a day shift arises.
c. Transfer to a Vacancy Within the Bargaining Unit

If the worker cannot be accommodated in her pre-disability position, is the employer required to consider her for alternative suitable positions in the workplace? Depending on the circumstances, a broad approach to defining the employment right of employees could encompass the right to be considered for positions within the bargaining unit or more broadly, within the enterprise.271 If this approach is adopted, then transferring the worker to a vacant position would conflict with the collective agreement provisions which require that vacancies be posted and that seniority shall play a role in determining the successful applicant. This impacts on all other workers of equal ability and greater seniority who might have been awarded the position if it had been posted.

In each of these examples (exemption from strict hiring and promotion systems, interference with shift selection, transfer to a vacant position) the accommodation requested impacts on other workers’ future working conditions by denying them the opportunity to use their seniority credits to claim a preferred shift or position, and in the hiring example violates the inside workers right to privileged access to those positions. Without the accommodation, the disabled worker will not be hired or will lose employment altogether. The burden on the coworkers in each of these cases is that they are denied the opportunity to move to a preferred shift or position. In a workplace with regular turnover, the result may be a small delay in obtaining the desired opportunity. In other cases, the lost opportunity may never arise again. In a workplace where shift work is the norm, and jobs that involve straight days are the preferred positions, workers may wait years to accumulate sufficient seniority to entitle them to a day job. The variability between jobs in terms of salary, duties performed, working conditions, geographic location, opportunities for promotion and so on, may be enormous, and even minor differences may have large personal significance for individual workers. A promotion with a small increase in salary may have a significant effect on the pension entitlement of a worker in the late years of his or her career. Having a day job may be of critical importance to a worker with young children whose spouse works nights. Workers whose seniority entitles them to preferred positions, may find the heavier physical effort of the non-preferred positions arduous. The impact that a desired shift or transfer may have on the quality of a working person's life may be substantial. Is it justifiable to

271 See my previous discussion of the scope of the right to equal treatment in employment in Part Three.
expect workers to forego these opportunities in order for disabled workers to obtain or maintain access to the workplace?

In any situation where there are more candidates than work opportunities, requiring the employer to give the work opportunity to one worker inevitably has an impact on other workers. When human rights legislation operates to prohibit an employer from directly discriminating because of race in the assignment of work opportunities, we do not consider the impact on other employees who might otherwise have obtained the opportunity had the employer directly discriminated, regardless of how long they may have desired the position, or how much they may have counted on the anticipated financial gain.

If an employer intended to modify a work station, in order to enable a successful disabled applicant to perform the work, we would not suggest that this accommodation should not be implemented, because another candidate had been hoping for the position, and would have received it if only the employer would refrain from accommodating the disabled employee in this way.

In a non-unionized workplace, if an employer departs from its usual practice of filling middle level positions with internal candidates, and instead hires a disabled applicant as an accommodation of her inability to enter the workforce through the usual entry level jobs, this will affect the career aspirations of inside workers. Similarly, if an employer transfers a disabled employee to a vacant shift or position as an accommodation in order for him or her to remain in the workplace, this will affect other coworkers who aspired to that shift because they preferred the hours, or hoped for the promotion because of the increased financial compensation. We would not anticipate that other workers who may have had their eyes on that shift/position for some time should be able to say - no, don’t accommodate in that fashion, for it impacts on me unreasonably.

When the accommodation of a disabled worker involves placing them in a vacant position in the workplace, this inevitably removes the work opportunity from other workers. In the non-unionized workplace, it seem reasonable to expect the employer to implement that form of accommodation, regardless of how much that position was desired by another worker, how long they have waited for it, or how much financial compensation they stand to gain.

In the unionized environment, the difference is that the parties have agreed in advance that when such shifts and positions become available, they will be posted and filled by bargaining unit
(or seniority unit) members, in accordance with seniority, and thus, have implicitly agreed that they will not be used to accommodate disabled workers. This agreement, embodied in the seniority provisions of the collective agreement, changes the expectations of unionized employees into collectively bargained rights. Depending on the circumstances of the particular workplace, workers may develop concrete and defined expectations toward particular preferred positions or shifts. In other cases, the unpredictable variables in the workplace may not foster such defined expectations. If it is accepted that that agreement, in and of itself, should not bar the accommodation, then it is the actual impact on coworkers which should count. Thus, a worker who has taken courses to position himself for a long awaited promotional opportunity, in reliance on a foreseeable work opportunity becoming vacant, may be able to establish that the loss of the anticipated work opportunity has a significant impact on him. On the other hand, in a situation where employees do not develop concrete expectations with respect to vacancies (because of the unpredictability of turnover of positions, skill and ability requirements, the vagaries of the bumping system and so on) the loss of the opportunity to bid on an alternative position may not be a unjustifiable burden to impose on other workers.

Unions and employers have already shown a strong inclination to negotiate collective agreement provisions to provide for the transfer of disabled workers to suitable positions as a means of accommodation.²⁷² Provisions setting aside light duty positions and allowing the waiver of the posting provisions in order to place disabled workers will tailor other workers’ expectations towards those positions at the outset, thus reducing the potential for resentment when disabled workers are accommodated in this fashion.

2. Impact on Current Working Conditions: Bumping

When it is not possible to accommodate a disabled worker in his or her own position or through the use of a vacant position, the issue of displacing another worker arises. A person’s present working conditions have significant intrinsic value.²⁷³ This is what underlies the presumption that an employer should first attempt to accommodate the worker in his or her pre-

²⁷²See the discussion in Part Six. II.B.1 and 2.

²⁷³See Elster’s discussion of the endowment effect and the differences between a position aspired to and one actually held, at text accompanying footnotes 187 and 188, in Part Four, section III.E. This recognition that the working conditions associated with one’s position have a significant intrinsic value is what underlies the prohibition against transferring a worker from her initial position because of her disability, when in fact she is capable of performing the work associated with that position. [Wentworth County (Board of Education) (1984). 14 L.A.C. (3d) 310 (Devlin)].
disability position before considering the possibility of accommodation in alternative positions. In

Re Mount Sinai Hospital and O.N.A. (1996) 54 L.A.C. (4th) 260 (R. M. Brown), at 274 the arbitrator expressed it this way:

In assessing the relative benefit to an employee of various jobs, consideration should be given not only to wages and other financial benefits but also to the non-monetary rewards of employment. The importance of these non-pecuniary matters was acknowledged by Dickson C.J.C. in Reference re Public Service Employee Relations Act (Alta) (1987), 87 C.L.L.C. 14,021 (S.C.C.) in the context of litigation under the Canadian Charter of Rights and Freedoms (at p. 12, 180):

In the present case, however, we are concerned with interests which go far beyond those of a merely pecuniary nature.
Work is one of the most fundamental aspects in a person’s life, providing the individual with a means of financial support and as importantly, a contributory role in society. A person’s employment is an essential component of his or her sense of identity, self-worth and emotional well-being. Accordingly, the conditions in which a person works are highly significant in shaping the whole compendium of psychological, emotional and physical elements of a person’s dignity and self-respect.

