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The Business and Legal Case to Accommodate Workplace Learning Needs¹

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Introduction

This paper examines some of the challenges associated with ensuring that workplace learning opportunities are extended to employees who are from one of the designated employment equity groups. It illustrates the critical role that workplace learning plays in creating equal opportunity for employees from these groups. Under Canadian law, employers have a legal and socio-economic duty to ensure that the workplace learning opportunities are fostered for all employees and in particular, employees from designated employment equity groups. This paper highlights, through two case studies, the judicial system's response to employers who failed to recognise the importance of accommodating the workplace learning needs of a person with a disability.

The paper begins with a conceptual overview of what constitutes workplace learning. It includes an overview of principles of learning in the workplace and characteristics associated with a workplace learning environment. This overview is followed by a discussion of organisational barriers that may impede workplace learning for employees from diverse backgrounds. The balance of the paper presents two legal case studies that highlight the judicial system's response to employee workplace learning accommodation needs that were not addressed by employers.

Globalisation and significant changes in the demographic make-up of the Canadian workforce have created an urgency for diversity in many organisations. Organisations that intend to be successful in the future will need to become genuinely multicultural; that is, equitable and accessible at all levels of the organisation.² The "successful" corporation will demonstrate its corporate commitment to a multicultural perspective by reflecting that commitment in the corporate mission statement. In order for a company to be recognised as one of "The Best Companies for Asians, Blacks, and Hispanics," diversity must be valued and demonstrated by the number of people from minorities employed at board member, top paid employee, manager, and total workforce levels.³

There are a number of benefits to adopting diversity initiatives within organisations. They include: full realisation of individual and organisational potential; improved creativity in solving problems⁴; a competitive edge

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² Minor, A, "From a University to a Poly-Versity: Organizations in Transition to Anti-Racism", *Perspectives on Racism and the Human Services Sector: A Case for Change*, 196 at 196, Carl E. James ed., 1996

³ Colvin, Geoffrey, "The 50 best companies for Asians, Blacks, and Hispanics", in *Fortune*, Volume 140, July 19, 1999, No. 2, 52 at 58

⁴ London, A. and Richard L. Daft, "Managing Employee Diversity Supplement", in *Management* (2d ed.), at 2, Richard L. Daft ed., 1991

and improved interaction with clients;⁵ and, increased staff morale, better employee retention, and decreased interpersonal conflict⁶

Diversity initiatives strive to create change in organisations. "*Multicultural organisational change is a process of dismantling visible and invisible barriers to the full social participation of non-discriminant groups, and establishing an organisation responsive and responsible to that larger community.*"⁷ The goal of diversity initiatives should be the integration, not the assimilation, of employees⁸. Successful diversity management will be that which empowers and enables all employees.⁹

The mere presence of a diverse workforce is not a guarantee that the organisation will be successful. Increasingly, it is becoming important for leaders in organisations to create a positive learning environment in which people share their knowledge and skills so that they can strive to achieve individual success and success in meeting larger organisational goals. Workplace learning is about creating an learning environment that is conducive to employees and managers taking the risks associated with new ideas. For example:

successful companies encourage employee learning through training programs and, even more so, by enabling and facilitating the exchange of knowledge and ideas and by empowering employees to try new ideas to help improve their own and the company's performance.¹⁰

Recruitment of individuals from populations such as visible minorities, women, aboriginal peoples, and persons with disabilities is an important aspect of diversity initiatives in organisations. In order to maximise the potential that members of these groups possess and, to ensure that the company benefits from the contributions of these individuals, workplace learning opportunities need to be extended to these employees. Hopefully, involvement in these activities will enable members of the designated employment equity groups to achieve their career and personal goals while enabling the organisation to fulfil its mission.

Workplace Learning: An Overview

Organisations are paying more attention to the importance of workplace learning. Formal corporate training initiatives increased forty five per cent between 1983 and 1991.¹¹ According to some estimates, enrolment in workplace learning programs exceeds the total enrolment in America's 3,300 universities and colleges.¹² Workplace learning is a major economic enterprise.

