THE CONTINUING LEGAL EDUCATION SOCIETY OF BRITISH COLUMBIA
CLE BC

EMPLOYMENT LAW CONFERENCE 2017
PAPER 3.1

Undue Hardship: Recent Cases Exploring the Process of Accommodation & the Threshold of Undue Hardship

These materials were prepared by Shanti P. Reda of Hamilton Howell Bain & Gould, Vancouver, BC, and Erin Brandt of Kent Employment Law, Vancouver, BC, for the Continuing Legal Education Society of British Columbia, May 2017.

UNDUE HARDSHIP: RECENT CASES EXPLORING THE PROCESS OF ACCOMMODATION & THE THRESHOLD OF UNDUE HARDSHIP

I. Introduction

Pursuant to section 13(1) of the BC *Human Rights Code* (the "*Code*"), a person must not refuse to employ a person, or discriminate against a person regarding employment or any term or condition of employment, on a prohibited basis.

It is well established that a complainant bears the onus of establishing a *prima facie* case of discrimination under section 13(1) of the *Code*. Where they do so, the onus then shifts and the enquiry turns to the question of whether the respondent can show that the adverse treatment was as a result of a bona fide occupational requirement ("BFOR") or a bona fide reasonable justification ("BFRJ").

In order to establish this justification, the defendant must prove that:

(1) It adopted the standard for a purpose or goal that is rationally connected to the function being performed;

(2) It adopted the standard in good faith, in the belief that it is necessary for the fulfillment of the purpose or goal; and

(3) The standard is reasonably necessary to accomplish its purpose or goal, in the sense that the defendant cannot accommodate persons with the characteristics of the claimant without incurring undue hardship.[1]

(the "Meiorin Test")

This paper will focus on the third element of the Meiorin Test, the test of undue hardship. For cases where the disability is acknowledged or established, and an entitlement to accommodation is present, the dispute in such cases is often over whether an employer has, or has not, established that it has accommodated the employee to the point of undue hardship. While the basic principle of accommodation to the point of undue hardship is conceptually straightforward, determining whether this standard has or has not been satisfied in a particular case, on the facts, can be challenging.

This paper will focus on three key 2016 Court decisions that help to clarify the threshold for undue hardship in a number of areas, as well as recent decisions of the BC Human Rights Tribunal (the "BCHRT") in these same areas.

First, we will discuss two seminal 2016 cases from the BC Courts clarifying that a holistic approach to undue hardship should be applied, considering both substantive and procedural aspects of the accommodation process, and also reaffirming the high threshold that may apply to establish undue hardship on the basis of financial hardship.

The decision of the British Columbia Court of Appeal ("BCCA") in *University of British Columbia v. Kelly*[2] and the decision of the British Columbia Supreme Court ("BCSC") in *Providence Health Care v. Dunkley,*[3] demonstrate the lengths to which service providers or employers (particularly large employers) will be expected to go in accommodating to the point of undue hardship and the importance placed on the accommodation process when assessing whether they have gone far enough. These cases demonstrate that adjudicators will carefully and contextually analyze the accommodation process and that minimal efforts at accommodation will not likely suffice where other accommodation options were not fully explored. These cases also emphasize the importance of employees being actively engaged participants in the accommodation process, expected to propose reasonable and thoughtful accommodation options while maintaining an openness to reasonable suggestions made by their employer.

Second, we will explore some recent cases considering the scope of an employer's duty to accommodate an employee who is no longer able to do her pre-disability position. In *Hamilton-Wentworth District School Board v. Fair,*[4] the Ontario Court of Appeal ("OCA") applied the holistic approach to the undue hardship test and determined that an employer will not satisfy the test of undue hardship where they have not accommodated an employee into a position they are qualified for (even if not the most qualified applicant) or have not placed them into a vacant position they have budgeted for. The OCA decision may also signify a movement towards more reinstatements, even after lengthy periods of absence.

We will compare *Hamilton-Wentworth District School Board* to decisions issued by the BCHRT in the last year, where the undue hardship threshold was met by employers attempting to

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1 *British Columbia (Public Service Employee Relations Commission) v. BCGSEU,* [1999] 3 SCR 3.

2 2016 BCCA 271 ["*Kelly*"].

3 [2016] B.C.J. No. 1584 ["*Dunkley*"].

4 [2016] ONCA 421 ["*Hamilton-Wentworth District School Board*"].

accommodate employees who were unable to work in their pre-disability position. We will suggest that the OCA has taken a more employee-friendly approach to this issue in contrast to recent decisions by the BCHRT.

II. The Importance of a Contextual Approach to the Process of Accommodation

The BCCA decision of *Kelly* and the BCSC decision of *Dunkley* have been reviewed in detail in previous CLE papers,[5] and it is not the intention of this paper to repeat that review. However, we will briefly summarize the most significant principles flowing from these cases relating to the undue hardship test and then will discuss more recently decided case law on this issue.

A. Kelly—Applying a Holistic Analysis to the Duty of Accommodation

Dr. Kelly was a medical resident at UBC in family medicine. He had been diagnosed with ADHD and a learning disorder, and struggled with satisfying the program requirements. After a failed accommodation process, Dr. Kelly was ultimately dismissed from his residency with UBC, as well as his employment with Providence Health Care ("PHC") (which employs residents, including Dr. Kelly).

The BCHRT found that Dr. Kelly's disability was a factor, perhaps the sole factor, in UBC's decision to terminate his residency, and that he had therefore established a *prima facie* case of discrimination pursuant to both sections 8 (service provision) and 13 (employment) of the *Code*. The BCHRT found that UBC had failed to provide reasonable accommodation to Dr. Kelly to the point of undue hardship, and awarded Dr. Kelly $385,194.70 for lost wages and $75,000 for the injury to his dignity, feelings and self-respect.[6]

On appeal to the BCCA, a central issue included whether the BCHRT erred in considering a procedural component to the duty to accommodate. Before the BCCA, UBC took the position that the *process* of accommodation should not have been considered. Rather, only its substantive reasons for adverse treatment are relevant. In other words, UBC argued "it should be judged on what it did, not what it did not do."[7]

In this case, the BCCA confirmed that "both procedural and substantive aspects of the impugned decision may be examined", which it refers to as a "holistic approach" to accommodation.[8] Specifically, the BCCA affirmed that:

> 42 The settled law is that while there is no free-standing procedural duty, both procedural and substantive aspects of the impugned decision may be examined. See Moore v. British Columbia (Ministry of Education), [2012] 3 S.C.R. 360; and see British Columbia (Public Service Employee Relations Commission) v. BCGSEU (Meiorin Grievance), [1999] 3 S.C.R. 3 at para. 66:

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5 See, in particular, "Undue Hardship: Recent Cases Exploring an Employer's Duty to Accommodate a Disabled Employee", CLEBC, Human Rights Conference – 2016.