Just as active employment confers non-economic advantages not enjoyed by those outside the workplace, one type of work may entail greater benefits of this sort than does another. This is one reason why a disabled employee may wish to return to the sort of employment held before disability struck.

By the same token, coworkers have legitimate reasons to value the financial and non-financial aspects of their current working conditions. To return to the common law situation, in which there is no legal impediment to an employer transferring or even terminating the employment of a worker with sufficient notice or pay in lieu of notice, would the displacement of another worker in order to accommodate a disabled colleague amount to a substantial impact on that worker? It seems undeniable that expecting a coworker to give up his employment altogether is a substantial burden to place on an individual in order to achieve a societal goal of ensuring equality of access to employment for the disabled. Similarly, requiring the coworker to take a cut in pay or suffer a drop in the standard of working conditions are significant burdens to place on one individual in order to maintain the disabled worker’s access to the workplace. At the other end of the spectrum, transferring of a coworker from one position to another with similar working conditions would not seem too high a price to expect workers to pay in order to achieve equality of opportunity in employment for disabled workers. Factors such as how long the worker had held the position, the working conditions and the financial compensation associated with the alternative positions and the personal significance to the affected worker of
the existing position, would have to be taken into account in assessing whether the change in working conditions would be too onerous a burden to require other employees to bear.

In the unionized setting, the employer's ability to displace worker through a "bumping" procedure is generally constrained by the provisions of the collective agreement. Bumping rights are usually triggered when the employer reorganizes the workplace and eliminates some positions. Workers are not normally displaced by workers who are unable to perform the functions of their position. Aside from the parties' implicit agreement that workers shall not be displaced in order to accommodate other workers, the impact on displaced workers in the unionized setting is similar to the non-unionized setting. In the case of the displacement of a junior worker, no seniority principle is being violated, for it is the essence of seniority that longer service workers should receive preference and remain in the workplace over more junior workers. One might anticipate that in a unionized environment junior workers could reasonably be expected to cede their position to a more senior disabled coworker. However, one would not reasonably expect unionized workers to be more at risk than non-unionized employees for risk of displacement for the purpose of accommodating disabled workers. Thus, as in the case at common law, one would not expect coworkers to give up their place in the workforce entirely or experience financial or serious non-financial losses in order to enable another worker to remain in the workplace.

More difficult is the question of displacing a senior worker in order to accommodate a disabled worker. In the common law situation, this situation is conceptually no different than the displacing of the junior employee, although the length of time the worker has held the position in question would be a relevant factor and may render displacement unreasonable. In the unionized setting, the notion of junior employees displacing senior employees is so antithetical to the principle of seniority that it instinctively appears unreasonable. However, upon close examination, the case for the displacement of senior workers can be just as strong as the case for the displacement of junior worker, depending on the circumstances. At one end of the spectrum, it is likely to be found unreasonable to displace a worker with twenty years seniority who has held his current position for many years and developed collegial relations with coworkers, in order to accommodate a disabled worker with two years seniority. At the other end of the spectrum, it does not seem onerous to displace a worker with two weeks greater seniority than the disabled worker from a position only held for a number of months into another position with similar working conditions. Apart from the departure from the strict terms of the collective agreement,
the actual impact on the coworker in the latter example seems justifiable.

In addition to the impact on other workers, this form of accommodation is likely to be resisted by employers because of the administrative costs associated with such transfers. The employer may be able to establish that accommodating disabled workers by invoking the bumping procedures would be so administratively difficult or costly that it amounts to undue hardship.

This form of accommodation seems particularly amenable to collective bargaining. Both unions and employer respondents to my survey expressed some support for this form of accommodation. Negotiated protections for senior disabled workers over junior workers is consistent with the principle of seniority and there is precedent for such protection. The parties may be able to negotiate reasonable limits to the displacement procedure, thus reducing the potential disruption of other workers and administrative costs associated with bumping procedures.

3. Impact on Ability to Maintain/Regain Existing Employment Status

In a unionized environment, a worker’s present working conditions include a bundle of rights which have no analogy in an individual contract of employment. At common law, an employer has no obligation to consider an employee’s relative length of service when allocating work opportunities. When the employer reorganizes the workplace and eliminates positions, it is free to terminate the employment contract of any employee it chooses (subject to the provision of reasonable notice or payment in lieu thereof). Further, if business improves and the employer decides to continue that function again, it is under no obligation to search out and offer that position to those employees who were terminated. In the unionized environment, workers have a

274 In my survey, 75% of union respondents and 31% of employer respondents expressed support for a clause which would enable a senior disabled worker to bump a junior worker to obtain a suitable alternative position. Some of the concerns expressed by employers included the impact on junior workers, which could be addressed through specific limitations in the collective agreement. See Appendix A and Table 5. On the other hand, in some circumstances the displacement of a coworker may be the most cost efficient form of accommodation for the employer. It is interesting to note that in two of the “bumping” grievances involving disabled workers, (Canada Post (Lascelles), supra note 205 and Canada Post (Godbout), supra note 205) it was the employer who initiated the bumping process in order to accommodate the disabled worker.

275 See Part Six, section II.B.3. 25% of survey respondents indicated that their collective agreement allowed senior disabled workers to displace junior workers.

276 In Renaud, supra note 16 at 986, the Supreme Court of Canada specifically noted that a collective agreement could contain “a formula for the accommodation of the religious beliefs of employees” so long as the provision complies with the duty to accommodate. See also Central Alberta Dairy Pool. supra note 9 at 528-9.
relative seniority ranking that has an intrinsic value, because it will affect future access to employment opportunities. A senior worker whose position is eliminated may have the right to maintain a place in the workforce by displacing a more junior employee. A unionized worker who has been temporarily laid off has the right to be recalled to work ahead of more junior workers. These rights, while they do not affect a worker's current working conditions, affect the worker's right to future opportunities, as well as the right to maintain or reclaim a place in the enterprise.

a. Protection from Bumping

Does the normal operation of the bumping system discriminate against the disabled worker who is unable to perform the duties of positions she is eligible to bump into? Although the bumping system is a neutral rule equally applicable to all employees, it has a prima facie discriminatory effect on the disabled worker because she is unable to use her seniority credits to maintain access to the workplace in the same way as non-disabled workers. The disabled worker has sufficient seniority and skill and ability to claim a position in the workplace over more junior employees. Because the range of positions she can perform is limited by the disability, she is unable to utilize those seniority credits in the same way as a non-disabled worker to maintain the same level of job security. Protection from bumping is an accommodation which enables her to use her seniority credits differently, in order to obtain the same level of job security. Rather than using her seniority to bump into another position to remain in the workplace, she must use her seniority to stay in the one position she is capable of performing.

Protecting the disabled worker's position impacts on the senior worker's right to use his seniority to bump into the position of his choice. While not quite as onerous an impact as displacing a worker from his position, the impact is similar in that the accommodation affects the senior worker's existing employment status. As in the bumping example, factors such as the comparability of the position denied with the alternative position available in terms of financial compensation and working conditions will determine whether protecting the disabled worker's position imposes an unreasonable burden on the coworker.

