INTERNATIONAL JOURNAL OF LEARNING
Volume 10, 2003
Article: LC03-0038-2003

Empowering Immigrant and Dyslexic Employees

Accessing Human Rights in the Canadian Workplace Through Legal Education

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WHAT LEARNING MEANS: Proceedings of the Learning Conference 2003

Edited by Mary Kalantzis and Bill Cope

Empowering Immigrant and Dyslexic Employees

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Abstract

This paper builds understanding about how people with a disability are adversely affected by systemic barriers in the workplace. It provides a legal education framework to empower employees to identify, and articulate their disability accommodation needs to employers. It examines two recent Canadian legal cases that highlight the employer's duty to accommodate the needs of dyslexic employees.

Economic and social success is often linked with educational achievement. Canadian citizens and newcomers to Canada rely heavily upon access to education to attain economic opportunity and prosperity. Who achieves economic success in Canadian society? Do newcomers and immigrants achieve the same levels of economic success as mainstream Canadians?

Research released in 2001 documents disturbing answers to these questions. Pendakur and Pendakur examined the earnings of visible minority and aboriginal men and women in Canada during the past twenty-five years. The income levels of the visible minority and aboriginal groups was broken down by gender and compared with comparable groups of Caucasian men and women. The Pendakur research indicates that:[1]

- visible minority women earned 10% less than their Caucasian counterparts in 1971. Over a twenty-five year period, the gap decreased. Visible minority women earned about 6% less than their Caucasian counterparts in 1996.
- visible minority men earned about 5% less than Caucasian males in 1971. The gap increased. Twenty-five years later, in 1996, visible minority men earned 15% less than Caucasian men.
- aboriginal women earned 20% less than Caucasian women in 1971. As at 1996, they fared slightly better at approximately 18% less than Caucasian women; and

[1] Pendakur, R and Pendakur, "Colour my world: has the minority – majority earnings gap changed over time?" Lecture delivered at the University of Calgary, Calgary, Alberta, February 2, 2001

International Journal of Learning, Volume 10 • www.LearningConference.Publisher-Site.com
 ISSN 1447-9494 (Print) • ISSN 1447-9540 (Online)
Paper presented at the Tenth International Literacy and Education Research Network Conference on Learning.
Institute of Education, University of London 15-18 July 2003 • www.LearningConference.com

Many organizations, including Immigrant serving agencies, offer human rights legal education workshops.[3] This type of awareness building is vital to assist prospective employees to understand human rights law in relation to the workplace. Education of this nature must demonstrate the delicate balance between Canadian society's expectation that we can exercise rights and freedoms, such as religious and political freedoms, while being protected from discrimination on protected grounds.

Canadian "rights" are not absolute. It is important that workshop objectives build participant awareness about the following concepts:

a) *bona fide* occupational requirements;
b) protected grounds and how they are defined;
c) appropriate interview questions;
d) objective and subjective standards of "reasonableness" when defining "harassment" or "discrimination";
e) the "reasonable limitations" defence that government agencies rely upon to exempt discriminatory conduct from legal sanction;
f) distinctions between criminal behaviour, tort and discriminatory conduct. For example, a sexual assault can also be a basis for a claim of sexual harassment and a tort action. Whereas, sexual harassment based on allegations of a poisonous work atmosphere, may not include the elements needed to form the basis for the criminal action of sexual assault.
g) the duty of employers to accommodate employee needs;
h) the legal duty of all employees, particularly people in positions of authority, to model appropriate behaviour;
i) power imbalance and abuse of authority;
j) the legal duty of employees to make their accommodation needs relating to medical disability and religious observances, known to the employer;
k) the distinction between the moral duty and the legal duty of employees to come forward with their concerns or observations relating to discriminatory conduct;
l) employer obligations and employee rights to ensure that due process and natural justice occur in addressing workplace concerns or formal complaints;
m) dispute or complaint resolution options and resources such as: employment assistance programs; the Alberta Human Rights and Citizenship Commission complaint process; grievance and arbitration processes that exist pursuant to collective agreements; corporate ombuds services; and the courts;
n) the role of the lawyer and the concept of solicitor and client privilege may be foreign to many people, including immigrants. The unique protection afforded by this common law principle must be emphasized so that people, again immigrants in particular, will feel safe in speaking with someone about their concerns; and
o) the role of the police and victim services in assisting victims of allegedly criminal conduct.

