How Did We Get Here?

Setting the Standard for the Duty to Accommodate*

Dianne Pothier**

It has been almost a quarter of a century since the Supreme Court of Canada's decision in *O'Malley* incorporated the concept of the duty to accommodate into Canadian human rights law and almost a decade since that concept acquired a more prominent position in that Court's adoption of the unified test for *bona fide* occupational requirement (BFOR) in *Meiorin*.[1] Yet, I think there remains some conceptual confusion about exactly where and how the concept fits in current Canadian human rights law.

The duty to accommodate cannot be properly understood as a stand-alone concept. It should be seen as subsumed within the overarching concept of reasonable necessity as a critical part of the test for a BFOR. It is also inextricably bound up with the qualification of undue hardship. Moreover, a full appreciation of accommodation includes both individual and systemic dimensions. The duty to accommodate originated as an *ad hoc* notion, involving only after-the-fact tinkering. A full development of the concept of accommodation requires an appreciation of systemic aspects that have the potential for fundamental transformation of the world of work. To date, the systemic aspects of accommodation have been given only scant attention. In my assessment, as explored in this article, the lack of clarity on all of these points stems largely from the duty to accommodate concept not having fully escaped its roots.

THE ROOTS IN *O'MALLEY*

The duty to accommodate was incorporated into Canadian human rights law simultaneously with the recognition of adverse effects discrimination. The initial association of the duty to accommodate with adverse effects discrimination viewed accommodation as individualized and *ad hoc* exceptions to general rules, where the general rules were not being questioned. That was the context of *O'Malley*.

O'Malley involved a claim against retail chain Simpsons-Sears alleging dis-

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1 *Ontario Human Rights Commission and O'Malley v. Simpson-Sears Ltd.*, [1985] 2 S.C.R. 536 at 551, 23 D.L.R. (4th) 321 [*O'Malley*]; *British Columbia (Public Service Employee Relations Commission) v. BCGSEU (Re Meiorin)*, [1999] 3 S.C.R. 3, 176 D.L.R. (4th) 1 [*Meiorin*].

crimination on the basis of creed. O'Malley was required by Simpsons-Sears to revert to part-time from full-time employment as a sales clerk when her conversion to Seventh Day Adventism caused a conflict between her religious convictions and her full-time work schedule. Simpsons-Sears required all full-time sales clerks to work some Saturdays, but the tenets of Seventh Day Adventism preclude work on Saturday, its Sabbath. Simpsons-Sears continued to employ O'Malley in a part-time capacity without Saturday shifts, but refused to fashion a full-time schedule not involving Saturday work.

There were several elements of *O'Malley* that made it relatively easy for it to serve as a test case for the recognition of adverse effects discrimination and the concomitant duty to accommodate up to the point of undue hardship. It is clear that Simpsons-Sears acted as it did on the assumption that its only legal obligation was to avoid direct (intentional) discrimination, and that it had no duty to accommodate O'Malley's religious convictions. When the Supreme Court of Canada concluded that Simpsons-Sears was wrong in law, Simpsons-Sears bore the brunt of its mistake of law, but its liability in this respect was quite limited. Although it is certainly ironic given the recognition of the case as having significantly expanded anti-discrimination law, O'Malley was not a champion of sex equality.

> Before the Board of Inquiry the complainant said she was no longer interested in full-time employment because her husband preferred that she not work full time. She, therefore, now seeks compensation only for the difference in remuneration between full-time and part-time employment lost between October 23, 1978 and July 6, 1979, the date of her marriage.[2]

Accordingly, there was little pressure on the Supreme Court of Canada to let Simpsons-Sears off the hook.