In the situation where the disabled worker does not have the seniority and the skills to bump into a more junior position, treating the disabled worker equally in employment would not require protecting her position. The Code guarantees disabled workers the same level of job security as other workers, commensurate with their seniority level, not greater job security. In
this example, the senior worker's displacement of the disabled worker is not discriminatory, since she is the most junior worker who would have been laid off, regardless of her disability. Protecting the disabled worker in this circumstance would give her greater job security than justified by her seniority level.

b. Recall Rights

The recall situation is similar to the protection from bumping example. While the system of recalling workers in strict order of seniority is a neutral rule, it has a negative impact on a disabled worker who cannot utilize her seniority credits to reclaim a position in the workplace, because her disability impedes her ability to perform most positions in the workplace. While her seniority credits are sufficient to entitle her to return to the workplace ahead of more junior workers, she cannot use her credits to regain access to the workplace in the same way as other workers. The accommodation required in order to enable her to obtain the same value from her seniority credits as non-disabled workers and return to the workplace commensurate with her seniority level, is to placed in one of the few positions she is capable of performing. The employer's attempt to accommodate the disabled worker violates the senior worker's right to be recalled first, and to claim the position given to the disabled worker. Whether this impact on the senior worker is justified will depend on the comparability of the two positions in terms of financial compensation and working conditions. As for the loss of two weeks pay, this financial loss would most appropriately be borne by the employer, unless the employer could establish that it caused undue hardship.

c. Transfer of Seniority Across Bargaining Units (or Seniority units)

I have already discussed the impact of transferring a disabled worker to a vacant position within the bargaining unit. The transfer of a disabled worker across bargaining units or seniority units has a similar impact on the future working conditions of those workers in the receiving bargaining unit, and that impact need not be discussed again. However, there will be further consequences if the worker is permitted to transfer her seniority credits as well. The preliminary issue is whether the loss of seniority upon entry into the new seniority or bargaining unit is discriminatory. The collective agreement provision that employees accrue seniority from

---

277 Whether the scope of the employment includes the right to be considered for employment outside the bargaining unit would depend on the particular circumstances of the case. See my previous discussion in part three, sectin II.C of the scope of the claim to employment under the Code.
date of entry into the seniority unit is a neutral rule, equally applicable to all, which has a prima facie discriminatory effect on a disabled worker who is transferred because of disability. The collective agreement provision imposes a burden (loss of seniority) on disabled workers who experience a disability-related need for a transfer which is not imposed on other workers who do not experience such a need.

The accommodation needed is to permit her to carry the seniority credits she has already acquired outside her unit. Whether the accrued seniority arose under a date of hire or hours worked seniority system, the disabled worker has already fulfilled the attendance functions which are essential to the accrual of seniority within her seniority unit.

For the purpose of determining entitlement to benefits, this crediting of constructive seniority has no impact on other workers and therefore the terms of the collective agreement should not act as a bar to this form of accommodation, unless the employer can establish that the cost of crediting the employee with benefit seniority would cause it undue hardship.

The more difficult issue is the transfer of seniority for competitive purposes. In the accrual of seniority examples above the accommodation allowed the disabled worker to maintain the ranking she would have had in the in the seniority unit, but for the discriminatory provisions in the collective agreement. In this example, the ranking of other workers on the seniority list was not artificially inflated as a result of some prior discrimination. This form of accommodation, the transfer of accrued seniority, will change the seniority ranking of all employees in the receiving unit who have less seniority than the disabled worker. In every future application of seniority for overtime, shift selection, transfer, promotion, lay-off or recall, the disabled worker will be ahead of them on the seniority list.

In light of the above analysis in which I suggested that it would be too onerous to expect another worker to give up his employment, accept a cut in pay, or endure substantially worse working conditions in order to allow another worker to remain in the workforce, reducing a worker's seniority ranking so that those conditions may occur, if not at the time of the accommodation, at some future date, seems similarly onerous. Further, the failure to accommodate in this circumstance does not lead the loss of employment for the disabled worker - it merely places her at the bottom of the seniority list. If the seniority unit is going through a period of downsizing, the immediate effect of this form of accommodation (transferring the disabled workers seniority) would be that the most junior employee would lose their employment
altogether, an impact which I previously suggested was too onerous an impact to expect a coworker to bear. If a vacancy should arise in the future, the accommodation of transferring the credits would result in the disabled worker getting preference over the more junior workers, contrary to the seniority provisions of the collective agreement. While this level of impact on the future expectations of workers may be acceptable when accommodation is required to keep the disabled worker in the workplace, it is too onerous a burden to place on a coworker simply to enable the disabled worker to seek promotional opportunities.  

There are a variety of accommodations which may enable the worker to gain access to or remain in the workplace, including modification of the workplace or work duties of the pre-disability position, transfer to a vacant alternative position, transfer of coworkers, protection from bumping, recall to specified positions, and temporary lay-off of the disabled worker, pending availability of a suitable position. Employers should be expected to implement an accommodation which is least disruptive to the seniority rights of other workers, before implementing those which are more onerous. Where the only reasonable accommodation available involves a disruption to the seniority provisions of the collective agreement, that should not bar the required accommodation, unless the impact on coworkers working conditions or opportunities is significant or substantial.

---

278 A similar proportionality analysis was used by the arbitrator in *Re Mount Sinai Hospital*, *supra* note 91 at 273 - 4 with respect to the increasing burden an employer could be expected to bear in order to keep a worker in the worker, compared with the lesser burden an employer could be expected to bear merely to assist a worker to remain in one positions rather than another:

The general principle of proportionality which emerges from the foregoing analysis is that the burden which an employer should be required to bear varies inversely with the consequential relief flowing to a disabled employee. One corollary of this principle is that more should be done to provide work to someone who otherwise would remain outside the active workforce, without any of the rewards of employment, than to place a person in one job rather than another.
CONCLUSION

The workplace poses many unintentional barriers to persons whose disabilities impair their ability to perform ordinary tasks of work in the same manner, at the same speed or on the same equipment, as non-disabled workers. Requiring employers to adapt the workplace to accommodate disability-related needs allows disabled persons the opportunity to gain access to and remain in the workforce. Ideally, disabled workers could be accommodated to enable them to continue to perform the work they were performing before the onset or deterioration of their disability. When this is not possible, employers may have to consider the availability of suitable alternative employment. This form of accommodation inevitably affects the working conditions and opportunities of other workers who may aspire to or currently perform the work sought by the disabled worker. In the unionized environment, this conflict between workers is exacerbated by seniority provisions in collective agreements.