6 *Supra*, note 2 at para 11.

7 *Ibid*, at para 40.

8 *Ibid*, at paras 42-43.

> 66 Notwithstanding the overlap between the two inquiries, it may often be useful as a practical matter to consider separately, first, the procedure, if any, which was adopted to assess the issue of accommodation and, second, the substantive content of either a more accommodating standard which was offered or alternatively the employer's reasons for not offering any such standard: see generally Lepofsky, [M. David Lepofsky, "The Duty to Accommodate: A Purposive Approach" (1993), 1 Can. Lab. L.J. 1.]

Specifically, the BCCA was affirming the BCHRT's reliance on the following procedural errors or emissions to support a finding that UBC had not accommodated Dr. Kelly to the point of undue hardship:

(1) UBC failed to obtain sufficient recent medical evidence at various steps of the process, failed to obtain medical evidence from practitioners with specialized knowledge in ADHD, and failed to fully analyze whether further medical supports would assist with accommodation;

(2) UBC did not follow up with resources suggested by Dr. Kelly's psychologist, nor did they discuss or clarify his recommendations with Dr. Kelly – "it was incumbent upon them to engage in dialogue about the accommodation process";

(3) "The Program took an overbroad and rigid view of some of the suggested accommodations (such as that every rotation must be lengthened, or that every aspect of family practice must be reduced to a template) and failed to explore reasonable possibilities";

(4) UBC did not provide written notice to Dr. Kelly about any weaknesses or areas that needed improvement;

(5) UBC relied on conjecture or subjective impressions as opposed to objective, quantifiable data with respect to the seeming lack of further accommodations and demonstrating unreasonable financial hardship;

(6) UBC did not seek input from Dr. Kelly prior to the meeting in which dismissal was recommended or prior to its decision;

(7) The evidence showed that, where accommodation was provided, Dr. Kelly's performance improved;

(8) Where some accommodation options may have been more time-consuming to explore, it was not established that it would have been "undue hardship", nor was any impact on other residents established to be "undue"; and

(9) UBC unreasonably truncated the accommodation process, essentially ending it before it had fully explored all accommodation options.[9]

In sum, while procedural errors will not give rise to an independent breach of the *Code*, procedural errors and omissions in the accommodation process may very well support a finding that an employer has not accommodated to the point of undue hardship. Put another way, both what an employer does and does *not* do are important when applying a holistic analysis.

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9 2012 BCHRT 32 ["*Kelly #1*"], at paras 542-564.

B. Dunkley—Confirming the Holistic Approach & Where Undue Hardship Will be Established Due to Cost

Dr. Jessica Dunkley is a deaf Metis doctor. During her undergraduate education at UBC and medical school at the University of Ottawa, Dr. Dunkley was provided with sign language interpreters. In March 2010, Dr. Dunkley was accepted to UBC's five year dermatology residency program at PHC. Upon receiving her acceptance, Dr. Dunkley contacted the Access and Diversity Office at UBC to request accommodation in the form of interpreters. By July 1, 2010, Dr. Dunkley's anticipated start date, arrangements had not yet been put in place to provide interpreter services. On October 12, 2010, Dr. Dunkley was placed on a paid leave, which transitioned to an unpaid leave on January 20, 2011. On February 2, 2011, Dr. Dunkley was informed that the requested accommodation could not be provided, and she was dismissed from the residency program by UBC and PHC.

On the issue of the standard of undue hardship, the BCSC confirmed that the BCHRT had "correctly referred to the decision of the Supreme Court of Canada in *Hydro-Quebec*[10] for the proposition that UBC and PHC are not required to prove that it was 'impossible' to accommodate Dr. Dunkley, but only that to do so would involve undue hardship."[11]

The BCHRT[12] had held that:

(1) UBC failed to sufficiently investigate the cost of engaging interpreters and unnecessarily delayed the accommodation process by asking for medical evidence three months after Dr. Dunkley's initial request, showing no regard for Dr. Dunkley's fast approaching residency commencement date;

(2) Neither UBC nor PHC took advantage of any of the resources provided by Dr. Dunkley of relevant, available information that they themselves could have obtained if they had taken the time and effort; and

(3) While both UBC and PHC raised the "idea of modifications", both fell short of actually proposing or offering a reasonable accommodation.[13]

On judicial review the BCSC evaluated the BCHRT's discussion on both the procedural and substantive components of the undue hardship analysis, including:

(4) *Procedural:* the efforts UBC and PHC made, the options they explored, and the offers they made to accommodate Dr. Dunkley's deafness; and

(5) *Substantive:* the substantive content of either a more accommodating standard offered by UBC and PHC or their reasons for not offering any such standard.

Further, the BCSC agreed with the BCHRT "that the failure of UBC and PHC to take reasonable steps to discover accurately the true cost of providing the required accommodation to Dr. Dunkley shows that neither UBC nor PHC has proven on a balance of probabilities that the cost of accommodation would amount to undue hardship". In this case, the total cost for the provision of

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10 *Hydro-Quebec v. Sydnicat des employées de technique professionelles et de bureau d'Hydro-Québec, section locale 2000 (SCFP-FTQ)*, 2008 SCC 43 ["*Hydro-Quebec*"].

11 *Supra,* note 3 at para 114.

12 [2015] B.C.H.R.T.D. No. 100 ["*Dunkley #1*"].

13 *Ibid*, at paras 440-505.

sign language interpreters over a span of five years for Dr. Dunkley was estimated by UBC and PHC to be between $2.5 and $3 million. The BCHRT was critical of the estimates given by UBC and PHC (and their methodology for calculating them) as they appeared impressionistic; indeed, testimony revealed that the cost was a "crude calculation" made up of "rough numbers", a tentative estimate because "there was more work to do in terms of assessing what this thing was really going to cost."[14] Such a paradoxical approach (that half-heartedly delved into the actual costs, but firmly concluded that the total was too much) was rejected by the BCSC, and is an important reminder to employers that they cannot put too low a value on accommodating the disabled.