The *O'Malley* case was also easy as a test case because the rule itself, requiring full-time sales clerks to work on Saturdays, was uncontentious, given the propensity of shoppers to shop on Saturdays.[3] The religious basis for O'Malley's claimed exception via accommodation did not undermine the logic of the rule catering to the vast majority of shoppers having no religious constraints on Saturday shopping. The innocuous nature of the general rule in *O'Malley* prompted Justice McIntyre to say:

> Where there is adverse effect discrimination ... there is no question of justification raised because the rule, if rationally connected to the employment, needs no justification; what is required is some measure of accommodation.[4]

2 *O'Malley*, *supra* note 1 at para. 5.
3 *Ibid.* at para. 24.
4 *Ibid.* at para. 23.

As initially conceived by the Supreme Court of Canada, the duty to accommodate was disconnected from justification of general rules. It was seen as individualized and *ad hoc* exceptions to generally valid rules. It was seen as minor tinkering rather than fundamental transformation.

From the start in *O'Malley*, the duty to accommodate was qualified by the limit of undue hardship.[5] While embracing adverse effects (unintentional) discrimination, the Court was looking for a way to contain its scope. Yet the Supreme Court of Canada was able to say very little about undue hardship in *O'Malley*. Simpsons-Sears could not claim it had accommodated O'Malley up to the point of undue hardship where (based on the assumption of no legal obligation) it had made absolutely no efforts at accommodation in a full-time position.

Thus, the particular way in which the duty to accommodate emerged in *O'Malley* left it somewhat disconnected from associated concepts. In the years following *O'Malley*, jurisprudence from the Supreme Court of Canada increasingly separated the analysis of direct and adverse effects discrimination, with the duty to accommodate only linked to the latter.[6] Moreover, the lack of any justification requirement for general rules in adverse effects discrimination cases was strengthened with the result that, after a finding of a *prima facie* case of discrimination, the analysis went straight to the duty to accommodate.[7]

THE UNIFIED TEST IN *MEIORIN*

Almost fourteen years after *O'Malley*, the Supreme Court of Canada in *Meiorin* retreated from the bifurcated approach between direct and adverse effects discrimination. *Meiorin* involved a challenge to an aerobic fitness standard for forest firefighters. The aerobic fitness standard was introduced after Meiorin had been on the job for three seasons. Although her previous job performance had been judged satisfactory, she was terminated after failing the aerobic fitness test multiple times. Her union filed an unjust dismissal grievance which went to arbitration. The basis for the challenge to Meiorin's dismissal was sex discrimination. Because of physiological differences between men and women, the aerobic fitness test was disproportionately failed by women. Although the test did not explicitly distinguish between men and women, and was thus not direct discrimination, the fact that women were significantly more likely to fail the test made out the *prima facie* case of adverse effects discrimination.[8] The Supreme Court of Canada's prior jurisprudence adopting a bifurcated approach told the arbitrator that, as a case of adverse effects discrimination, the employer's defence hinged on the duty to accommodate without a serious questioning of the general rule.

5 *Ibid.*

6 *Central Alberta Dairy Pool v. Alberta (Human Rights Commission)*, [1990] 2 S.C.R. 489, 72 D.L.R. (4th) 417.

7 *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970, 95 D.L.R. (4th) 577 [*Renaud*].

8 *Meiorin*, *supra* note 1 at para. 69.

The Supreme Court of Canada in *Meiorin* expressly overruled its previous jurisprudence and abandoned the bifurcated approach whereby the BFOR analysis had been relevant only to direct discrimination and the duty to accommodate had been relevant only to adverse effects discrimination. In a unanimous judgment in *Meiorin* the Court adopted a unified approach to both direct and adverse effects discrimination, applying a single three-step test for a BFOR.

> ... three-step test for determining whether a prima facie discriminatory standard is a BFOR. An employer may justify the impugned standard by establishing on the balance of probabilities:
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> (1) that the employer adopted the standard for a purpose rationally connected to the performance of the job;
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> (2) that the employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfilment of that legitimate work-related purpose; and
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> (3) that the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer.[9]

Typically steps one and two are speed bumps, ultimately conceded to the respondent. The make or break part of the unified BFOR test is usually step three, where the duty to accommodate is incorporated.