Workers seek the agreement of their employer to allocate limited work opportunities based on length of service for several reasons. Seniority provisions constrain the potential for management (and union) officials to exercise their discretion to distribute limited work opportunities in an arbitrary way. In the context of employment, length of service is perceived as a fair and objective criteria upon which to base management decisions. The essence of seniority provisions is the agreement between the employer and workers that specified work opportunities shall be allocated to certain workers based upon length of service. Conversely, the parties to the collective agreement agree in advance that other factors (such as disability-related needs) will not be used to allocate those work opportunities. Once workers have successfully negotiated seniority provisions, workers accumulate seniority credits in accordance with the terms of the collective agreement. Seniority credits affect workers’ economic security and workers rely on them to make financial commitments. Any interference with agreed upon seniority rules lessens the value of workers’ earned seniority credits.

The requirement to accommodate disability-related needs and the requirement to comply with seniority provisions both enhance the work opportunities of workers, by restricting the potential for arbitrary and discriminatory conduct by employers. When those requirements conflict, which principle should be followed: the principle of non-discrimination or the principle of seniority?

Equality rights are not absolute. The limit of a disabled person’s right to equal
opportunity is reached when the accommodation required to achieve equality would cause substantial interference with the rights of other workers. When a requested accommodation would interfere with the seniority provisions of the collective agreement, this disrupts the *a priori* agreement between the parties that factors such as disability-related needs will not be taken into account when allocating work opportunities. That agreement in and of itself should not bar the requested accommodation, since it would contrary to public policy to allow employees and employers to unintentionally contract out of their obligation to accommodate disabled workers. However, the actual impact on other workers’ working conditions and opportunities is relevant. The impact of a proposed accommodation on other workers’ social and financial well-being will depend upon the particular circumstances of the affected workers, and the nature of interference with the seniority provisions of the collective agreement. At one end spectrum of potential hardship caused by interference with seniority rules is the loss of employment if the accommodation required to maintain the disabled worker in the workplace results in the displacement of another worker. This is a significant burden to place on one worker in order to achieve the societal goal of equality of opportunity for disabled persons, and could not reasonably be required. On the other hand, in a workplace where opportunities for movement are frequent, waiving the posting requirement of the collective agreement in order to place a disabled worker who would otherwise lose his or her employment would not appear to impose a substantial burden on the coworker who must delay the opportunity to transfer to a desired position. Along the spectrum are a variety of situations, each of which must be judged on their unique facts, to determine whether the actual impact on affected coworkers is substantial.
BIBLIOGRAPHY


K. J. Bentham, The Duty of Fair Representation in the Negotiation of Collective Agreements (Kingston: Industrial Relations Centre, Queen's University Press, 1991)


CAW Submission to the Standing Committee on the Administration of Justice on Bill 79, Employment Equity Act, 1992


Contract Clauses, (March 1992) 16 Lancaster Labour Law Reports No. 3


L. Dulude, Seniority Systems and Employment Equity for Women (Kingston: Industrial Relations Centre Press, 1995)


D. Galarneau, "Unionized Workers" (Spring 1996) Perspectives 43 (Statistics Canada Catalogue # 75-001-XPE)


T. G. Ison, "Rights to Employment under the Workers' Compensation Acts and Other Statutes" (1990) 28 Osgoode Hall L. J. 839

M. D. Lepofsky, "The Duty to Accommodate: A Purposive Approach" (1992) 1 Can. Lab. L. J. 1

D. Lewin and S. Schecter, "Four Factors Lower Disability Rates" (1995) 74 Personnel J. (No. 1) 9 - 11 (Special Supplement)
D. MacLeod, "Employment Equity Legislation - Should Seniority Based Layoffs Be Exempt From This Legislation" unpublished paper, University of Toronto, Spring 1992

K. MacLeod, The Seniority Principle: Is it Discriminatory? (Kingston, Ont.: Industrial Relations Centre, Queen's University Press, 1987)


D. Q. Mills "Seniority Versus Ability in Promotion Decisions" (1985) 38 Industrial and Labor Relations Review 421

A. M. Molloy, "Disability and the Duty to Accommodate" (1992) 1 Can. Lab. L.J. 22

P. Nash and L. Gottheil, "Employment Equity: A Union Perspective" (1992) 2 Can Lab L. J. 49


Statistics Canada

Adults with Disabilities: Their Employment and Education Characteristics, June 1993, Catalogue# 82-554

A Portrait of Persons with Disabilities, February 1995, Catalogue # 89-542E

CALURA, Labour Unions, 1992, Catalogue # 71-202

Profile of Persons with Disabilities (Limited at Work/Perception): Canada Provinces and Territories, Statistics Canada, September 1995

Projections of Persons with Disabilities (Limited at Work/Perception), Canada, Provinces and Territories, 1993 - 2016, January 1996, Catalogue # 91-538E

Selected Characteristics of Persons with Disabilities Residing in Households, Catalogue # 82-555
Information provided over the telephone by Derek Thomas, (613) 951-2093

Status Report: Persons with Disabilities,( Working Group on Employment Equity, Ministry of 

L Rev 78

C. W. Summers and M. C. Love "Work Sharing as an Alternative to Layoffs by Seniority: Title 
VII Remedies in Recession" (1976) 124 University of Pennsylvania Law Review 893

Law Journal 703

K. Swinton, "Accommodating Women in the Workplace: Reproductive Hazards and Seniority 
Systems" (1992) 1 Can. Lab. L. J. 125

K. Swinton, "Restraints on Government Efforts to Promote Equality in Employment: Labour 
Relations and Constitutional Considerations" in R. Abella, Research Studies for the Royal 
Commission on Equality in Employment (Ottawa: Supply and Services Canada. 1985) 273
APPENDIX A

I. Methodology

The pool from which survey respondents were drawn was a list provided by the Ontario Ministry of Labour, Office of Collective Bargaining, Current Agreements with Handicapped Worker Provisions, Sorted by Provision and Employer Name. The last comprehensive coding of collective agreements took place in January 1995. There were approximately 1200 collective agreements on the list. Potential respondents were randomly selected from list.

A total of 560 questionnaires were mailed out, 290 to employers and 270 to unions, along with a covering letter explaining the purpose of the survey. Reminder notices were sent two weeks later. Copies of the union questionnaire and covering letter are included at the end of this appendix. The employer questionnaire was substantially similar. 33 questionnaires and 8 additional reminder cards were returned, undelivered. Accordingly, I used the figure of 519 in calculating the response rate.

59 questionnaires were returned, 47 substantially completed and 12 only partially completed. The response rate was 11% overall (9% for substantially completed questionnaires).

There were significantly more responses received from employers (43) than from unions (16). There were more responses from the public sector (45) than from the private sector (14). Responses were received from across Ontario. Most of the industries were represented, although a large number were from health, welfare services. The collective agreements covered as few as 2 employees at one location to 26,000, at various locations. See Table 1 at the end of this appendix for detailed breakdown of size, sector and industry.

II. Summary of Survey Results

A. Calculation of Seniority (Questions 7 through 9b)

The responses to these questions were not tabulated, as the variety of responses was too great to group in any meaningful way.