Undoubtedly, in an era of globalisation and increasing competition, the possession and utilisation of knowledge by employees is recognised as a primary competitive advantage. Successful companies are those that

⁵ Santora, Joyce.E., "Kinney Shoe Steps into Diversity", *Personnel Journal*, Volume 70, Sep 1991, No. 9, at 72-77; Daft, R. L., *supra* at 2; and, Walker, Barbara A. & William C. Hanson, "Valuing Differences at Digital Equipment Corporation", in *Diversity in the Workplace: Human Resources Initiatives*, 119 at 120, Susan E. Jackson ed., 1992

⁶ Daft, R. L., *supra* at 2; Walker & Hanson, *supra* at 2, and, MacLeod, J. M., "Valuing Diversity in Human Service Organizations", in *Professional Social Service Delivery in a Multicultural World*, 155 at 161, Gwat-Yong Lie and David Este eds., 1998

⁷ Thomas, Barb, *Multiculturalism at Work: A Guide to Organizational Change*, at 30, 1987

⁸ MacLeod, J. M., *supra* at 161

⁹ Thomas, B., *supra* at 30

¹⁰ Tobin, Daniel R., *The Knowledge Enabled Organization: Moving From "Training" to "Learning" to Meet Business Goals*, at 2, 1998

¹¹ Carnevale, Anthony P. and Ellen S. Carnevale, "Growth Patterns in Workplace Training", in *Training and Development*, Volume 48, May 1994, No. 5, S22 at 22

¹² *Id.* at 22

consistently create new knowledge, disseminate it widely throughout the organisation, and quickly embody it in new technologies and products.¹³

Managers at all levels of the organisation need to:¹⁴

- Take responsibility for their employees' learning activities, and their own;
- Provide continuous learning opportunities; and
- Reinforce learning as employees try out new skills

What is Workplace Learning?

Workplace learning encompasses training and human resource development.¹⁵ At times, the terms training, human resource development, and workplace learning are used inter-changeably. What, then, is workplace learning? Workplace learning involves employees learning new skills designed to help them keep their organisations competitive in an increasingly global economic environment.¹⁶

Workplace learning is also concerned about future work competencies:¹⁷

It is about investment in the general capabilities of employees, as well as the specific and technical. And it is about the utilisation of their knowledge and capabilities wherever they might be needed in place and time.

There are three primary purposes related to workplace learning:¹⁸

1. Improving Performance for the Benefit of the Organisation
 - of self as worker
 - of the team or work community
 - of the enterprise
2. Improving Learning for the Benefit of the Learner
 - for self

¹³ Tobin, D., *supra* at 21

¹⁴ *Id.* at 8

¹⁵ Watkins, Karen, "Workplace Learning Changing Times, Changing Practices", in *Workplace Learning New Directions for Adult and Continuing Learning* No. 68, 3 at 3, W. Franklin Spikes ed., 1995

¹⁶ Spikes, W. Franklin, "Editor's Notes", in *Workplace Learning: New Directions for Adult and Continuing Education*, No. 68, 1 at 1, W. Franklin Spikes ed., 1995

¹⁷ Boud, David & John Garrick, "Understandings of Workplace Learning", in *Understanding Learning at Work*, 1 at 5, David Boud & John Garrick eds., 1999

¹⁸ *Id.* at 6

- for one's personal growth and life
3. Improving Learning as a Social Investment
- for citizenship (including the environment)
 - for team or work community (including learning organisations); and,
 - for future enterprises.

In describing the difference between learning and training, it is asserted that learning focuses on the employee--the person doing the learning--whereas training focuses on the trainer.¹⁹ In organisations where workplace learning is valued, only the employee and the employee's manager determine what is to be learned to improve individual and organisational performance.²⁰

An alternate view is that it is necessary to differentiate between training, education and learning when describing workplace learning. Learning is described as:²¹

Learning is the way in which individuals or groups acquire, interpret, recognise, change or assimilate a related cluster of information, skills and feelings. . . . Learning takes place through daily interaction and experience within the organization. . . [Learning] is often self-directed and self-monitored and includes informal modes such as coaching, mentoring and working groups focused around a specific task.