The BCSC found that neither UBC nor PHC had demonstrated any error by the BCHRT, and dismissed their petitions for judicial review.

C. Jones v. Sobeys West—An Employer Fails to Explore Potential Accommodation Options at Their Peril

Subsequent decisions by the BCHRT have confirmed that, where an employer relies on purported undue hardship, the process it uses to evaluate accommodation options will be carefully scrutinized, as will available accommodation options that are not fully explored or implemented. One such case is *Jones v. Sobeys West*.[15]

Ms. Jones was employed as a cashier for Sobeys West ("Sobeys"). When Sobeys changed its point of sale ("POS") software, Ms. Jones raised concerns with Sobeys around her ability to read the POS display as a result of having impaired vision and blindness in one eye. Ms. Jones filed a complaint against Sobeys alleging that Sobeys had not accommodated her physical disability. With her complaint pending, Ms. Jones continued to make efforts to use the new POS display. However, her efforts to seek accommodation from Sobeys were unsuccessful.

After Ms. Jones filed her complaint with the BCHRT, Sobeys brought an application to dismiss Ms. Jones' complaint. In its decision dismissing Sobeys' application, the BCHRT evaluated the efforts that Sobeys had made to accommodate Ms. Jones. Specifically, Sobeys:

(1) Discussed options with its POS display provider to make changes to the display;

(2) Reviewed medical documentation provided by Ms. Jones which describes display requirements that would meet Ms. Jones' request for accommodation; and

(3) Made inquiries with the Canadian National Institute for the Blind concerning technologies that would enable individuals with vision loss and their employers to adapt the workplace to an individual employee's needs and confirmed that such technology exists.[16]

In June 2015, the parties entered into a settlement agreement pursuant to which Sobeys agreed to make modifications to the POS display without delay (the "Settlement Agreement"). However, rather than move forward with a software solution, Sobeys decided to provide Ms. Jones with a second monitor overtop the regular POS display which showed a larger version of what was

14 *Supra*, note 3 at paras 513-518.

15 2016 BCHRT 196 ["*Sobeys West*"].

16 *Ibid,* at paras 20-22.

displayed on the other screen (the "Second Screen Approach"). After a 30 minute trial in October 2015, Ms. Jones determined that this proposed solution did not resolve her concerns.[17]

In January 2016, Sobeys moved Ms. Jones to the position of produce clerk. However, Ms. Jones raised concerns that she could not safely or reasonably perform that job, given her limited peripheral vision.[18] Sobeys did not offer Ms. Jones any other position and in March 2016, Ms. Jones agreed to try the position, despite her objections. At that time, Sobeys also requested Ms. Jones to participate in a trial of a revised Second Screen Approach.[19] After her trial of the revised Second Screen Approach, Ms. Jones met with her doctor and noted additional modifications to the revised Second Screen Approach, which Ms. Jones asserts were never resolved.[20]

In deciding to dismiss Sobeys' application to dismiss Ms. Jones' complaint, the BCHRT considered the following:

(1) Sobeys had decided not to pursue a software solution to Ms. Jones' request for accommodation due to cost;

(2) Following the Settlement Agreement, Sobeys failed to meet with Ms. Jones to discuss the Second Screen Approach;

(3) Following the revised Second Screen Approach, Sobeys unilaterally determined that Ms. Jones had been accommodated, and that Ms. jones "would just have to live with" any residual issues; and

(4) Ms. Jones consistently made efforts to work with Sobeys, by trying both the Second Screen Approach and the produce position.[21]

Ultimately, the BCHRT declined to exercise its discretion to dismiss Ms. Jones' complaint on the basis that Sobeys had not established that it had remedied any outstanding accommodation issues raised by Ms. Jones, relying on *Dunkley* as follows:

> First, the question of an employer's further inquiries or possible solutions (in the sense of reasonable and practical steps) is relevant to the determination of whether it is not possible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship on the employer: British Columbia (Public Services Employee Relations Commission) v. BCGSEU [1999] 3 S.C.R. 3 ("Meiorin") at para 54; Dunkley v. UBC and another, 2015 BCHRT 100 at para 423, upheld on review Providence Health Care v. Dunkley, 2016 BCSC 1383. Here, Sobeys has provided very little evidence about its enquiry with NCR and leaves certain questions about the timeline unexplained. It provides no evidence of having followed up with CNIB despite CNIB having apparently advised that it specializes in this type of issue and may have suitable technology to assist. It did not include Ms. Jones in any consultation or discussion around possible options. Sobeys acknowledges that accommodation of Ms. Jones' impairment took some time but does not explain why it took nearly six months and a determination that it was unable to accommodate Ms. Jones in the cashier

17 *Ibid*, at paras 31-33.

18 *Ibid,* at para 34.

19 *Ibid,* at paras 39-41.

20 *Ibid,* at paras 43-44.

21 *Ibid,* at paras 71-74.

> position before it determined it could retry the Second-Screen approach with a larger, differently shaped screen.[22]

In *Sobeys-West*, the BCHRT also reconfirmed that adjudicators should be cautious with respect to assessing whether the cost of providing an accommodation meets the test of undue hardship.[23]

D. Jeppesen v. ICBC—Confirmation that there is No Freestanding Procedural Requirement

While it is clear that a holistic analysis is applied, subsequent cases have reconfirmed the principle in *Kelly* (and prior cases) that an inappropriate accommodation process does not on its own constitute an independent actionable wrong. In *Jeppesen v. ICBC*,[24] a case dealing with section 8 of the *Code* (discriminatory service provision), the BCHRT re-confirmed on a section 27 application to dismiss:

> In dismissing the complaint against ICBC, I want to be clear that I expressly reject the submission by Mr. Jeppesen that the duty to accommodate includes a free-standing procedural component that must be considered. …[25]

Thus, while the process may be very important as part of a holistic analysis, it must always be linked to an independent actionable breach of the *Code* (i.e. discrimination).

III. Accommodation to the Point of Undue Hardship Where an Employee Cannot Fulfill Their Pre-Disability Duties

One particularly challenging area of the law is where an employee has a right to be accommodated, but is medically unable to fulfill the requirements of their pre-disability position. A recent OCA decision, *Hamilton-Wentworth District School Board,* clarifies how far an employer may have to go in such circumstances to satisfy the threshold of undue hardship. We will also contrast this decision against similar recent BCHRT decisions, where complainants were not successful in their complaints of discrimination.