REASONABLY NECESSARY

The significance of the unified BFOR test is not just that the duty to accommodate applies to both direct and adverse effects discrimination. What needs to be emphasized is that the duty to accommodate is now integrated into the justification analysis that the BFOR demands.[10] That is a marked departure from the approach in *O'Malley* set out above.

Though I think it is misleading, the third step of the *Meiorin* test is frequently described as the duty to accommodate step.[11] The duty to accommodate is only one element of the third step. To focus only on the duty to accommodate risks missing the connection between justification and the duty to accommodate. The core of the justifica-

9 *Ibid.* at para. 54.

10 *Ibid.* at para. 62

11 e.g. Michael Lynk, "Disability and Work: The Transformation of the Legal Status of Employees with Disabilities in Canada" in R. Echlin & C. Paliare, eds., *Law Society of Upper Canada Special Lectures 2007: Employment Law* (Toronto: Irwin Law, 2007) 210.

tion requirement in the crucial third step of *Meiorin* is the concept of reasonable necessity.[12] Proper assessments of the duty to accommodate must be linked back to this notion. Failure to do so represents a slipping back into the supposedly abandoned approach of *O'Malley*.

The integration of the duty to accommodate into the justification analysis means that the starting point for any BFOR analysis should be the general validity of the rule or policy in question. The previous failure to do that in adverse effects discrimination cases was identified in *Meiorin* as problematic, specifically because of its potential to legitimize systemic discrimination.[13] Challenging systemic discrimination means challenging dominant norms, which involves more than simply creating exceptions to rules via accommodation.

Although the grammatical construction of step three of the *Meiorin* test may suggest that the duty to accommodate is always an issue, that conclusion does not follow from the *Meiorin* judgment as a whole. As previously noted, a principal reason for adopting a unified test in *Meiorin* is to ensure that the validity of the standard is always open to challenge. If the challenged rule or policy is not in any sense reasonably necessary, the BFOR test has not been met. In an obvious case that conclusion can be reached without consideration of the duty to accommodate. I have previously used the following illustration:

> Take as an example an employment rule that says the job must be performed while standing. The rule is challenged by someone using a wheelchair. Assume there is actually nothing about the workplace or the job that hinges on whether the job is performed from a standing or seated position. In other words, there is no sense at all in which the standing rule is reasonably necessary. In such a scenario, the rule should simply be struck, without any need to canvass the duty to accommodate. That would leave all employees with the choice of performing the job standing or seated, irrespective of whether they have a disability which precludes (or makes difficult) standing. Since a primary purpose of prohibiting disability discrimination is to challenge able-boded norms, the first line of inquiry should be whether the norm can be disregarded altogether, without any need to consider exceptions. That is an essential first inquiry, if systemic discrimination is to be challenged.[14]

If accommodation issues arise, *Meiorin* says there is a duty to accommodate up to the point of undue hardship, but it does not follow that accommodation issues always arise. Once a *prima facie* case of discrimination (whether direct or adverse effect) has been made out, the duty to accommodate is theoretically engaged, but need

12 *Meiorin, supra* note 1, at para. 62.

13 *Ibid.* at paras. 39-42.

14 Dianne Pothier, "Tackling Disability Discrimination at Work: Toward a Systemic Approach" (Revised version of a paper presented at a conference on "The *Charter* and Human Rights at Work: 25 Years Later" held at the University of Western Ontario, London, Ontario, 29 October 2007) at 17.

not be a practical issue.

Even where there is a potential issue of accommodation, the link to reasonable necessity is important in focusing the accommodation inquiry. Accommodation involves exceptions or adjustments to rules. If a contemplated exception undermines the logic of the rule, it means the proper focus should be on the validity of the rule. This was ultimately the situation in *Meiorin* itself.