Principles of Workplace Learning

A number of different principles of workplace learning exist. Through adherence to these principles, organisations can create work environments in which learning can be maximised.²² The following are examples of principles that relate to workplace learning:²³

- Employees can participate freely and fully in collaborative problem-solving through dialogue [and] shared leadership roles, [and] engage in continual re-negotiation of activities and priorities in which competing claims may be put forward, assessed, and deliberated;
- Employees can share progressively in decision-making;
- Employees are encouraged to take different perspectives, attitudes, and roles vis-à-vis their work;

¹⁹ Tobin, D., *supra* at 153

²⁰ *Id.*, at 153

²¹ Marsick, Victoria J., "Introduction", in *Learning in the Workplace*, 1 at 4, Victoria J. Marsick ed., 1987

²² Watkins, K., *supra* at 9; Marsick, Victoria J., "Applications to Practice", in *Learning in the Workplace*, 199 at 200, Victoria J. Marsick ed., 1987

²³ *Id.* at 200

- Employees can ask questions, receive accurate and considerate feedback, and reflect on themselves;
- Employees can think critically and reflectively; can question what is taken for granted including organisational norms, established ways of thinking, and belief systems; and can engage in problem-setting and re-framing;
- Employees can experiment without suffering serious consequences;
- Employees can make inferences from daily activities that enable them to learn how to learn and to solve long-range problems;
- A climate of mutual respect for one another's self-worth is established where employees can be sensitive to one another's feelings and free from coercion;
- Employees are free to pursue self-directed learning and are encouraged to become increasingly empowered vis-à-vis their work; and,
- Learning through mentoring, coaching, and small group work is fostered.

The following section of the paper describes some of the challenges that visible minorities, women, aboriginal people, and people with disabilities may encounter in relation to workplace learning. It is incumbent on managers and other senior organisational personnel to be aware of the systemic issues that create barriers to workplace learning opportunities.

Systemic Workplace Learning Barriers

There may be a host of systemic barriers within the organisation that hinder workplace learning opportunities for members of the designated employment equity groups. When organisations give a training department responsibility for learning within an organisation, managers at all levels abdicate their own responsibility for ensuring that employees gain the knowledge and develop the skills they need to succeed.²⁴ There is recognition that managers need to take on responsibility for their employees' learning activities.

In the case of women, visible minorities, persons with disabilities, and aboriginal people, it is critical that these individuals are treated in an equitable manner in relation to workplace learning. The hiring of individuals from these groups represents just the initial step in relation to employment equity. In describing the plight of women and minorities in organisations, it is stated that:²⁵

Women and minorities typically are excluded from on-the-job training, formal training, and employer-supported study because they are disproportionately hired into low skill, dead-end jobs that do not require additional training. Thus, they are stuck. Further, women and minorities seldom have mentors to shepherd them.

²⁴ Tobin, D., *supra* at 7

²⁵ Henderson, George, *Cultural Diversity in the Workplace: Issues and Strategies*, at 68, 1994

As a consequence of exclusion and a lack of mentors, it is highly likely that the potential of these individuals is wasted. Higher turnover costs are likely to be incurred when organisations lose these employees due to disillusionment because of lack of equitable opportunity or recruitment by other companies.

The climate within an organisation may also serve as a major barrier hindering learning opportunities for employees from diverse backgrounds. For example, ongoing learning within the organisation may not be important or regarded as a priority. This results in an organisational climate where managers do not facilitate and encourage learning and the open sharing of knowledge and ideas. Once again, the career aspirations of employees who are women, aboriginal, visible minorities, or persons with disabilities may be quite limited.

An important aspect of workplace learning environments is the availability of mentors. Mentors are regarded as important because they serve as role models. In addition, mentors are in the position to assist employees from the equity groups in a variety of ways such as 1) helping them to gain an enhanced understanding of the organization; 2) informing them of job opportunities within the company; 3) serving as a sympathetic ear, simply listening to employees as they reflect upon their workplace experience.

With the growing diversity of the Canadian workforce, employers must recognize the importance of creating workplace environments that facilitate the learning needs of all employees. Utilizing two legal case studies, the balance of the paper highlights the judicial system's response in two cases where an employee's workplace learning accommodation needs were not addressed by their employers.

Despite advances in human rights law, employers and academics continue to exhibit a lack of knowledge about the extent of their legal duty to accommodate a person with a learning disability such as a disability caused by auditory dyslexia.