A. Hamilton-Wentworth District School Board—The Search for Accommodation Where an Employee is no Longer Able to do their Pre-Disability Position

In *Hamilton-Wentworth District School Board,* the OCA affirmed a decision of the Ontario Human Rights Tribunal ("OHRT") decision reinstating an employee who had been out of the workforce for many years, in a case that hopefully marks a more employee-friendly turn to the law in this area.

Ms. Fair had been employed by the School Board as an asbestos supervisor. In fall 2001, she developed a generalized anxiety disorder, depression, and post-traumatic stress disorder in response

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22 *Ibid*, at para 91.

23 *Ibid*, at para 92. See also *British Columbia (Superintendant of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1993] SCR 868 at para 41.

24 [2017] B.C.H.R.T.D. No. 37.

25 *Ibid*, at para. 86.

to the highly stressful nature of the job and her fear that in making a mistake about asbestos removal, she could hurt others or expose herself to personal liability.

She was approved for and received LTD benefits from March 2002 to April 2004. In April 2003 while still receiving LTD benefits, Ms. Fair indicated she wanted to return to work, which the employer initially refused on the basis that it did not have sufficient medical information available to it.

In June 2003, Ms. Fair commenced a work-hardening program (volunteering in the human resources department) aimed at returning to work full-time. She was clear that she wanted full-time work as soon as it was available. By this point, the employer had received medical evidence supporting that Ms. Fair should avoid any work involving personal liability, such as "overseeing construction or renovation projects".[26]

As will be discussed below, two potential accommodation options arose in June and July 2003, which the employer refused to place Ms. Fair into and which were ultimately the basis of the dispute before the OHRT and the OCA.

In November 2003, the employer sought further medical clarification of the employee's disability. Updated medical was promptly provided clarifying that Ms. Fair should return to a position with less exposure to the kind of stressors in her previous role.[27]

In February 2004, the employer asked Ms. Fair to be assessed by a psychiatrist of their choosing. The employer's instructing letter to this psychiatrist stated:

> Sharon has a skewed view of entitlement and says we owe her a job and we are violating her human rights.... I view Sharon as being extremely manipulative—if she believes you have something that can help her, she treats you well—otherwise....She can enhance details to attempt to sway your perspective.... The rehab worker from OTIP has told me that she views Sharon as manipulative, difficult and single minded.[28]

The employer's letter closed as follows: "Please help identify REAL limitations/restrictions, fitness to return to work, separate medical from preference, etc."

Despite this instructing letter, the employer's psychiatrist essentially agreed with the prior medical opinions, i.e. that Ms. Fair could work so long as the job did not entail "responsibility for health and safety issues, nor any duties which would leave her at risk for personal liability".[29]

By April 2004, Ms. Fair's two year "own occupation" LTD benefits had expired. Her LTD carrier assessed her as capable of gainful employment, and terminated her LTD benefits. The employer terminated Ms. Fair's employment in July 2004, when it determined that no suitable position could be identified for Ms. Fair to return to. By this time, Ms. Fair had filed a complaint with the OHRT. She subsequently filed a civil wrongful dismissal action, which was subsequently transferred to the OHRT following a change to the rules.

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26 *Supra*, note 4 at para 10.

27 *Ibid*, at paras 15-16.

28 *Ibid*, at para 18.

29 *Ibid*, at para 20.

Due to circumstances held not to be the employee's fault, the OHRT decision was not issued until February of 2012, *7.5 years after Ms. Fair's dismissal and over ten years after her last day of actual work* (other than her work hardening program in 2003).

The OHRT held:[30]

(1) Ms. Fair had fulfilled her obligation to co-operate fully in the accommodation process;[31]

(2) The employer was "not open to adopting an active role in canvassing all possible accommodation solutions from the outset", as evidenced by the fact that when asked by the LTD carrier early on whether there were less demanding positions available that Ms. Fair could do, the employer responded that all non-union positions are demanding;[32]

(3) The employer failed to meet its duty to accommodate when its disability manager refused a request by the LTD carrier to meet to discuss exploring volunteer or work-hardening activity, on the basis that she did not have enough information about Ms. Fair's restrictions and limitations (the OHRT held attending the meeting would have provided the employer with further information);[33]

(4) The employer unnecessarily delayed accommodation meetings with Ms. Fair (pointing to a three month delay in a requested meeting);[34]

(5) The employer failed to clarify ambiguity in the medical evidence provided;[35]

(6) The employer attempted to influence its expert through the manner in which it framed the letter sent to its expert (discussed above). The OHRT held the employer was "not attempting to obtain objective clarification of the applicant's limitations but was intended to encourage the expert to conclude that the applicant was not worthy of accommodation";[36] and

(7) The employer failed to consider accommodating the grievor into other positions, instead holding from the outset that, if she could not do her former position, she could not work in any supervisory position in the plant department.[37]

It is clear a holistic approach was applied and procedural considerations were critical to a finding that the employee had not been accommodated to the point of undue hardship. Again, the focus was on both what steps the employer had taken, and what reasonable steps it had *failed* to take.

The OHRT held there was work available that Ms. Fair could have been accommodated into short of undue hardship (as discussed below). The parties were subsequently unable to resolve the issue

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30 [2012] O.H.R.T.D. No. 336 ["*Hamilton-Wentworth District School Board #1*"].

31 *Ibid*, at paras 11-15.

32 *Ibid*, at paras 18-20.

33 *Ibid*, at para 22.

34 *Ibid*, at para 26.

35 *Ibid*, at para 27-29.

36 *Ibid*, at paras 30-32.

37 *Ibid*, at paras 33-35.

of remedy, so the matter was remitted to the OHRT and a further decision was issued ordering reinstatement and full wage loss, which equalled $419,283.89, as well as $30,000.00 for the injury to Ms. Fair's dignity.[38]

The OCA heard the employer's appeal from the Divisional Court in November 2015, and reasons for judgment were issued in May 2016. At issue was whether the OHRT erred in holding Ms. Fair should have been accommodated into one of two disputed positions and whether she should be reinstated after such a lengthy time period out of the workplace.

First, in June of 2003, the employer had advertised a position for "staff development supervisor", in the human resources department. Another employee was doing the position at the time. The employer short-listed various employees for the posted position, including Ms. Fair and the other employee who had been temporarily filling the position. After interviews, the latter employee was awarded the position (and it was undisputed that the employee selected was the most qualified applicant for the position).