As described above, *Meiorin* involved an aerobic fitness test that was gender neutral on its face but, because of physiological differences, was disproportionately failed by women compared to men. Since this was a case of adverse effects discrimination, the previous jurisprudence of the Supreme Court of Canada had said the issue was joined as an issue of the duty to accommodate by means of an exception, without any serious questioning of the standard itself. This exposed an inherent contradiction in the context of *Meiorin*. To argue that an exception be made for Meiorin did undermine the rule. The justification for the aerobic fitness standard was safety. The union's argument, accepted by the arbitrator, was that Meiorin's past job performance proved that she could safely perform the job in spite of having failed the aerobic fitness test. In other words, the aerobic fitness standard was not an accurate test of safety. Thus the nub of the BFOR analysis in *Meiorin* is the validity—the reasonable necessity—of the rule which was found wanting by the Supreme Court of Canada.[15]

In order for accommodation to fit into a BFOR analysis, the concept of accommodation needs to be expanded beyond the *O'Malley* notion of exceptions to rules that are accepted as generally valid. What *Meiorin* does, without fully explaining that it is changing the concept of accommodation, is expand the notion of accommodation—from exceptions to rules to adjustments to rules, potentially involving a challenge to the overall validity of the rule.[16] That is an important implication of integrating the duty to accommodate into the justification analysis demanded by a BFOR. Accommodation analysis is part of answering the question whether the standard is reasonably necessary.

The underlying question for a BFOR analysis is identifying the essential qualifications for the job. If, with accommodation short of undue hardship, the core functions of the job can be performed, a standard that excludes that accommodation will not be reasonably necessary and therefore will not be a BFOR. The accommodation may be an exception that leaves the rule generally intact, or an adjustment that significantly alters the rule. If the rule is wholly invalid it may be struck in its entirety without recourse to accommodation analysis. Conversely, if no amount of accommodation will enable the essence of the job to be performed, the BFOR test of reasonable necessity will be established.

Where the necessity of the standard is obvious, the accommoda-

15 *Meiorin. supra* note 1, at paras. 72, 83.
16 *Ibid.* at paras. 64-65, 68.

tion analysis may be quite perfunctory. For example, in order to be a bus driver, it is necessary to be able to see well enough to drive. With current technology, there is no accommodation that will enable a blind person to be a bus driver. But what the duty to accommodate demands is that, even with a seemingly valid rule, the option of accommodation needs to be assessed. It involves probing deeply into the question of what is a reasonably necessary qualification.

This should all be very basic. But somehow the duty to accommodate since *Meiorin* has often not acknowledged the connection between the duty to accommodate and the justification element of the BFOR. That can happen when the duty to accommodate is inappropriately seen as a stand-alone concept, rather than, as it should be, understood as subsumed within the justification test of reasonable necessity.

In its most recent BFOR cases, *McGill Health* and *Hydro-Quebec*, the Supreme Court of Canada repeated the reasonably necessary description of the third step of *Meiorin*.[17] However, it did not highlight the reasonable necessity element in its application to the facts of the cases, since the issues had been joined at the duty to accommodate up to undue hardship. Both cases involved instances of termination for non-culpable absenteeism where the employers were held to have accommodated up to the point of undue hardship before terminating long-absent employees. I would suggest that the link between accommodation and reasonable necessity helps to explain the analysis of termination for innocent absenteeism where a disability precludes a return to work. It matches up with the comments of Justice Deschamps in *Hydro-Quebec* identifying the "employee's duty to perform work in exchange for remuneration."[18]

A recent arbitration decision, *Maple Leaf and Karges,* brings home the real issues.[19] Karges, the grievor, had been terminated after a thirty-nine-month absence from work. The employer relied on the following collective agreement provision:

> The seniority of no employee will be considered broken, all rights forfeited and the employee will be terminated when he/she has been absent from work due to illness or injury for thirty (30) months and there is no medical evidence of their ability to return to the workplace.