These concepts are key to understanding how people are protected, and at the same time, obligated. For some individuals, these concepts may be difficult to

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[3] Based on oral conversations in 2002 with Executive Directors: Fairiborz Birjandian, Calgary Catholic Immigrant Services Society, Hadassah Ksienski, Calgary Immigrant Aid Society, and Edna Sutherland, Calgary Catholic Womens Association.

embrace due to the person's cultural values or political experience in their country of origin. For example, in some Canadian households or foreign countries, police and lawyers are regarded as untrustworthy. In other countries, an employee would find it difficult or culturally unacceptable to embarrass a supervisor by refusing an advance or reporting the supervisor's unwelcome or inappropriate conduct.

All employees, including immigrant employees, must be prepared with human rights legal education information before they venture into the workplace. Human rights principles evolve and fluctuate with the passage of time. People need this information at all stages of the employment cycle and on a continuing basis during their employment.

This information can be helpful for the individual engaged in a job search. Knowing what one is required by law, and not required by law, to disclose can assist the person to prepare an appropriate resume or to respond to inappropriate interview questions. This information is even more important to an immigrant who may incorrectly assume that the employer's questions are appropriate or authorized by law.

Once on the job, human rights legal education information is critical so that the employee can meet employer expectations without sacrificing personal integrity. All employees, and particularly immigrants, must know how to apply Canadian standards to distinguish discriminatory conduct from non-discriminatory or inappropriate conduct. They must also know when, and how, to speak out against perceived discrimination that might occur in the Canadian workplace.

Feelings of vulnerability, uncertainty and shame often preclude people from informing employers about their workplace concerns.[4] Instead, they endure a poisonous work atmosphere; internalize the damaging attitudes that are projected toward them; and suffer detrimental physical and emotional consequences.[5] Due to their legal status, immigrants may be less likely to inform their employers or people external to the workplace (such as police, a community member, or a human rights tribunal) about the inappropriate conduct of co-workers or supervisors.

2) Build awareness about language disabilities related to dyslexia

Despite advances in human rights law and increased public awareness, employers and academics continue to exhibit a lack of knowledge about the extent of their legal duties under human rights law; and in particular, the legal duty to accommodate a person with a disability. Alberta human rights complaints related

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[4] Based on the author's professional experience with over 200 people who represented a highly diverse population, including immigrants and aboriginal people, and who alleged discrimination in "white collar" workplaces located in Canadian rural and urban centres between 1994-2000.

[5] Based on the author's experience with the group of employees referred to at footnote 7. All employees in this group expressed some form of emotional and physical upset caused by the perceived discriminatory conduct. Those expressions ranged from statements about suicidal thoughts to expressing feelings of hostility, anxiety, shame, embarrassment and self-loathing. Feelings of isolation and multiple barriers were expressed more frequently by workers who self identified as from ethno-specific cultural groups than from those workers who did not self identify.

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These two cases are summarized and discussed in the following section of this paper.

Case #1: The Justice Institute of British Columbia v The Attorney General of British Columbia, the British Columbia Police Commission and Franck Furlan[11]

Mr. Furlan was hired as a police recruit. He was required to participate in academic training delivered by the Justice Institute. The training requirements stipulated that if a student failed three assessments, the student's training would be suspended. Mr. Furlan failed his three assessments. He was suspended, returned to the Police Department, and resigned.

Mr. Furlan sought a review of the decision to suspend him from the academic training program. The suspension decision was upheld and automatically referred to a "Committee of Variance" for its consideration.

The Committee of Variance conducted a hearing. A neuropsychological assessment was presented. The neuropsychological assessment indicated that Mr. Furlan suffered from a learning disability in the area of language. The disability affected his ability to meet the standards for the training program. Had Mr. Furlan been able to write his exams in a private room, with additional time, he would be able to successfully complete the required training. Evidence was given that Mr. Furlan became aware of his disability AFTER he was suspended.