Before the OCA, the employer's first primary argument about the staff development supervisor position was that the medical evidence did not establish that Ms. Fair was medically fit to return to work when this position was filled. The OCA upheld the trial judge's findings on this as follows:

> 57 There were also the opinions of Ms. Fair's treating psychiatrist and the School Board's own expert that Ms. Fair was capable of returning to full-time employment. Indeed, it was as a result of the treating psychiatrist's medical opinion that OTIP determined that Ms. Fair was no longer entitled to receive LTD benefits.
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> 58 Moreover, in my view, the School Board too narrowly interprets the medical opinions to indicate that Ms. Fair was unable to work in any supervisory position because of potential liability and responsibility for safety issues. It was open to the Tribunal to construe the medical opinions as confining Ms. Fair's medical restrictions to supervisory positions involving the same level of personal liability as her previous position. Certainly there was no evidence that the positions of Area Supervisor or Staff Development Supervisor involved the same risk of personal liability as Ms. Fair's previous position.

Before the OCA, the employer's second main argument about this position was that the OHRT erred by holding it had to displace a more qualified incumbent to accommodate Ms. Fair into the position. On the argument of "displacement", the OCA held:

> 70 First, as the Divisional Court agreed, the position was vacant. The other employee was not an incumbent in the position. If she had been, the School Board would not have been obliged to post the position to allow for competition in accordance with its own policy. … Finally, there was no evidence that the other employee's displacement from the position would have caused undue hardship to her, any other employee, or to the School Board.

While no longer necessary, the OCA also went on to specifically affirm the OHRT's ruling that the principles of accommodation may require the displacement of an incumbent.[39] The OCA also noted that the employer's own internal policies on accommodation contemplated that transfers might occur.

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38 [2013] O.H.R.T.D. No. 420 ["*Hamilton-Wentworth District School Board #2*"].

39 *Supra*, note 4 at para 52.

On the issue of accommodating a "lesser" qualified applicant, the OCA also issued a strong principled statement on this issue:

> 71 *The School Board also submits that there is no authority for the proposition that, in order to accommodate someone with a disability, that person should be given preference over someone who is a legitimate contender and the more qualified candidate for an employment position.*
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> 72 *The School Board's argument misconstrues an employer's duty to accommodate.*
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> 73 It is true that an employer has no obligation to place a disabled employee into a position for which he or she is not qualified: see, for example, *Ellis v. General Motors of Canada Ltd.*, 2011 HRTO 1453, at para. 28; *United Food and Commercial Workers Union, Local 1000A v. Kretschmar Inc. (MacEachern Grievance)* (2004), 129 L.A.C. (4th) 68, at paras. 7, 13-14, 21.
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> 74 However, *to fulfil its duty to accommodate an employee's disability, an employer may be required in an appropriate case to place a disabled employee into a position for which he or she is qualified but not necessarily the most qualified.* [Emphasis added]

In sum, a disabled employee needs only to meet the minimum qualifications, they do not need to be the most qualified. Notably, in *Hamilton-Wentworth District School Board, supra*, the OCA upheld a training period of up to six months for the new position. While such a lengthy period of training is unusual, and likely flowed from the specific facts of this case, certainly there are other cases that have held that training or orientation may be required to satisfy an employer's duty to accommodate.

Second, in July 2003, an area supervisor also left; the vacant position was located in the same department as the asbestos supervisor position Ms. Fair had previously filled. The specific evidence before the OHRT was that:

> 41…[T]he totality of the evidence indicates that the plant was in the process of re-organization and the respondent anticipated reorganizing many of the positions and hiring several more area supervisors. As it turns out, those reorganization plans did not take place due to financial considerations, but the fact remains that as of July 2003 there was ample opportunity to return the applicant to the plant as an area supervisor. The respondent also argues that it was under orders to reduce full-time positions ("FTE's"). *However, the obligation to reduce FTE's cannot be done at the expense of a disabled employee on disability leave. The order to reduce FTE's was not an order to terminate employees, but rather not to hire new ones. The applicant was not a new employee. She was an employee on disability leave with a right to return to work in an existing FTE vacancy. Further, the budget documents for 2003/2004 reflect that there was no change to the total supervisory complement for the plant department, which indicates that there were surplus FTE's where the applicant could have been placed.* [Emphasis added]

Before the OCA, the employer argued that the OHRT had essentially ordered it to "create a surplus position" for Ms. Fair, contrary to principles of accommodation. The OCA upheld the OHRT's decision as follows:

> 67 On the contrary, as the Tribunal noted, the School Board's 2003/2004 budget provided for this position. Moreover, as indicated by Ms. Fair in her June 2003 email to the Disability Management Co-ordinator, she wanted to be considered for opportunities within the plant department. However, the Controller of the plant department refused to consider her for any position other than her previous position.

> 68 As a result, there is no basis to interfere with the Tribunal's factually-based conclusion that the School Board could have placed Ms. Fair in the position of Area Supervisor in the plant department.

We suggest that, as with all accommodation cases, the ultimate test is whether undue hardship has been established on the facts. Here, where the employer required the work to be done (and it had been done until recently by a full-time incumbent), where funding had been allocated in the budget for the position, where it was attempting to reduce new hires but was not laying off existing staff, and where it was anticipated that the position would be filled in the future, it would not have been undue hardship for the employer to accommodate Ms. Fair into the position (despite perhaps a loss in savings). While the facts are unusual, the basic principle that an employer may have to incur some additional costs to accommodate a disabled employee is well-established from prior cases.

Finally, the OCA affirmed the following remedy ordered by the OHRT, namely that Ms. Fair "be reinstated to a suitable position for which she had the basic general qualifications, equivalent to the level that she had been at when last employed by the School Board." [40] The OCA noted this is an unusual remedy, particularly after so many years of unemployment, but ultimately held that "Ms. Fair's employment relationship with the School Board was not fractured and the passage of time had not materially affected her capabilities".[41]

Notably, both the OHRT and the OCA relied on Ms. Fair's diligence throughout the lengthy and complicated litigation as evidence that she could likely succeed if reinstated.

B. Barker v. Vitalus Nutrition—An Example of a Narrower Approach to this Issue Taken by the BCHRT

Hamilton-Wentworth District School Board provides a useful contrast to recent decisions by the BCHRT that, in our opinion, have taken a narrower approach to the test of undue hardship when an employee is seeking to be accommodated into a position other than their pre-disability one.