The grievor was on long term disability and a Canada Pension Plan permanent disability pension had been approved. Her psychiatrist diagnosed her as "totally disabled from work for foreseeable future" with an "unknown" re-

17 *McGill University Health Centre (Montreal General Hospital) v. Syndicat des employés de l'Hôpital general de Montréal* [2007] 1 S.C.R.161 at para. 13, (2007), 277 D.L.R. (4th) 577 [*McGill Health*]; *Hydro-Québec, Syndicat des employé-e-s de techniques professionnelles et de bureau d'Hydro-Québec, section locale 2000 (SCFP-FTQ)* 2008 SCC 43 at para. 11, 294 D.L.R. (4th) 407 [*Hydro-Quebec*].
18 *Hydro-Quebec, ibid.* at para. 15.
19 *Maple Leaf Consumer Foods Inc. and Schneider Employees Association (Karges),* (2007) 165 L.A.C. (4th) 432 (Ont.).

turn-to-work date.[20] Some might wonder about the point of the grievance, since it was not seriously contested that the grievor was unavailable for work.

The union's principal motivation seems to have been to enable the grievor to continue to receive employee benefits such as extended health care.[21] It is understandable that this would be of interest to the union and the grievor, and that a union would try to negotiate continued employee benefits for those on long-term disability. However, as arbitrator Hinnegan said, absent such a collective agreement right, human rights legislation does not require indefinite continuation of employee status to achieve this result. Relying heavily on *McGill Health*, the arbitrator held that the employer had met its duty to accommodate in having provided a lengthy opportunity for the employee to be in a position to return to work. The point can be made more directly and more obviously. As a BFOR, it is reasonably necessary that an employee actually show up for work. That is the most basic of job requirements. Some level of absenteeism is consistent with continued job status, but at some point undue hardship is reached establishing a BFOR.

The *McGill Health* and *Hydro-Quebec* cases not only reaffirm the connection between reasonably necessary and the duty to accommodate, they also reiterate the importance of associating the duty to accommodate with the defence of undue hardship.

UNDUE HARDSHIP

As noted above, from the start the duty to accommodate has been limited by the defence of undue hardship, with particular emphasis on the "undue" part. Some level of hardship is assumed to be consistent with the collective responsibility to ensure discrimination-free workplaces and beyond.[22] However, in the early cases where the respondent employer had done nothing at all to accommodate, the discussion of undue hardship was rather abstract. There could be no concrete claim that the duty to accommodate had reached its outer limits when the existence of the duty had not even been acknowledged. More recently, however, the defence of undue hardship has been more concrete, and has been successfully invoked in the last two Supreme Court of Canada cases just mentioned, *McGill Health* and *Hydro-Quebec*.

In both *McGill Health* and *Hydro-Quebec* the Supreme Court of Canada overturned the decisions of the Quebec Court of Appeal, both of which imposed very stringent assessments of the duty to accommodate. *Hydro-Quebec* turned, in large measure, on the meaning of the word "impossible" in the third step of the *Meiorin* test. What is meant by *Meiorin*'s reference to "impossible to accommodate individual employees"?[23] The Quebec Court of Appeal had separated out "impossible to accommodate" from "undue hardship". It concluded that the employer had failed the test of impossibility, and thus failed the BFOR, without having reached discussion of undue

20 *Ibid.* at 433.
21 *Ibid.* at 436.
22 *Renaud, supra* note 7, at para. 19.
23 *Meiorin, supra* note 1, at para. 54.

hardship. It is extraordinary that the Quebec Court of Appeal thought *Meiorin* could be read in this way. All Supreme Court of Canada discussions of the duty to accommodate before, during, and since *Meiorin* have linked the duty to accommodate with the defence of undue hardship. The sentence in the third step of *Meiorin* using the word "impossible" ends with "without imposing undue hardship on the employer."[24] Both grammatically and conceptually, "impossible" needs to be understood as intertwined with "undue hardship." The Supreme Court of Canada, speaking through Deschamps J, unequivocally affirmed that in *Hydro-Quebec*.