B. Absenteeism Clauses (Questions 10a to 12b) Table 2

C. Use of Seniority (Questions 13 to 15) Table 3

D. Negotiating History of the Disabled Worker Clause (Questions 16 to 19)

25 out of 36 respondents indicated that the union proposed the introduction of the disabled worker clause, either unilaterally or jointly with the employer. 7 out of 11 union respondents indicated that they faced some opposition from employers. Only 2 out of 11 unions reported any opposition from members to the introduction of the disabled worker clause.
E. Limitations in Clauses (Question 20 to 22b)

A small number of respondents indicated that the disabled worker protection was only available for work-related injuries or that there were different provisions for work-related vs non-work-related injuries. Most clauses (34 out 47 or 72%) provided the employer with the discretion in implementing the disabled worker clause. 17 out of 45 (38%) respondents indicated that union consent or joint discussion with management was required.

F. Comprehensiveness of the Clause (Questions 23) Table 4

G. Effectiveness of Clause (Question 26 - 30)279

Many employers rated the disabled workers clauses (or, in some cases, workplace practice or policy) as effective or very effective (19/29 = 65.5%) with respect to temporary disability; fewer rated the clause as effective with respect to permanent disability (14/27 = 52%). Most unions rated the disabled workers clauses (or in some cases, workplace practice) as effective or very effective (9/13 = 69%) with respect to temporary disability, but fewer rated them as effective or very effective with respect to permanent disability (7/13 = 54%)

H. Support for Strengthening the Disabled Worker Clause (Question 31) Table 5

I. Factors which contribute to or impede accommodation (Question 32)

The responses were of a descriptive nature and cannot be tabulated.
The Impact of the Duty to Accommodate Disabled Workers
On Seniority Rights Under Collective Agreements

A Survey of Disabled Worker Clauses in Collective Agreements

Please read the entire questionnaire before responding. Please circle answers where appropriate, mark "N/A" where question is not applicable, and provide descriptive explanations where appropriate. Please feel free to write on the back, or add additional sheets if necessary.

Return Address: Faculty of Law, University of Toronto
78 Queen's Park, Room 226
Toronto, Ontario
M5S 2C5
Attention: M. Kaye Joachim
FACULTY OF LAW, UNIVERSITY OF TORONTO

The Impact of the Duty to Accommodate Disabled Workers on Seniority Rights under Collective Agreements: A Survey of Disabled Worker Clauses in Collective Agreements

GENERAL INFORMATION

1. Union:______________________________________________________________

2. Employer:__________________________________________________________

3. Duration of current collective agreement:_______________________________

4. Number of employees covered by collective agreement:____________________

5. Number of bargaining units covered by your collective agreement:___________

6. Which clause(s) in your collective agreement give special consideration to assist disabled workers to remain at or return to work (referred to as "disabled worker clause(s)") (Please list article number(s) in collective agreement)
CALCULATION OF SENIORITY

7. Describe how seniority is accumulated in your collective agreement. Please list applicable clause(s).

________________________________________________________________________
________________________________________________________________________
________________________________________________________________________
________________________________________________________________________

8. How are seniority lists applied in lay-off, recall, transfer and promotion? (please mark the appropriate box, or more than one if applicable. For example, if the bargaining unit is plant wide, then mark both "bargaining unit" and "plant/company wide")

<table>
<thead>
<tr>
<th></th>
<th>Plant/Co-Wide</th>
<th>Department/ Division</th>
<th>Bargaining Unit</th>
<th>Other - Please Specify</th>
</tr>
</thead>
<tbody>
<tr>
<td>Lay-Off</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Recall</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Transfer</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Promotion</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

9a. Is seniority affected when transferring between departments, bargaining units, or other internal unit?

1. Yes
2. No

9b. If yes, how?

________________________________________________________________________
________________________________________________________________________
________________________________________________________________________

10a. Does the collective agreement contain a deemed termination clause as a result of a prolonged period of absence?

1. Yes
2. No

10b. If yes, please indicate article number of collective agreement.
11a. Does the collective agreement contain a provision whereby a worker loses seniority as a result of a prolonged period of absence?

1. Yes
2. No

11b. If yes, please list article number of collective agreement.

12a. Does the collective agreement contain a provision whereby a worker stops accumulating seniority as a result of a prolonged absence?

1. Yes
2. No

12b. If yes, please list article number of collective agreement.

USE OF SENIORITY

13. Is seniority a contributing factor in determining any of the following: (Please circle applicable circumstances)

1. Lay-off
2. Recall
3. Transfer
4. Promotion
5. Shift preference

14. Under the collective agreement, is the employer required to post vacancies?

1. Yes
2. No

15. Is seniority a factor in filling vacancies?

1. Yes
2. No
NEGOTIATING HISTORY OF THE DISABLED WORKER CLAUSE

16. In what year (approximately) did the disabled worker clause first appear in the collective agreement? ______________

17. Who proposed the disabled worker clause:

1. Union
2. Employer

If union proposed clause, please answer question 18 (a)-(h); if employer proposed clause, please skip to question 19.

18a. Why did you seek to introduce the disabled worker clause into the collective agreement?

__________________________________________________________________________________
__________________________________________________________________________________
__________________________________________________________________________________
__________________________________________________________________________________
__________________________________________________________________________________

18b. Did the employer oppose the introduction of the disabled worker clause?

1. Yes
2. No

18c. If the employer was opposed, how did you persuade the employer to accept the clause?

__________________________________________________________________________________
__________________________________________________________________________________
__________________________________________________________________________________
__________________________________________________________________________________

18d. Please describe the negotiation of the disabled worker clause. (For example, did the wording of the clause change? how? at whose request?)

__________________________________________________________________________________
__________________________________________________________________________________
__________________________________________________________________________________
__________________________________________________________________________________
18e. Did you specifically discuss the disabled worker clause with union members prior to the negotiation/ratification of the collective agreement?

1. Yes
2. No

18f. If yes, please explain the nature of the discussions

________________________________________________________________________
________________________________________________________________________
________________________________________________________________________
________________________________________________________________________

18g. Did union members express opposition to the introduction of the disabled worker clause?

1. Yes
2. No

18h. If yes, how did you deal with it?

________________________________________________________________________
________________________________________________________________________
________________________________________________________________________
________________________________________________________________________

19. If the employer proposed disabled worker clause, please describe negotiations. (For example, what was your initial response? did the wording of the clause change? how? at whose request? Why did you agree to the clause?)

________________________________________________________________________
________________________________________________________________________
________________________________________________________________________
________________________________________________________________________
________________________________________________________________________
APPLICATION OF THE DISABLED WORKER CLAUSE

(Regardless of the wording of the disabled worker clause, please answer the following questions based on your knowledge of actual past practice)

20a. Is the protection of the disabled worker clause applicable to (please circle as many responses as apply):

1. Physical disability
2. Mental disability
3. Work-related injury
4. Non-work-related injury
5. Temporary disability
6. Permanent Disability
7. Other- please describe

20b. If the disabled worker clause is limited to certain categories of disabled workers, please explain why:

21. Is the protection offered to disabled workers at the discretion of management, or is it mandatory? An example of a mandatory provision would be: "The employer shall provide suitable, alternative, available work". An example of a discretionary provision would be: "The company may transfer the disabled worker to a light duty position, if available."