For example, in *Barker v. Vitalus Nutrition Inc.*,[42] Mr. Barker was employed as a dryer operator. In August 2010 Mr. Barker suffered a workplace injury to his shoulder and filed a WorkSafeBC claim. After a brief absence, Mr. Barker returned to work with light duties. In late 2010 Mr. Barker applied for the position of pasteurizer, and commenced this role in late January 2011.[43]

In June 2011 Mr. Barker informed Vitalus Nutrition Inc. ("VNI") that he was experiencing increased pain and commenced a medical leave. During the period of July 2011 to September 2012, Mr. Barker underwent shoulder surgery, physiotherapy, occupational rehabilitation and pain management.[44] On November 2, 2012, WorkSafeBC determined that Mr. Barker was unable to return to his pre-injury job, and would therefore commence phase 2 of the WorkSafeBC Rehabilitation Program, which involved exploring modified duties or alternate employment with VNI. If these efforts were unsuccessful, WorkSafeBC would move to phase three, which would

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40 *Ibid*, at paras 87-97.

41 *Ibid*, at para 95.

42 2016 BCHRT 88 ["*Barker*"].

43 *Ibid*, at paras 9-10.

44 *Ibid*, at para 13.

assist Mr. Barker with looking for work with an alternate employer.[45] On June 11, 2013, WorkSafeBC informed VNI that as a result of VNI's inability to accommodate Mr. Barker in a suitable modified or alternate employment on a full-time, permanent basis, WorkSafeBC would move to phase three of the Rehabilitation Program, which would include formal training, job search and/or training on the job sponsorship with another employer.[46]

On September 9, 2013, VNI informed Mr. Barker that it was closing his VNI file as a result of its discussions with WorkSafeBC and VNI's inability to accommodate Mr. Barker.[47] On January 9, 2014, WorkSafeBC closed Mr. Barker's claim based on his inability to find employment with another employer in phase three and an intervening neck injury that was not a compensable claim.[48]

By a letter dated January 22, 2014, VNI dismissed Mr. Barker from his employment, effective April 22, 2014, based on frustration of the employment contract.[49]

After Mr. Barker filed a human rights complaint, VNI brought an application to dismiss Mr. Barker's complaint on the basis that VNI had accommodated Mr. Barker's disability to the point of undue hardship, and on the basis of frustration.[50] Specifically, VNI argued that it had accommodated Mr. Barker by:

> a. granting him time off and leaves of absence when he was unable to work due to his medical condition(s);
>
> b. facilitating graduated return to work programs and modified duties in an effort to allow [Mr. Barker] to return to work;
>
> c. continually maintaining contact with [Mr. Barker] and requesting information regarding the status of his medical condition(s) and his ability to return to work;
>
> d. seeking, accepting, and relying on information provided to them and in consultation with occupational therapy and vocational rehabilitation professionals contracted by WorkSafeBC and [Mr. Barker] himself, to assess whether there were any other available positions for which [Mr. Barker] may be qualified and which would accommodate the ongoing functional limitations arising out of his medical condition(s);
>
> e. complying with all requests for information from WorkSafeBC and coordinating potential attempts by [Mr. Barker] to return to work; and
>
> f. incurring costs associated with the accommodation efforts, including increased WorkSafeBC assessment ratings resulting from the vocational rehabilitation costs for [Mr. Barker].[51]

In response, Mr. Barker argued that VNI had not established that it would have suffered hardship:

> 1. By accommodating Mr. Barker into the full or part-time positions of production planner and/or shipper/receiver;

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45 *Ibid*, at para 15.

46 *Ibid*, at para 22.

47 *Ibid*, at para 25.

48 *Ibid*, at para 27.

49 *Ibid*, at para 11.

50 *Ibid*, at para 2.

51 *Ibid*, at para 37.

> 2. By accommodating Mr. Barker into one of its clerical or administrative positions, including data entry clerk in particular after he had completed his computer training (summer 2013);
>
> 3. By bundling together administrative, production, training, safety, and sanitation tasks into a full-time position;
>
> 4. By considering displacing, adjusting and/or modifying the positions of any of the 50 employees to accommodate Mr. Barker;
>
> 5. By failing to be cognizant of the dynamic and changing nature of Mr. Barker's medical condition by failing to consider Mr. Barker's neck surgery scheduled for February 5, 2014 and the possibility of improvement in his functioning and prognosis;
>
> 6. By failing to advise Mr. Barker that his employment was in jeopardy prior to effecting its termination of employment contract; and
>
> 7. By failing to fulfill the procedural component of its duty to accommodate by terminating Mr. Barker's employment by letter.[52]

In this case, the BCHRT found that it was not reasonable to place Mr. Barker in a clerical/administrative role, since typing and writing exacerbated his pain. Further, Mr. Barker had previously been absent from a computer course for over a week due to neck pain.[53]

More questionable, VNI had a part-time and on-call shipper/receiver position available that was medically suitable for Mr. Barker. From the decision, it does not appear this position was ever expressly offered to Mr. Barker; rather, it appears it was discussed between the employer and WorkSafeBC. WorkSafeBC had determined that the position was unacceptable given that the work was casual and would be unlikely to exceed 20 hours per week. WorkSafeBC instead elected to assist Mr. Barker with vocational rehabilitation towards employment with another employer by proceeding with phase three of the Rehabilitation Program.[54]

After considering VNI's ongoing cooperation in trying to accommodate Mr. Barker as requested by WorkSafeBC, Mr. Barker's physical limitations as described in various reports, the lack of evidence to support that Mr. Barker had wanted to return to work in a part-time on-call position as opposed to commencing phase three of the Rehabilitation Program, the BCHRT found that Mr. Barker's complaint had no reasonable prospect of success. As a result, the BCHRT dismissed Mr. Barker's complaint on the basis that VNI could establish a BFOR such that there was no reasonable prospect that Mr. Barker's complaint could succeed at a hearing.[55]

While the BCHRT expressly notes that the test for accommodation to the point of undue hardship under the *Code* is not the same as the test for whether a respondent fully cooperated with the directions of WorksafeBC[56] we suggest the BCHRT does in fact merge these tests and fails to apply

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52 *Ibid*, at para 39.

53 *Ibid*, at para 49.

54 *Ibid*, at para 51.

55 *Ibid*, at para 54.