There are twice as many identified dyslexics in English speaking cultures as in countries with less complex languages.²⁶ Between five to fifteen percent of Americans have some degree of dyslexia.²⁷ Due to the complexity of the English language, English-speaking workforces are far more likely to require accommodation due to dyslexia than French or Italian speaking workforces.

Employers need to be aware of the nature of this learning disability that they can be proactive in developing policies to effectively address the needs of employees. This portion of the paper examines:

1. *The Canadian Charter of Rights and Freedoms*;
2. federal and provincial human rights legislation;
3. where does accommodation end --the tests for "undue hardship"; and
4. two cases that illustrate the legal duty required of a learning institution and government employer to accommodate the needs of a person with a learning disability due to dyslexia: *The Justice Institute of British Columbia v The Attorney General of British Columbia, the British Columbia Police Commission and Franck Furlan* (1999) and *Nancy Green v. Canadian Human Rights Commission, Public Service Commission of Canada, Treasury Board, and Human Resources Development Canada* (2000).

²⁶ Recer, Paul, "Dyslexia Difficult for English Speaking People to Overcome", The Associated Press, Washington, as published in The Globe & Mail, February 15, 2001

²⁷ *Ibid* at paragraph 8

a) *The Canadian Charter of Rights and Freedoms – Government Obligations*

The *Canadian Charter of Rights and Freedoms* is a pivotal piece of Canadian constitutional law that enshrines citizen rights to equality and multicultural identity. It applies to the actions of government or government agencies. Section 15 of the *Charter* sets out enumerated or “protected” grounds. The list of grounds in s.15 is “not exclusive”²⁸; courts will add to the list as necessary to achieve equity.

An aggrieved citizen bears the onus of proving, on the balance of probabilities, that the equality provisions of s.15 apply to that person and that the law in question denies that person a benefit or creates a disadvantage that does not apply to other people.²⁹ About seventy percent of the cases that come forward on this basis fail due to the person’s inability to establish that a breach of s.15 occurred.³⁰

Laws that are discriminatory because they do not “measure up”, may be valid if the impact of the discriminatory law is considered, under section 1, “a reasonable exception in a free and democratic society”. In the case of direct discrimination, the onus shifts to the government to demonstrate, on the balance of probabilities, that the infringement of equality rights is reasonable.³¹ The test to be met by government should be a “strict and onerous one; but not impossible”.³² If a breach of a s. 15 protected equality right is proved, the offending law is rarely saved under s.1.³³

b) *Federal and Provincial Human Rights Legislation*

Federal employers are required to comply with the *Canadian Human Rights Act*.³⁴ Provincial employers are required to comply with provincial human rights law and not discriminate. Discriminatory conduct takes one of two forms: a) direct; or b) indirect (also known as “adverse”). Direct discrimination occurs when an employer adopts a practice or rule that, on its face, discriminates on a prohibited ground.³⁵ For example, “no Catholics or no women or no blacks employed here”.³⁶ The Supreme Court of Canada recognized that:

Direct discrimination occurs when an employer adopts a practice or rule, which on its face discriminates on a prohibited ground.³⁷

²⁸ *Andrews v Law Society of British Columbia*, supra note 38 at 308

²⁹ *Miron v Trudel*, [1995] 2 S.C.R. 418 at 485-486

³⁰ Martin, Sheilah, “Balancing Individual Rights to Equality and Social Goals”, *Canadian Bar Review*, Volume 80, March-June 2001, Nos. 1 and 2, 299 at 306

³¹ *Ontario Human Rights Commission v Etobicoke*, [1982] 1 S.C.R. 202 at 208; *Ontario Human Rights Commission and O’Malley v. Simpson-Sears*, [1985] 2 S.C.R. 536 at 558

³² *Martin, S.*, supra note 146 at 364

³³ *Ibid.* at 306

³⁴ R.S.C., 1985, C. H-6, ss 2 (as am. by S.C. 1998, C. 9, S.9), 3 (as am. by S.C. 1996, c. 14, s.2), 7, 10 (as am. By S.C. 1998, c. 9, s.13), 15 (1) (as am. *idem*, s. 10), (2) (as am. *idem*), 25, 53(1) (as am. *idem*, s. 27), (2)(as am. *idem*), (3) (as am. *idem*), (4) (as am. *idem*), 62(1)