> However, there is a problem of interpretation in the instant case that seems to arise from the use of the word "impossible". But it is clear from the way the approach was explained by McLachlin J. [in *Meiorin*] that this word relates to undue hardship. ... What is really required is not proof that it is impossible to integrate an employee who does not meet a standard, but proof of undue hardship, which can take as many forms as there are circumstances.[25]

This means that undue hardship must be assessed on a case-by-case basis.

What implications does this have for the role of the duty to accommodate in a BFOR analysis? It means that, as a legal obligation, the duty to accommodate is the same for all employers once a *prima facie* case of discrimination has been made out. Yet the practical implications of that duty will vary widely because the point of undue hardship will vary according to the particular circumstances. Size of operation, skill level and interchangeability of employees, nature, and target of product or service provided are obvious factors that will impact on when and where the point of undue hardship will be reached.

As discussed above, it is also helpful to link assessment of undue hardship back into the notion of reasonable necessity, as the overarching standard of justification for a BFOR. If a qualification is truly necessary for the proper performance of the job, it is an undue hardship to waive that qualification. At the same time, the concept of "hardship" can help ensure that the concept of "necessity" not be watered down. If there is no undue hardship involved in adjusting the standard, the unadjusted standard cannot be reasonably necessary.

The concepts of reasonable necessity, duty to accommodate, and the defence of undue hardship are all inextricably linked. None can be properly understood in isolation. None is a stand-alone concept. They are substantially interrelated

24 *Ibid.*
25 *McGill Health, supra* note 17 at para.12.

AD HOC VERSUS SYSTEMIC ACCOMMODATION

As noted above, the initial concept of the duty to accommodate as adopted in *O'Malley* was exclusively an individualized one, invoked on an *ad hoc* basis. *Meiorin* gives signs of expanding that notion. One of *Meiorin*'s critiques of the old bifurcated approach was that it risked legitimizing systemic discrimination by not challenging dominant norms.[26] That suggests that systemic accommodation is needed to dismantle those norms. *Meiorin* also emphasizes the significance of contemplating and investigating alternate standards and of building accommodation into the standard.[27] These stipulations reflect a more macro perspective on accommodation. They potentially involve fundamental transformation rather than just after-the-fact tinkering as contemplated in *O'Malley*.[28]

Although *O'Malley* was a case of creed discrimination and *Meiorin* was a case of sex discrimination, the concept of the duty to accommodate is especially significant in disability cases. The duty to accommodate is about dealing with difference, and disability as a ground of discrimination encompasses the widest range of difference. Whether one approaches difference on an *ad hoc* or systemic basis will affect the breadth of impact of accommodation.

I have previously contrasted *ad hoc* and systemic accommodation in the context of disability with reference to the earlier noted example of a standing rule that was in no sense reasonably necessary and thus not a BFOR.

> Consider a revised version of the previous example. Assume the reason for the standing rule is that the job involves operating equipment that is designed to be used while standing. Thus the rule makes some sense in general, but not in a way that can be conclusive overall. The accommodation question is whether the equipment can be modified or adjusted so as to be operated from a seated position. It may matter a lot when one asks that question. If accommodation is merely *ad hoc* and individualized, that question can be asked after the fact, at which point the equipment modification may be very difficult, potentially invoking undue hardship. In contrast, a systemic approach to accommodation would ask the question before the fact, and build into the initial design of the equipment a relatively easy means of adjusting from a standing to a seated position. Similarly, the ease of generating alternate format versions of printed documents (such as large print or Braille, or compatibility with a voice synthesizer) depends on the way in which the document was first created ... Thus a systemic approach to accommodation anticipates the need for individualized accommodation, and builds in the necessary flexibility from the outset. ...
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> A systemic approach to accommodation challenges able-bodied norms by contemplating diversity from the start. *Ad hoc* individualized accommodation contemplates "disability specific needs as a segregated thought

26 *Meiorin*, *supra* note 1 at paras. 39-42.
27 *Ibid.* at para. 65; *ibid.* at para. 68.
28 Colleen Sheppard, "Of Forest Fires and Systemic Discrimination: A Review of *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*" (2001) 46:2 McGill L.J. 533-559.