56 *Ibid*, at para 46.

a holistic analysis when assessing the accommodation process, resulting in a narrow application of the test of undue hardship.

Specifically, the BCHRT is not troubled by the employer having had an available part-time casual position that appears to match the Complainant's medical limitations, that was not offered to the Complainant. Instead, the BCHRT notes that WorkSafeBC found this position unacceptable, given that the employee required permanent accommodation, and instead elected to assist the employee with phase three rehabilitation.[57]

We suggest that, given that the part-time shipper/receiver position was not offered to him, the BCHRT's decision was questionable and demonstrates an overly narrow approach to undue hardship. The test of undue hardship is intended to set a high threshold, that maximizes the chances of a disabled employee being able to continue to work, and should not properly be satisfied by an employee proceeding with phase three benefits where a position was not even offered to him for consideration. The onus lies with the employer, and a failure to explore this option should properly be attributed to the employer.

Notably, the BCHRT quoted and purported to rely on the seminal decision of *Hydro-Quebec*, wherein the Supreme Court of Canada rejected a mechanical rigid approach to undue hardship, holding that:

> …The employer does not have a duty to change working conditions in a fundamental way, but does have a duty, if it can do so without undue hardship, to arrange the employee's workplace or duties to enable the employee to do his or her work.
>
> …rigid rules must be avoided. If a business can, without undue hardship, offer the employee a variable work schedule or lighten his or her duties – or even authorize staff transfers – to ensure that the employee can do his or her work, it must do so to accommodate the employee.[58]

However, the BCHRT went on to flatly reject, on a preliminary basis, the argument that the employer had to bundle duties to accommodate the employee or had to consider displacing or modifying the positions of other employees to facilitate his accommodation.[59]

We suggest that this is an example of exactly the kind of rigid mechanical approach the Supreme Court of Canada was cautioning about. Here, there does appear to have been a casual position that was available, with up to 20 hours of work per week, that the Complainant appears to have been medically able to complete. It is possible that some minimal bundling or re-shuffling of other available work, short of undue hardship, could have allowed this part-time casual position to become a more viable and long-term opportunity for this disabled employee, for example by increasing the hours or creating permanent .5 FTE. The employer does not appear to have done this analysis, and therefore we submit cannot properly satisfy its onus to establish that doing so would have constituted undue hardship. Instead, the BCHRT narrowly and rigidly rejected an argument that the employer was required to explore such an option (we note contrary statements of the law on this point have been made in numerous cases, including in *Hamilton-Wentworth District School Board).*

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57 *Ibid*, at paras 50-51.

58 *Hydro-Québec v. Syndicat des employées de techniques professionnelles et de bureau d'Hydro-Québec, section local 2000 (SCFP-FTQ)*, 2008 SCC 43, quoted at para 33 of Barker.

59 *Supra*, note 42 at para 44.

This case also demonstrates the importance of complainants being actively involved in the accommodation process, strategically considering available options, and being realistic about their options where they can no longer do their pre-disability position (particularly where they work for a small employer, with limited options). While we suggest the onus lay with the employer to clearly offer the employee the part-time casual position, we also note that the result might have been different had the Complainant asserted a right to this part-time casual position, despite his ongoing involvement with WorkSafeBC. Ultimately, this employee does not appear to have located other employment, so this option may have been the best available one (particularly if some minor re-bundling of duties could have enhanced the opportunity).

We suggest this case demonstrates the importance of applying a holistic analysis to the test of undue hardship, carefully assessing the accommodation process, including analysing accommodation options an employer did and did *not* fully explore. Examined holistically, we suggest the flaws in the accommodation efforts of the employer in *Barker* are apparent. They simply failed to thoughtfully or fully consider all available accommodation options open to them, as is required to satisfy the undue hardship test.

On a final point, notably, the BCHRT did not accept the employer's argument that incurring costs associated with efforts, such as increased WorkSafeBC assessment ratings resulting from vocational rehabilitation costs of the employee, is properly considered as an effort to fulfill the duty to accommodate, since these assessment ratings are required by the *Workers Compensation Act.*[60]

C. Cable v. Coast Mountain Bus Company—An Example of How Important It Is to Identify Other Viable Accommodation Options

One other recent case of interest on accommodating an employee into a position other than the pre-disability one is *Cable v. Coast Mountain Bus Company*.[61] In this case, the Complainant was employed as an Instructor for Coast Mountain Bus Company ("CMBC") in a unionized position. In June 2012, Mr. Cable commenced a medical leave due to mobility issues. In February 2014, Mr. Cable informed CMBC that he wanted to return to work. After reviewing the medical information provided by Mr. Cable, CMBC determined that Mr. Cable would not be able to perform "even the most basic functions of Instructor for the foreseeable future".[62]

In June 2014, Mr. Cable's employer arranged for and paid for Mr. Cable to undergo a functional capacity evaluation to properly assess accommodation options for Mr. Cable. However, all parties agreed that Mr. Cable's disability prevented him from returning to his pre-disability role. As a result, CMBC began to explore alternate, permanent full-time positions for Mr. Cable. In December 2014, Mr. Cable returned to work in a temporary position as a Training Instructor. In April 2015, CMBC offered Mr. Cable his choice of two permanent positions, for which he was qualified. Mr. Cable chose the Inventory Procurement Assistant, a significantly lower pay rate.[63]

However, Mr. Cable was not well-suited for his new role, and as a result of unsatisfactory performance, CMBC informed Mr. Cable that a new accommodation would need to be found once a new position became available. At several meetings, CMBC informed Mr. Cable that a failure to

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60 *Ibid*, at para 43.

61 2016 BCHRT 144 ["*Cable*"].

62 *Ibid*, at paras 9-12.

63 *Ibid*, at paras 13, 15, 18, 20.

find or qualify for a new position could result in a review of Mr. Cable's employment relationship with CMBC.[64]

In September 2015, CMBC identified a new position for Mr. Cable as a Customer Information Clerk (a further decrease in pay), which was contingent on Mr. Cable completing a six week training course.[65] Mr. Cable was successful in this new position. Nevertheless, Mr. Cable filed a human rights complaint against CMBC and Canadian Office and Professional Employees Union Local 378 (the "Union") on the basis that he was not properly accommodated, given the reduction in his wages.[66]

Notably, Mr. Cable was unionized and the Union had fully participated in the accommodation process. He was unrepresented before the BCHRT, and as described below, Mr. Cable appears to have failed to clearly identify to the BCHRT any accommodation options that were open to the employer that it did not fully explore. Also notably, he had in fact been successfully accommodated by the time of his application, just into a lower paid position which would only take effect over a gradual five year period.