³⁵ *Central Alberta Dairy Pool v. Alberta (Human Rights Commission)* [1990] 2 S.C.R. 489 at 505/6; (1990), 111 A.R.241; 72 D.L.R. (4th) 417; [1990] 6 W.W.R. 193, 76 Alta L.R. (2d) 97; 12 C.H.R.R. D/417; 90 CLLC 17,025; 113 N.R. 161

³⁶ *Ontario Human Rights Commission and O’Malley v. Simpson-Sears Ltd.* (1985) 23 D.L.R. (4th) 321 at 332 (S.C.C.); 156 [1985] 2 S.C.R. 536;

³⁷ *Central Alberta Dairy Pool v. Alberta (Human Rights Commission)* supra note 35 at 505-506

If an employer can demonstrate that a *bona fide* occupational requirement warrants a discriminatory hiring practice, the court will allow an act of direct discrimination of this nature to stand. Employers are required to present objective (and often scientific) evidence to persuade a court that a discriminatory practice is, indeed, *bona fide*.

Indirect or adverse discrimination occurs:

...where an employer, for genuine business reasons, adopts a rule or standard which is on its face neutral, and which will apply equally to all employees, but which has a discriminatory effect upon a prohibited ground upon one employee or group of employees in that it imposes, because of some special characteristic of the employee or group, obligations, penalties, or restrictive conditions not imposed on other members of the workforce³⁸.

Employers have a legal duty to prevent or remove discriminatory barriers. If the barrier cannot be removed, the employer's duty is to alleviate the affects of adverse discrimination by accommodating employee differences to the extent of "undue hardship".³⁹

c) Where Does Accommodation End -- The Tests for "Undue Hardship"⁴⁰

1. Interchange ability of the Workforce and/or Facilities

The court will assess the overall nature of the employer's operation to determine if the employer can be flexible and accommodate the employee. For example, a large corporate entity is usually perceived as better able to absorb and spread the cost of accommodation across the corporate budget.⁴¹

2. Safety

Safety issues have an impact on an employer's ability to accommodate. An employee's accommodation may require a reduction in safety standards of avoid an onerous situation. The employee may be permitted to assume a higher level of risk in this instance.

3. Disruption of a collective agreement

From a human rights perspective, collective agreement terms are not impenetrable. The courts may permit an employer to address employee accommodation by disrupting seniority rights and shift schedules. If employer efforts to seek alternate accommodation solutions are insufficient, and the impact on collective bargaining rights of other employees is "substantial", the proposed accommodation and disruption to the collective agreement is likely to be regarded as "an undue hardship".

³⁸ Id. at 505-506 quoting *Ontario Human Rights Commission and O'Malley v. Simpson-Sears*

³⁹ Id. at 520

⁴⁰ Id. at 521

⁴¹ National Institute of Disability Management and Research at 110

4. *Employee Morale*

*In Central Alberta Dairy Pool v Alberta (Human Rights Commission)*⁴², the Supreme Court of Canada confirmed that employee morale is a factor, to be considered with caution, when assessing undue hardship. The Court noted that mere employee discomfort or prejudice toward a person with a disability was not a valid reason for taking employee morale into consideration when assessing undue hardship.⁴³

5. *Cost*

The Court will assess whether an employer can absorb the cost of accommodation in its overall budget. A mere expense is not sufficient to create "undue hardship"; the cost must be significant when assessed from an operational perspective.

- d) Two recent cases that illustrate the nature and extent of the duty to accommodate learning disabilities due to dyslexia.

*The Justice Institute of British Columbia v The Attorney General of British Columbia, the British Columbia Police Commission and Franck Furlan*⁴⁴

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 suspension; the decision was upheld and referred to a "Committee of Variance" for consideration.

The Committee of Variance conducted a hearing. A neuropsychological assessment indicated that Mr. Furlan suffered from a learning disability in the area of language and that, if Mr. Furlan been able to write his exams in a private room, with additional time, he would be able to successfully complete the training. 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.

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 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.

⁴² *Supra* at note 37 at 515

⁴³ *Id.* at 112

⁴⁴ 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>

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. It was not patently unreasonable for the Committee to conclude that:

...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.

This case is an example of adverse effect discrimination. Mr. Furlan was entitled to reinstatement in the training program. *Furlan* 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).