The Committee concluded that Mr. Furlan's learning disability needs should have been accommodated. It considered the relevant factors (cost, availability of outside sources of funding, health and safety requirements) and concluded that the Institute's accommodation of Mr. Furlan's disability would not cause undue hardship on the Institute. The Committee directed the reversal of the decision to terminate Mr. Furlan's training. The Committee also indicated that the onus would fall on the Institute to address health and safety risks when designing the required accommodation.

The Justice Institute sought judicial review on three grounds: 1) jurisdictional errors; 2) errors in applying human rights law, and 3) a denial of natural justice. For the purposes of this paper, only the second ground is relevant.

Mr. Justice Sigurdson reviewed the transcripts from the hearings and the law. He noted that a person requiring accommodation is expected to disclose the disability and the need for accommodation. He also concluded that based on the results of the first of the three assessments, and information known to a Staff Sergeant, that the Police Department, and the Institute, had notice of a possible disability. The Committee accepted that Mr. Furlan did not acquire such knowledge until after he resigned.

Mr. Justice Sigurdson accepted the Committee's conclusion that Mr. Furlan's learning disability in the area of language restricted his ability to pass the training required to become a police officer. He concluded that based on the evidence before it, that it was not patently unreasonable for the Committee to conclude that:

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[11] British Columbia Supreme Court, June 30, 1999, Docket No. A982348, Vancouver Registry, as downloaded in twenty two pages from the British Columbia Supreme Court web site at: http://www.courts.gov.bc.ca

> ...without a chance to compete fairly on the examinations, that he [Mr. Furlan] is precluded from employment in the law enforcement field. We are not satisfied that the ...examinations attempted by Mr. Furlan were intended to measure his ability to read or complete tests under specific time constraints. It would be unfair at this point, to prevent whole classes of individuals such as Mr. Furlan from participating in the field of law enforcement simply because the testing instrument...appears to be a barrier to his competencies being evaluated in relations (*sic*) to the average recruit constable.

Mr. Justice Sigurdson agreed that the case was an example of adverse effect discrimination and not a form of direct discrimination that would be justifiable due to a *bona fide* occupational requirement. The Court held that the Committee's decision would not be reversed. Mr. Furlan was entitled to reinstatement in the training program.

This case demonstrates that courts will require accommodation when there is an adverse (indirect) discriminatory impact upon a person due to the application of an apparently neutral rule (i.e. the time permitted for the test). The court's comments imply that an employer may have a duty to inquire into the reasons for an employee's failure on a work related examination. Certainly, if the learning institution had done so, Mr. Furlan might have been accommodated more readily.

Had accommodation occurred voluntarily, two years of financial and emotional costs related to the proceedings would have been avoided. In addition to preserving resources, society would gain the opportunity for a person with a disability to be a contributing member of society in the occupation of his choice, policing. Certainly, to be effective social change agents, municipal police departments are in need of a wide range of competent and dedicated people that mirror society.[12]

Furlan illustrates an aspect of human rights law and accommodation that is specific to the wording of the *British Columbia Human Rights Code*. Had the Committee been persuaded that the rule *"a candidate must produce X within a specific time"* was a *bona fide* occupational requirement for policing, then the issue of whether accommodation is required, or achievable without undue hardship, would not arise. The *bona fide* occupational requirement would serve as a complete defence to the direct discriminatory impact of the rule.

Case #2: Nancy Green v. Canadian Human Rights Commission, Public Service Commission of Canada, Treasury Board, and Human Resources Development Canada[13]

The Federal Government of Canada hired Nancy Green in 1975. Her career progressed well with the Federal Government. Over a twelve-year period, she progressed to an Acting Director, PM-5 level position.

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[12] Based on the author's professional discussions with police chiefs and cultural diversity policing representatives from four major forces in two Canadian jurisdictions over a period of several years; and based on a mid-1999 British Columbia review of a diversity survey summary report focusing on issues related to women in policing.