1. Discretionary
2. Mandatory

22a. Does the application of the disabled worker clause require the consent of the union?

1. Yes
2. No
22b. If yes, please explain the nature of the union's discretion

_____________________________________________________________________
_____________________________________________________________________
_____________________________________________________________________

23. Assuming that the disabled worker cannot be accommodated in his/her own position without undue hardship, does the disabled worker clause in your collective agreement provide for (please circle as many responses as apply):

1. Transfer to a suitable, alternative, vacant position in the bargaining unit

2. Transfer to a suitable, alternative, vacant position outside the bargaining unit

3. Training for suitable, alternative position

4. Light duty jobs set aside to accommodate temporarily disabled workers

5. Light duty jobs set aside to accommodate permanently disabled workers

6. Waiving of posting requirements in collective agreement in order to place disabled worker

7. Waiving of other requirements in collective agreement in order to place disabled worker

8. Disabled worker retains seniority in suitable alternative position

9. Disabled worker has right to bump junior employee to obtain suitable alternative position

10. Disabled worker is protected from bumping by able-bodied worker (except in case of lay-off)

11. Enhanced protection against lay-off

12. Enchanced recall rights

13. Other - please describe

_____________________________________________________________________
_____________________________________________________________________
_____________________________________________________________________
24a. Approximately how many temporarily disabled workers have approached the union for assistance in accommodating their disabilities, in the past:

1. 12 Months
2. 13 to 24 Months
3. 25 to 36 Months

24b. Approximately how many permanently disabled workers have approached the union for assistance in accommodating their disabilities, in the past:

1. 12 Months
2. 13 to 24 Months
3. 25 to 36 Months

24c. Approximately how many temporarily disabled workers have been accommodated in some way under the disabled worker clause in the past:

1. 12 Months
2. 13 - 24 Months
3. 25 - 36 Months

24d. Approximately how many permanently disabled workers have been accommodated in some way under the disabled worker clause in the past:

1. 12 Months
2. 13 - 24 Months
3. 25 - 36 Months

25a. In those cases where the disabled worker could not be accommodated in his/her own position without undue hardship, how many of these accommodations involved:

___ Waiving of posting requirements in collective agreement in order to place disabled worker

___ Waiving of other requirements in collective agreement in order to place disabled worker

___ Disabled worker retains seniority in suitable alternative position

___ Disabled worker has right to bump junior employee to obtain suitable alternative position

___ Disabled worker is protected from bumping by abled-bodied worker (except in case of lay-off)
25b. Were any of the above accommodations *proposed* by the employer or the worker, but not accepted by the union? Please describe your response and the reasons for your response.

________________________________________

________________________________________

**ASSESSMENT OF THE DISABLED WORKER CLAUSE**

26. How often are *temporarily* disabled workers able to remain at or return to work as a result of the application of the disabled worker clause in your collective agreement?

1. Over 75 % of the time  
2. 50 - 75% of the time  
3. 25 - 50% of the time  
4. Less than 25 % of the time

27. How often are *permanently* disabled workers able to remain at or return to work as a result of the application of the disabled worker clause in your collective agreement?

1. Over 75 % of the time  
2. 50 - 75% of the time  
3. 25 - 50% of the time  
4. Less than 25 % of the time

28. How would you rate the effectiveness of the disabled worker clause in your collective agreement as a mechanism for retaining/or returning *temporarily* disabled workers to work?

1. Very effective  
2. Effective  
3. Somewhat effective  
4. Ineffective

29. How would you rate the effectiveness of the disabled worker clause in your collective agreement as a mechanism for retaining/or returning *permanently* disabled workers to work?

1. Very effective  
2. Effective  
3. Somewhat effective  
4. Ineffective
30. Please comment on the reasons why you rated your disabled worker clause as you did.

________________________________________________________________________
________________________________________________________________________

STRENGTHENING THE DISABLED WORKER CLAUSE

31. Would you support a more comprehensive disabled worker clause, which included the following (please indicate yes or no and explain briefly why or why not):

1. Transfer to a suitable, alternative, vacant position in the bargaining unit?

________________________________________________________________________
________________________________________________________________________

2. Transfer to a suitable, alternative, vacant position outside the bargaining unit?

________________________________________________________________________
________________________________________________________________________

3. Training for suitable, alternative position?

________________________________________________________________________
________________________________________________________________________

4. Light duty jobs set aside to accommodate temporarily disabled workers?

________________________________________________________________________
________________________________________________________________________

5. Light duty jobs set aside to accommodate permanently disabled workers?

________________________________________________________________________
________________________________________________________________________
6. Waiving of posting requirements of collective agreement in order to place disabled worker?

7. Waiving of other requirements of collective agreement in order to place disabled worker - please explain which requirements you believe could be usefully waived

8. Worker retains seniority in suitable alternative position?

9. Disabled worker has right to bump junior employee to obtain suitable alternative position?

10. Disabled worker is protected from bumping by able-bodied worker (except in case of lay-off)?

11. Enhanced protection against lay-off?

12. Enhanced recall rights?

13. Other - please describe
32. In your opinion, how would the following characteristics of your membership/workforce be likely to contribute to or impede the success of a more comprehensive disabled worker clause:

1. size of workforce

2. interchangeability of workforce

3. length of seniority of workers

4. number of bargaining units

5. number of seniority lists

6. skills required by workforce

7. vacancy rate generally

8. vacancy rate in light duty jobs
9. number of disabled workers requiring accommodation