> rather than an inclusive thought". In contrast, systemic accommodation is founded on "inclusive thought." That is what gives the duty to accommodate the potential to be genuinely transformative in challenging able-bodied norms, instead of just after-the-fact tinkering. Although this distinction is not inconsistent with *Meiorin*, it is not clearly drawn out in the judgment.[29]

Harris Rebar and Rose, a recent arbitration decision, is helpful in fleshing out the interrelationship between *ad hoc* and systemic accommodation.[30] Harris Rebar dismissed Rose, relying on the following collective agreement provision:

> 16 The continuous service and a seniority status of an employee shall not be affected or interrupted as a result of layoffs, injury, illness, leaves of absence, or other cause and not due to the voluntary act or fault of the employee; however, the continuous service of an employee and his seniority status shall be terminated for any of the following reasons, unless the Company and the, by agreement in writing, determine otherwise:
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> 1. absence of an employee from work for three (3) consecutive regular working days without having requested permission to be absent or without notifying the Company, during such three (3) days, of the necessity of being absent, unless failure to request permission to be absent, or so notify the Company was due to circumstances beyond such employee's control.

Rose's absence was due to his having been on a drinking binge. Learning of that explanation did not cause the employer to reconsider its decision to terminate, and the union grieved.

The loss of his job seems to have been a wake-up call for Rose, causing him to admit that he had a drinking problem, and ultimately to admit that he was an alcoholic. He used the services Harris Rebar had contracted for as its Employee Assistance Plan. There does not seem to have been any issue about his eligibility for these services in spite of Rose's termination, but it is not clear whether there was express coverage of terminated employees. By the time of the arbitration hearing Rose had completed an intensive treatment program and was receiving follow-up care, and had been successful "so far" in maintaining his sobriety.[31]

Arbitrator MacDowell concluded that alcoholism was the explanation both for Rose's absence and his failure to call in, precluding the employer from reliance on

29 *Supra* note 14 at 18-19; notes omitted.

30 *International Assn. of Bridge Structural & Ornamental Ironworkers, Local 834 v. Harris Rebar, a Division of Harris Steel Ltd. (Shopmen's Union) (Rose Grievance)* (2007), 165 L.A.C. (4th) 1 [*Harris Rebar and Rose*].

31 *Ibid.* at 15.

article 16.

> For the foregoing reasons, I find that to the grievor's termination of employment, based on Article 16, cannot stand; nor was there "just cause" to terminate the grievor's employment. In my opinion, the "no call no show" issue should, instead, have been dealt with as an *individualized* question of "disability" and "accommodation". The grievor's employment should not have been terminated.
>
> I therefore direct that the grievor be reinstated in employment forthwith, that his service and seniority be restored, and that he be compensated for all wages and benefits lost from the date of his discharge, to the date of this Award - except for the period when he was seeking rehabilitation for his alcoholism, and therefore would not reasonably have been permitted or able to work. (emphasis in original)[32]

As noted, arbitrator MacDowell emphasized the individual nature of the accommodation, responding to Rose's particular circumstances. He relied on the Supreme Court of Canada's decision in *McGill Health* as authority for the requirement of individualized accommodation.[33]

McGill Health is proper authority for the importance of individualized accommodation, which explains why an automatic termination clause in a collective agreement is not a conclusive answer from the employer.[34] Given the inability to contract out of human rights legislation, if a collective agreement offers less protection than human rights legislation would demand, it is ineffective.[35]

But *McGill Health* says more than that. It treats the three year automatic termination clause as "negotiated accommodation".[36] That description does not make it automatically valid, but it is relevant evidence as to what the parties considered as undue hardship.[37] I have previously commented on this aspect of *McGill Health* as follows:

> Although she does not precisely describe it in such terms, Justice Deschamps' approach should, in my assessment, be commended as a move toward a systemic assessment of undue hardship. Rather than an *ad hoc* process that treats every case as an isolated instance, it is preferable to think generally about what kind of long-term absenteeism would constitute undue hardship. Employers and unions are thus encouraged to negotiate automatic termination clauses, and encouraged to negotiate generous ones so as not to be generally vulnerable to challenge as inconsistent with human rights legislation. Any

32 *Ibid.* at 23.
33 *Ibid.* at 26.
34 *Hydro-Quebec*, *supra* note 17 at para. 22.
35 *Ibid.* at paras. 21-21.
36 *Ibid.* at para. 18.
37 *Ibid.* at para. 27.

> case within the termination clause is automatically resolved. Any case outside the termination clause could possibly give rise to a challenge, but there will be a heavy evidentiary burden to succeed in such a challenge
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> ... Waiting for a problem to emerge before contemplating how to deal with it is potentially dangerous. Confronting the issue in an *ad hoc* manner only when a particular case arises risks making mistakes when in a crisis-management mode. Assessing undue hardship in an anticipatory way, outside a particular context that may arise in a very charged atmosphere, is generally preferable. It can take the pressure off individual disabled employees who may already be quite vulnerable. Approaching accommodation up to the point of undue hardship in a general/systemic way, while still taking individual circumstances into consideration, will (overall at least) be less marginalizing to individual disabled employees.[38]

How, if at all, is systemic accommodation relevant to *Harris Rebar and Rose*? Although arbitrator MacDowell makes no comment on this point, systemic accommodation is actually the key to Rose's reinstatement. Although the employer was unwilling to individually accommodate Rose in his job, it managed (perhaps in spite of itself) to offer systemic accommodation by having an Employee Assistance Plan available. The employer's purchase of external services to constitute an Employee Assistance Plan was an example, *inter alia*, of anticipating the need to manage alcoholism, but without knowing which individuals could or would benefit from such services. This is individualized accommodation, but not *ad hoc* accommodation. It is properly described as systemic accommodation because it anticipates the general need for accommodation before the specific case arises. In the absence of the Employee Assistance Program, Rose might have had great difficulty in finding or affording a means of coming to terms with his alcoholism, enabling a return to work with a reasonable expectation of regular attendance. The success of systemic accommodation in this case precluded the employer from establishing undue hardship.

Although there are examples of systemic accommodation, the jurisprudence has yet to fully embrace the concept of systemic accommodation. If fully embraced, systemic accommodation has the potential to fundamentally transform the workplace. What started as minor tinkering in *O'Malley* could become profound change. Coming to terms with systemic accommodation is, in my assessment, the major current challenge to employers arising from human rights obligations.

CONCLUSION

The duty to accommodate is an evolving and expanding concept that needs to be understood in conjunction with related concepts. The duty to accommodate is part of the test for a BFOR, and thus is properly understood within a process of justification, the most critical element of which is reasonable necessity. From the outset,

38 *Supra* note 14, at 26-27.

the duty to accommodate has been qualified by the defence of undue hardship. It is in the context of undue hardship that the specific circumstances of an employer will determine the ultimate scope of the duty to accommodate. Although the duty to accommodate started out as individualized exceptions to rules while not challenging the general validity of rules, it has developed into a means of challenging norms. The duty to accommodate needs to take account of individual circumstances, but that can and should be done in a manner that includes a systemic approach to accommodation. To date, that is the least developed aspect of the duty to accommodate.

The BFOR notion of reasonable necessity, the duty to accommodate, the defence of undue hardship, and the notion of systemic accommodation are all interrelated concepts that inform each other. None can properly be understood in isolation. All have had and will continue to have a profound impact on the organization of the world of work.