[13] Green v Canadian Human Rights Public Service Commission of Canada, Treasury Board, and Human Resources Development Canada, 1998 T.D. 6/98 C.H.R.D. No. 5 (QL); downloaded 21 pages from the Ontario Human Rights Commission website at: http://www.chrt-tcdp-.gc.ca/decisions/docs/green-e.htm

Ms. Green applied for a PM-6 level position as Manager, of the Employment Equity Consulting Service for the Department of Immigration. A major function of this position was to assist the department to increase its representation of women, aboriginal people, visibility minority members, and people with disabilities.

Ms. Green competed for the PM-6 position. After interviews and exercises, she stood first on knowledge, ability and personal suitability. She needed to demonstrate that she had the capacity to learn French within a pre-determined time i.e. 1860 hours with discretion for extension of up to six weeks. This specified period of time was the "neutral rule or policy" that the employer had established to ensure that the Government's cost of delivering language training to its employees was cost effective.

Ms. Green's test results indicated her potential to learn a foreign language was below that permitted by the policy. Ms. Green received a "negative" prognosis. As a result, she was not eligible to participate in the full time language program for federal government employees. Even so, in January 1998, she was appointed as the Acting manager and worked in the position one year.

During her year as Acting Manager, Ms. Green turned to her employer for assistance. She learned that she might have a learning disability. Ms. Green was tested for a learning disability and diagnosed as an individual with dyslexia affecting auditory processing functioning and sequencing skills.

The Department took steps to have the government accommodate her needs. The Department attempted to gain entry for her into the language-training program. The Public Service Commission denied the Department's request and stood firm on the application of its "neutral policy" with respect to Ms. Green's "low aptitude".

Instead of accommodating the employee by looking at the appropriateness of its rules applicable to the testing system, the employer allotted resources for French tutoring and part time evening classes. Ms. Green performed well. Ms. Green was advised to learn more French on her own and apply for another interview to assess her aptitude. In December 1998, Ms. Green was asked to resign from the Acting position. She found employment at the PM-5 level.

Ms. Green filed an internal appeal objecting to the decision to terminate her Acting status. Her internal appeal was upheld. It was recommended that a new internal competition occur so that Ms. Green could compete. The internal competition was not held; a surplus employee was appointed to the position. Ms. Green applied, without success, for more senior positions; she was not successful.

Ms. Green filed a complaint with the Canadian Human Rights Commission. She named the prohibited ground of discrimination as disability: dyslexia in auditory processing. The Treasury Board arranged further tests and assessments of Ms. Green's aptitude. The expert retained concluded that Ms. Green would be a successful second language student within the allotted time.

The expert took exception to the language testing process used by the government because that process defines aptitude narrowly within the domain of auditory memory sequencing. The expert opined that the definition of aptitude used in the testing process was *"very limited and hence restrictive and discriminatory to*

people with auditory processing disorders."[14] The expert noted that people with auditory processing disorders are often very effective in situations in which time is not a critical element[15] The expert made a series of recommendations including that the language training proceed; the government did not act on that recommendation.

The Human Rights Tribunal heard this case and concluded that Ms. Green satisfied the three part test required to establish a *prima facie* case[16]: 1) she was qualified for the PM-6 position; 2) she was not hired; and 3) someone no better qualified than her, but lacking the distinguishing feature that is the subject of the complaint i.e. the learning disability, obtained the position.

The Tribunal held that the Treasury Board policy that adopted the standardized test to assess aptitude for second language learning, had an adverse discriminatory effect upon persons with a learning disability, even though, on its face, it was neutral and meant to apply to all employees equally. It was therefore impossible for a person with a learning disability to compete successfully.

Having made her *prima face* case, the onus then shifted to the government to demonstrate that it could not accommodate her needs short of undue hardship. Various accommodation options were considered, including an exclusion from the aptitude testing process on compassionate grounds; none were acceptable.