____________________________________________________________________

____________________________________________________________________

10. physically strenuous nature of jobs

____________________________________________________________________

____________________________________________________________________

11. attitude of membership

____________________________________________________________________

____________________________________________________________________

12. climate of strict adherence to seniority rights

____________________________________________________________________

____________________________________________________________________

13. shift schedules

____________________________________________________________________

____________________________________________________________________

14. education and training on human rights and accommodation issues

____________________________________________________________________

____________________________________________________________________

15. other - please describe

____________________________________________________________________

____________________________________________________________________
<table>
<thead>
<tr>
<th>Number of Employees Covered by Collective Agreement</th>
<th>Public/Private</th>
<th>Industry Code</th>
</tr>
</thead>
<tbody>
<tr>
<td>E1 150/50</td>
<td>public</td>
<td>health. welfare services</td>
</tr>
<tr>
<td>E2 3</td>
<td>public</td>
<td>local government</td>
</tr>
<tr>
<td>E3 505/75</td>
<td>public</td>
<td>transportation</td>
</tr>
<tr>
<td>E4 1300/1500/50</td>
<td>public</td>
<td>health. welfare services</td>
</tr>
<tr>
<td>E5 360</td>
<td>public</td>
<td>health. welfare services</td>
</tr>
<tr>
<td>E6 70</td>
<td>public</td>
<td>health. welfare services</td>
</tr>
<tr>
<td>E7 235</td>
<td>public</td>
<td>health. welfare service</td>
</tr>
<tr>
<td>E8</td>
<td>public</td>
<td>health. welfare services</td>
</tr>
<tr>
<td>E9 170</td>
<td>public</td>
<td>education. related services</td>
</tr>
<tr>
<td>E10 110</td>
<td>public</td>
<td>health. welfare services</td>
</tr>
<tr>
<td>E11 88/77/91/30</td>
<td>public</td>
<td>health. welfare services</td>
</tr>
<tr>
<td>E12 690</td>
<td>public</td>
<td>education. related services</td>
</tr>
<tr>
<td>E13 200</td>
<td>private</td>
<td>manufacturing - food. beverage</td>
</tr>
<tr>
<td>E14 16</td>
<td>public</td>
<td>health. welfare services</td>
</tr>
<tr>
<td>E15 90</td>
<td>public</td>
<td>local government</td>
</tr>
<tr>
<td>E16 55</td>
<td>public</td>
<td>transportation</td>
</tr>
<tr>
<td>E17 2</td>
<td>public</td>
<td>electric. water. gas</td>
</tr>
<tr>
<td>E18 400</td>
<td>public</td>
<td>health. welfare services</td>
</tr>
<tr>
<td>E19 100</td>
<td>public</td>
<td>education. related services</td>
</tr>
<tr>
<td>E20 132</td>
<td>private</td>
<td>manufacturing - primary metals</td>
</tr>
<tr>
<td>E21 7700</td>
<td>public</td>
<td>transportation</td>
</tr>
<tr>
<td>E22 5308 (4 collective agreements altogether)</td>
<td>public</td>
<td>communications</td>
</tr>
<tr>
<td>E23 140/180</td>
<td>public</td>
<td>local government</td>
</tr>
<tr>
<td>E24 160</td>
<td>private</td>
<td>manufacturing - chemicals</td>
</tr>
</tbody>
</table>

\[380\] Where more than one number is provided, there was more than one collective agreement. Each number refers to a separate collective agreement.
<table>
<thead>
<tr>
<th>Code</th>
<th>Value</th>
<th>Type</th>
<th>Category</th>
</tr>
</thead>
<tbody>
<tr>
<td>E25</td>
<td>90</td>
<td>private</td>
<td>manufacturing - clothing</td>
</tr>
<tr>
<td>E26</td>
<td>250</td>
<td>public</td>
<td>local government</td>
</tr>
<tr>
<td>E27</td>
<td>325</td>
<td>public</td>
<td>education, related services</td>
</tr>
<tr>
<td>E28</td>
<td>500 (in 2 collective agreements)</td>
<td>private</td>
<td>manufacturing - chemicals</td>
</tr>
<tr>
<td>E29</td>
<td>115</td>
<td>public</td>
<td>local government</td>
</tr>
<tr>
<td>E30</td>
<td>12</td>
<td>public</td>
<td>electric, gas, water</td>
</tr>
<tr>
<td>E31</td>
<td>155/100</td>
<td>private</td>
<td>manufacturing - transportation equipment</td>
</tr>
<tr>
<td>E32</td>
<td>29</td>
<td>public</td>
<td>local government</td>
</tr>
<tr>
<td>E33</td>
<td>15</td>
<td>public</td>
<td>education, related services</td>
</tr>
<tr>
<td>E34</td>
<td>200</td>
<td>public</td>
<td>health, welfare services</td>
</tr>
<tr>
<td>E35</td>
<td>18</td>
<td>public</td>
<td>electric, gas, water</td>
</tr>
<tr>
<td>E36</td>
<td>38</td>
<td>private</td>
<td>manufacturing - electrical products</td>
</tr>
<tr>
<td>E37</td>
<td>150</td>
<td>public</td>
<td>health, welfare services</td>
</tr>
<tr>
<td>E38</td>
<td></td>
<td>public</td>
<td>health, welfare services</td>
</tr>
<tr>
<td>E39</td>
<td>56/38</td>
<td>public</td>
<td>electric, gas, water</td>
</tr>
<tr>
<td>E40</td>
<td>751/233/58/71</td>
<td>public</td>
<td>health, welfare services</td>
</tr>
<tr>
<td>E41</td>
<td>95</td>
<td>public</td>
<td>education, related services</td>
</tr>
<tr>
<td>E42</td>
<td>560</td>
<td>private</td>
<td>forestry</td>
</tr>
<tr>
<td>E43</td>
<td>240</td>
<td>public</td>
<td>health, welfare services</td>
</tr>
<tr>
<td>U1</td>
<td>various</td>
<td>public</td>
<td>health, welfare services</td>
</tr>
<tr>
<td>U2</td>
<td>26,000 (various locations)</td>
<td>private</td>
<td>manufacturing - transportation equipment</td>
</tr>
<tr>
<td>U3</td>
<td>200+</td>
<td>public</td>
<td>health, welfare services</td>
</tr>
<tr>
<td>U4</td>
<td>130</td>
<td>private</td>
<td>forestry</td>
</tr>
<tr>
<td>U5</td>
<td>175</td>
<td>private</td>
<td>manufacturing - food &amp; beverage</td>
</tr>
<tr>
<td>U6</td>
<td>141</td>
<td>public</td>
<td>local government</td>
</tr>
<tr>
<td>U7</td>
<td>500</td>
<td>private</td>
<td>manufacturing - transportation equipment</td>
</tr>
<tr>
<td>U8</td>
<td>47</td>
<td>private</td>
<td>construction</td>
</tr>
<tr>
<td>U9</td>
<td>3000</td>
<td>private</td>
<td>transportation - air transport</td>
</tr>
<tr>
<td>U10</td>
<td>300</td>
<td>public</td>
<td>health, welfare services</td>
</tr>
<tr>
<td>U11</td>
<td>19</td>
<td>public</td>
<td>health, welfare services</td>
</tr>
<tr>
<td>Code</td>
<td>Value</td>
<td>Type</td>
<td>Sector</td>
</tr>
<tr>
<td>------</td>
<td>-------</td>
<td>---------</td>
<td>-----------------------------</td>
</tr>
<tr>
<td>U12</td>
<td>600</td>
<td>public</td>
<td>local government</td>
</tr>
<tr>
<td>U13</td>
<td>17</td>
<td>public</td>
<td>health, welfare services</td>
</tr>
<tr>
<td>U14</td>
<td>2000</td>
<td>public</td>
<td>health, welfare services</td>
</tr>
<tr>
<td>U15</td>
<td>200</td>
<td>public</td>
<td>local government</td>
</tr>
<tr>
<td>U16</td>
<td>331</td>
<td>public</td>
<td>health, welfare services</td>
</tr>
<tr>
<td># of Agreements Which Contained clause</td>
<td>Total # of Agreements</td>
<td>%</td>
<td>Employers</td>
</tr>
<tr>
<td>---------------------------------------</td>
<td>----------------------</td>
<td>---</td>
<td>-----------</td>
</tr>
<tr>
<td>Q10 Deemed Termination Clause</td>
<td>49</td>
<td>65</td>
<td>75%</td>
</tr>
<tr>
<td>Q11 Loss of Seniority after Prolonged Absence</td>
<td>43</td>
<td>60</td>
<td>72%</td>
</tr>
<tr>
<td>Q12 No Accumulation of Seniority after Prolonged Absence</td>
<td>43</td>
<td>62</td>
<td>69%</td>
</tr>
</tbody>
</table>