In an application to dismiss Mr. Cable's complaint, CMBC and the Union argued that they acted in a reasonable and non-discriminatory manner, and that they had provided Mr. Cable with reasonable accommodation.[67]

In this case, the BCHRT found the following:

(1) Mr. Cable was offered and trained for one job, and when that didn't work, he was offered and trained for a second job which he continued to perform as of the date of the BCHRTs decision;

(2) Mr. Cable was unable to point to any other job that he could do that offered more pay;

(3) While Mr. Cable was fearful that if he was not successful in his role he would face dismissal, the Union argued that it would have acted to prevent such dismissal;

(4) CMBC would be able to establish at a hearing that it had a BFOR to justify the reduction to Mr. Cable's pay;

(5) Mr. Cable would be unable to prove that the Union discriminated against him in its participation in the accommodation process; and

(6) There was no reasonable prospect that Mr. Cable's complaint would succeed.[68]

As a result, the BCHRT dismissed Mr. Cable's complaint against both respondents. Critical to its decision was its finding that he "does not point to any other job that he could do or that offers more pay".[69]

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64 *Ibid*, at para 23.

65 *Ibid*, at para 27.

66 *Ibid*, at para 50.

67 *Ibid*, at paras 36, 45.

68 *Ibid*, at paras 51-53.

69 *Ibid*, at para 51.

This case demonstrates the importance of complainants clearly identifying accommodation options they wish an employer to consider or explore, if they wish to be successful in a complaint asserting they were not accommodated to the point of undue hardship. This case also reconfirms that, where accommodation is not possible into a position with equal or similar pay short of undue hardship, employers can successfully defend accommodation into a position with reduced pay. However, again, the critical issue is what evidence there is of accommodation options the employer failed to fully examine or consider. Put simply, a claim that the employer "did not do enough" may not be successful. A complainant is far more likely to be successful if they have actively participated in the accommodation process and have suggested further information and options for their employer to explore and consider, and have ultimately identified a viable accommodation option that the employer failed to consider or implement.

IV. Conclusion

The above cases demonstrate a number of useful principles about the threshold for undue hardship.

First, the *process* of accommodation is very important, and forms an integral part of a holistic approach to the test of accommodating to the point of undue hardship. This includes the employer's actual attempts to identify accommodation options, the efforts it made to research and explore options, and other options reasonably available to them and their associated costs. Large employers or service providers, in particular, will be expected to fully demonstrate that they appropriately satisfied these steps.

In *Dunkley #1*, the BCHRT stated that it is a reasonable expectation for an employer or service provider that does not have experience in accommodating a particular disability to "do some basic research and look to the obvious experts".[70] In *Dunkley #1*, UBC cited lack of experience or knowledge respecting the requirements of deaf professionals, which prompted the BCHRT to comment about what was really UBC's lack of common sense in seeking reliable information on which to proceed, especially where such information was so easily accessible, and to consequently criticize UBC's repeated "failure to take obvious first steps to educate themselves".[71] Interestingly, unreasonable delay in the accommodation process is also referenced in some of the above-referenced cases.

Similarly, in *Sobeys-West*, the BCHRT commented that "the question of an employer's further inquiries or possible solution (in the sense of reasonable and practical steps) is relevant to the determination of whether it is not possible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship on the employer".[72]

Second, these cases also demonstrate the importance of employees (and trade unions where applicable) being active participants in this process, and doing their own research and analysis to present reasonable accommodation options for the employer's consideration. The reality is that accommodation can be a difficult process, and complainants are more likely to succeed where they do not sit passively by critiquing suggestions made by the employer, but rather act as empowered advocates putting forward thoughtful and reasoned suggestions themselves. This requires time and effort on their part of course, and may ultimately require them accepting an accommodation option

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70 *Supra*, note 12 at para 572.

71 *Ibid*, at para 573-574.

72 *Supra*, note 15 at para 91.

that is not what they are hoping for but does reasonably appear to be the best available option, short of undue hardship.

Third, the employer's "attitude" to accommodation, will be relevant. In *Dunkley #1,* the BCHRT had the following to say about UBC's attitude:

> From about June 1 on, I have found that Dr. Dunkley was correct in her view that UBC was not making good faith efforts to reasonably accommodate her. As noted above, *UBC's approach reflects an attitude which did not fully accept its responsibility to reasonably accommodate* Dr. Dunkley. Some of the evidence, including that of Dr. Rungta (and Ms. Knowles for PHC), *suggested an attempt to prove undue hardship rather than an attempt to determine if accommodation could be proved, short of undue hardship.* [Emphasis added][73]

Fourth, at least for large employers, these cases confirm minimal or sometimes even moderate to high cost may not constitute undue hardship. This principle from *Dunkley* was reinforced in *Barker*, for a smaller employer attempting to rely on costs associated with the WorkSafeBC process. It is likely fair to say that, at least for large employers, it is difficult to establish undue hardship based on cost alone.

Fifth, *Hamilton-Wentworth District School Board, supr*a, clarifies that an employer's duty to accommodate can extend for a very long time indeed, as can its exposure to reinstatement as a remedy (and to damages for delay in reinstating).

Sixth, at least in Ontario, the OCA has indicated that they will apply a similar holistic analysis to whether an employer has properly attempted to accommodate an employee into a different (i.e. not their pre-disability) position. However, the case law continues to be contradictory in this area and there appears to be a recent trend in BC of too narrowly rejecting such complaints. We suggest the recent decision of *Hamilton-Wentworth District School Board* may be helpful to plaintiff-side practitioners in our province, and may be worth relying on to push towards a more nuanced holistic approach to this issue.

Finally, it is clear that the workers' compensation and LTD process (where applicable), while separate, may become very important in assessing the reasonableness of accommodation efforts. An employer does not comply with suggestions made in that process at their peril. For example, in *Hamilton-Wentworth District School Board, supra*, the employer having failed to meet with the LTD carrier earlier on was one of the factors the OHRT referred to negatively.

The appellate cases we refer to in this paper are quite recent, and we look forward to seeing how these important decisions are interpreted and applied in upcoming decisions by the BCHRT.

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73 *Supra*, note 12 at para 692.