It is ironic that this "policy" was adhered to by the Public Service Commission on the basis that *"as a strong proponent of human rights"*, the Commission would be seen to be acting in an unfair manner if it granted an employee with a recently identified disability a second chance. This thinking was repeated by a representative of the HRDC who commented that *"the HRDC has an exemplary record when it comes to employment equity, particularly in the area of disability"* but *"I don't think the test itself constituted a barrier; the disability is the barrier"*.[17]

The Tribunal noted this attitudinal shortcoming when it stated: [18]

> ...the right to have a disability accommodated to the point of under hardship by her employer, so that she would be on a "level playing field" ...were part of the policies of the Public Service Commission. It would appear...that its attitudes and practices created a situation where it could not implement its own human rights and employment equity policies.

The Tribunal concluded that there was an almost "total lack of accommodation".[19] The Tribunal noted that the employees involved, while "having good intentions, had little or no effective training in how to deal with the theory of accommodation"[20]. The Tribunal observed that employees did not have authority to

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[14] Green v Canadian Human Rights Public Service Commission of Canada, Treasury Board, and Human Resources Development Canada, supra at note 170 at 11 quoting case transcript at 686

[15] Ibid at 12 quoting case transcript at 680-681

[16] Folch v Canadian Airlines International (1992) 17 C.H.R.R. D/261 (CHRT); Shakes v Rex Pak Ltd. (1981) 3 C.H.R.R. D/1001; Grover v National Research Council of Canada, 92 C.L.L.C./7046 (CHRT)

[17] Green v Canadian Human Rights Public Service Commission of Canada, Treasury Board, and Human Resources Development Canada, supra at note 172 at 22

[18] Ibid at 21

[19] Ibid at 19

[20] Ibid at 20

make recommendations or decisions to remedy the situation; no policy existed with respect to a "negative performance indicator"; and poor communications, case continuity and responsibility problems existed. Rather than rectify these shortcomings, the employer did nothing to accommodate the employee.

The Tribunal commented that there appeared to be a lack of understanding about the nature of learning disabilities and the effective action needed to accommodate them. The employee's complaint was meritorious and the employer pursued practices that tended to deprive her, and other individuals like her, of employment opportunities because of a learning disability. The employer's practices and procedures were a form of systemic discrimination and the employer had not met its duty to accommodate despite its self-portrayal as an employer that espoused "laudable theories and policies of non-discrimination."[21] The Tribunal observed, "if the practices and procedures had been based on these policies...this complaint would never have been made".[22]

The Tribunal ordered that the government departments involved must learn how to effectively implement their own policies. The departments were ordered to:

1. Create, within six months of the Tribunal's decision, an education and training program for all employees concerning mechanisms to effect the accommodation of persons with learning disabilities. These training programs were to be used to train all employees within eighteen months.
2. develop a policy to review cases if a person with a disability does not meet the parameters of any other policy.
3. review its policies regarding access to language training to ensure that people with disabilities are accommodated; ensure policies form part of all employee training.
4. devise an alternate method to test the aptitude of a person with a learning disability. The method must take into account the nature of the disability and the compensatory strategies used by the person.
5. immediately appoint Ms. Green to a PM-6 level position or, failing the availability of such a position, upgrade her salary to that level.
6. pay her $69,895.25 wages lost due to the discriminatory practice plus $825.66 per month while in litigation;
7. pay a lump sum to compensate for income tax implications;
8. adjust her pension to reflect her PM-6 salary;
9. admit her to the full time government sponsored French language training program and accommodate her needs while in training;
10. remove from her personnel file all records related to her "negative prognosis". (This Order was modified on appeal to require confidentiality, rather than destruction, of these records).[23]
11. arrange management training appropriate so that she may advance in her career.
12. appoint Ms. Green to an EX-1 Manager's position after she completes her management training,

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[21] Ibid at 24

[22] Ibid at 24

[23] The Attorney General of Canada v Nancy Green and Canadian Human Rights Commission, T-1529-98 as downloaded from the Federal Court of Canada web site at: http://www.fja.gc.ca/en/cf/2000/vol4/html/2000fca26617.p.enhtml at 4

13. pay her $5,000 as special compensation for her frustration and loss of respect that occurred during her ten years of dealing with systemic discrimination.
14. pay her compound interest. (on appeal this amount was reduced to simple interest)[24]
15. pay her $4,057.22 for legal advice. (On appeal, this award was struck because the *Canadian Human Rights Act*[25] does not mention such an award)[26]

The Tribunal's decision was appealed to the Federal Court of Canada. Mr. Justice Lemieux upheld the tribunal's decision as a case of adverse effect discrimination where the relevant rule is not struck down but instead the accommodation of disability is paramount.[27] The Court noted that it was inappropriate of the employer to treat Ms. Green as "mainstream" once the learning disability was identified.