Although there were only 59 respondents, some respondents answered these questions in respect of more than one collective agreement; hence, the total number of collective agreements may exceed the number of respondents.
Table 3

Summary of Survey Responses - Use of Seniority

<table>
<thead>
<tr>
<th></th>
<th># of Positive Responses</th>
<th>Total # of Responses&lt;sup&gt;282&lt;/sup&gt;</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>Seniority a factor in Lay-off</td>
<td>59</td>
<td>59</td>
<td>100%</td>
</tr>
<tr>
<td>Seniority a factor in Recall</td>
<td>59</td>
<td>59</td>
<td>100%</td>
</tr>
<tr>
<td>Seniority a factor in Transfer</td>
<td>46</td>
<td>59</td>
<td>78%</td>
</tr>
<tr>
<td>Seniority a factor in Promotion</td>
<td>50</td>
<td>59</td>
<td>85%</td>
</tr>
<tr>
<td>Seniority a Factor in Shift Preference</td>
<td>25</td>
<td>59</td>
<td>42%</td>
</tr>
<tr>
<td>Requirement to Post Vacancies</td>
<td>56</td>
<td>59</td>
<td>95%</td>
</tr>
<tr>
<td>Seniority a Factor in Filling Vacancies</td>
<td>56</td>
<td>59</td>
<td>95%</td>
</tr>
</tbody>
</table>

<sup>282</sup> Some respondents answered these questions in respect of more than one collective agreement.
### Table 4

Comprehensiveness of the Disabled Worker Clause

<table>
<thead>
<tr>
<th>Positive Responses</th>
<th>Total # of Responses</th>
<th>% of Positive Responses</th>
</tr>
</thead>
<tbody>
<tr>
<td>Transfer to suitable, alternative, vacant position in the bargaining unit</td>
<td>36</td>
<td>43</td>
</tr>
<tr>
<td>Transfer to suitable, alternative, vacant position outside the bargaining unit</td>
<td>19</td>
<td>42</td>
</tr>
<tr>
<td>Training for suitable alternative position</td>
<td>14</td>
<td>43</td>
</tr>
<tr>
<td>Light duty jobs set aside to accommodate temporarily disabled workers</td>
<td>23</td>
<td>42</td>
</tr>
<tr>
<td>Light duty jobs set aside to accommodate permanently disabled workers</td>
<td>19</td>
<td>43</td>
</tr>
<tr>
<td>Waiving of posting requirements in collective agreement in order to place disabled worker</td>
<td>19</td>
<td>43</td>
</tr>
<tr>
<td>Waiving of other requirements in collective agreement in order to place disabled worker</td>
<td>13</td>
<td>46</td>
</tr>
<tr>
<td>Disabled Worker retains seniority in suitable alternative position 283</td>
<td>34</td>
<td>42</td>
</tr>
<tr>
<td>Disabled workers has right to bump junior employee to obtain suitable alternative position</td>
<td>10</td>
<td>35</td>
</tr>
<tr>
<td>Disabled worker is protected from bumping by able-bodied worker (except in case of lay-off)</td>
<td>10</td>
<td>42</td>
</tr>
<tr>
<td>Enhanced protection against lay-off</td>
<td>4</td>
<td>41</td>
</tr>
<tr>
<td>Enhanced recall rights</td>
<td>3</td>
<td>41</td>
</tr>
</tbody>
</table>

---

283 The survey did not distinguish between workers who are accommodated within their own seniority unit/bargaining unit and those who are accommodated outside the seniority/bargaining unit.
Table 5
Support for Strengthening the Disabled Worker Clause

<table>
<thead>
<tr>
<th>Protection Method</th>
<th>Positive Union Responses</th>
<th>% of Positive Union Responses</th>
<th>Positive Employer Responses</th>
<th>% of Positive Employer Responses</th>
</tr>
</thead>
<tbody>
<tr>
<td>Transfer to suitable, alternative. vacant position in the bargaining unit</td>
<td>12/14</td>
<td>86%</td>
<td>19/28</td>
<td>68%</td>
</tr>
<tr>
<td>Transfer to suitable, alternative. vacant position outside the bargaining unit</td>
<td>11/14</td>
<td>79%</td>
<td>9/31</td>
<td>29%</td>
</tr>
<tr>
<td>Training for suitable alternative position</td>
<td>14/14</td>
<td>100%</td>
<td>20/29</td>
<td>69%</td>
</tr>
<tr>
<td>Light duty jobs set aside to accommodate temporarily disabled workers</td>
<td>14/14</td>
<td>100%</td>
<td>16/30</td>
<td>53%</td>
</tr>
<tr>
<td>Light duty jobs set aside to accommodate permanently disabled workers</td>
<td>14/14</td>
<td>100%</td>
<td>7/28</td>
<td>25%</td>
</tr>
<tr>
<td>Waiving of posting requirements in collective agreement in order to place disabled worker</td>
<td>7/13</td>
<td>54%</td>
<td>22/30</td>
<td>73%</td>
</tr>
<tr>
<td>Waiving of other requirements in collective agreement in order to place disabled worker</td>
<td>4/10</td>
<td>40%</td>
<td>11/20</td>
<td>55%</td>
</tr>
<tr>
<td>Disabled Worker retains seniority in suitable alternative position²⁸⁴</td>
<td>14/14</td>
<td>100%</td>
<td>25/27</td>
<td>93%</td>
</tr>
<tr>
<td>Disabled workers has right to bump junior employee to obtain suitable alternative position</td>
<td>9/12</td>
<td>75%</td>
<td>9/29</td>
<td>31%</td>
</tr>
<tr>
<td>Disabled worker is protected from bumping by able-bodied worker (except in case of lay-off)</td>
<td>11/12</td>
<td>92%</td>
<td>11/26</td>
<td>42%</td>
</tr>
</tbody>
</table>

²⁸⁴The survey did not distinguish between workers who are accommodated within their own seniority unit/bargaining unit and those who are accommodated outside the seniority/bargaining unit. Thus, it is not clear whether the respondents were actually expressing support for the proposition that disabled employee could transfer seniority outside the seniority/bargaining unit.
<table>
<thead>
<tr>
<th>Feature</th>
<th>Date</th>
<th>Percentage</th>
<th>Count</th>
<th>Frequency</th>
</tr>
</thead>
<tbody>
<tr>
<td>Enhanced protection against lay-off</td>
<td>5/13</td>
<td>38%</td>
<td>2/28</td>
<td>7%</td>
</tr>
<tr>
<td>Enhanced recall rights</td>
<td>5/13</td>
<td>38%</td>
<td>1/28</td>
<td>4%</td>
</tr>
</tbody>
</table>

* not included in positive responses