Conclusion

It is evident from the *Furlan* and *Green* cases that despite advances in human rights law, educational institutions and employers need to improve their understanding of: a) the various types of disabilities (particularly invisible disabilities such as dyslexia); b) the disproportionate impact of disabilities upon specific groups within society; c) the stereotypes that surround people with disabilities; and d) and how to effectively accommodate the needs of a person with a learning disability.

The *Furlan* and *Green* cases highlight the personal costs that are incurred when employers and learning institutions fail to fulfil their legal obligations. The cost of this failure is well illustrated by evidence given by a government witness in the *Green* case: "*Nancy Green's case was not unique...each year, since 1981, the witness had seen, on average, some 280 "otherwise qualified" candidates whose appointments were denied for the same reason as in her case.*"[28] The witness spoke of efforts made at government levels to make the Treasury Board aware of the negative impacts and perceived inequities of these access policies. Although complaints have diminished over the years, and departments have either accepted the policy or found practical means to cope with the rules, none of these activities provided relief to Nancy Green. [29]

It is a loss to the employer, the individuals involved, and the Canadian taxpayer when two hundred and eight people per year are denied equal opportunity for advancement due to the adverse impact of government policy. The cost to human dignity, productivity and the advancement of the right of people with disabilities is immeasurable in comparison to the savings, if any, that accrued as a result of the "time limit" imposed by the government's discriminatory policy.

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[24] Ibid at 5
[25] Supra at note 154
[26] The Attorney General of Canada v Nancy Green and Canadian Human Rights Commission, Supra at note 181 at 5
[27] Ibid at 2
[28] Supra at 181 at 11
[29] Ibid at 11

Green and *Furlan* illustrate that although an employer or educational institution may perceive that it is meeting its duty to accommodate, courts will look carefully at the facts, and when appropriate, impose a standard that requires employers to identify more creative solutions to provide relief to adversely affected individuals. This standard requires more effort on the part of employers and awareness training of people in positions of authority.

The *Green* case also illustrates that although an employer may see itself as a champion of human rights in the workplace, courts will not accept mere words or written policies as satisfaction of the employer's duty to accommodate. *Green* and *Furlan* make it clear that in order to be a true "champion" of human rights, an employer or academic institution must demonstrate understanding about: the nature of a disability; its impact upon a person in light of any "neutral" policies; and its legal duties to accommodate the employee or student. *Green* demonstrates that employers cannot allow bureaucratic structures, poor communication, lack of clarity regarding defined areas of responsibility, and inflexible and inadequate "policy" to rationalize its inability to address inequities in the workplace.

Employers must be proactive and assess their attitudes, work environments, policies and practices to determine their impact on employees. In the case of academic institutions, this principles applies in relation to students with disabilities. *Furlan* and *Green* speak volumes to this legal and social obligation. All employers and academic institutions, regardless of the number of employees, should have policies in place to address workplace issues such as parental leave, human rights concerns, accommodation requirements, and complaint resolution. Once in place, it is far more likely that some of the economic disparities referred to earlier in this paper are one step closer to being addressed on a systemic level.

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This journal and individual papers published at http://LearningConference.Publisher-Site.com/
a series imprint of theUniversityPress.com

First published in Australia in 2004 by Common Ground Publishing Pty Ltd at
http://LearningConference.Publisher-Site.com/

ISSN 1447-9494 (Print)
ISSN 1447-9540 (Online)

The International Journal of Learning is a peer-refereed journal which is published annually. Full papers submitted for publication are refereed by the Associate Editors through an anonymous referee process.

Papers presented at the Tenth International Literacy and Education Research Network Conference on Learning.
Institute of Education, University of London 15-18 July 2003