*Nancy Green v. Canadian Human Rights Commission, Public Service Commission of Canada, Treasury Board, and Human Resources Development Canada*⁴⁵

The Federal Government of Canada hired Nancy Green in 1975. She was a twelve year employee who had progressed to an Acting Director, PM-5 level position.

Ms. Green competed for a PM-6 level 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 policy was established to ensure that the cost effective delivery of language training.

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. She was not eligible to participate in the full time language program. Even so, she was appointed as the Acting PM-6 manager.

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

The Department attempted to gain entry for her into the language training program to accommodate her needs. The Public Service Commission denied the Department's request. It stood firm on its "neutral policy".

Instead, the employer paid for Ms. Green's french language tutoring and part time evening classes. She performed well and was advised to learn more French on her own. After one year expired, Ms. Green was asked to resign from the Acting position because her aptitude test still remained a barrier. She returned to a PM-5 level position.

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 competition occur so that Ms. Green could compete for the PM-6 job. Instead, a surplus employee was appointed to the position.

⁴⁵ *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 web-site at: <http://www.chrt-tcdp-.gc.ca/decisions/docs/green-e.htm>

... 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."⁴⁶ The expert noted that people with auditory processing disorders are often very effective in situations in which time is not a critical element⁴⁷ 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* case⁴⁸: 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 government's policy, had an adverse discriminatory effect upon persons with a learning disability, even though, it was "neutral" and meant to apply to all employees.

Having made her *prima facie* 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 to the government.

The Public Service Commission resisted accommodation 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 an exemption to the "neutral policy". 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".⁴⁹

The Tribunal noted this attitudinal shortcoming when it stated⁵⁰:

...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.

⁴⁶ *Green v Canadian Human Rights Public Service Commission of Canada, Treasury Board, and Human Resources Development Canada, supra* at 11 quoting case transcript at 686

⁴⁷ *Id.* at 12 quoting case transcript at 680-681

⁴⁸ *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)

⁴⁹ *Green v Canadian Human Rights Public Service Commission of Canada, Treasury Board, and Human Resources Development Canada, supra* note 46 at 22

⁵⁰ *Id.* at 21

The Tribunal concluded that there was an almost "total lack of accommodation"⁵¹ and that the employees involved, while "having good intentions, had little or no effective training in how to deal with the theory of accommodation"⁵². The Tribunal observed that employees did not have authority to make recommendations or decisions to remedy the situation; no policy existed re a "negative performance indicator"; and poor communications, case continuity and responsibility problems existed.

The Tribunal commented that there appeared to be a lack of employer understanding about the nature of learning disabilities and the action needed to accommodate them. The employer had pursued practices that deprived Green, and other people like her, of employment opportunities. The employer's practices and procedures were a form of systemic discrimination; 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."⁵³ The Tribunal observed, "if the practices and procedures had been based on these policies...this complaint would never have been made".⁵⁴

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

1. Create, an education and training program for all employees concerning mechanisms to effect the accommodation of persons with learning disabilities.
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.
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 upgrade her salary to that level.
6. pay her \$69,895.25 lost wages;
7. pay a lump sum to compensate her 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).⁵⁵

⁵¹ *Id.* at 19

⁵² *Id.* at 20

⁵³ *Id.* at 24

⁵⁴ *Id.* at 24

⁵⁵ *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

11. arrange management training 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,
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)⁵⁶
15. pay her \$4,057.22 for legal advice. (On appeal, this award was struck)⁵⁷

The Tribunal's decision was appealed to the Federal Court of Canada 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.⁵⁸ The Court noted that it was inappropriate of the employer to treat Ms. Green as "mainstream" once the learning disability was identified.

Conclusion

Canadian human rights law is rapidly evolving. This evolution has been significantly enhanced due to *The Canadian Charter of Rights and Freedoms*. It is evident from *Furlan* and *Green* that despite these advances, educational institutions and employers need to improve their understanding of: a) various types of disabilities; b) the disproportionate impact of disabilities upon 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.

Furlan and *Green* highlight the personal and institutional costs that accrue when employers and learning institutions fail to accommodate. In *Green* a government witness said: "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."⁵⁹

It is a tragic loss to the employer, the individuals involved, and the Canadian taxpayer when 280 people per year are denied opportunities for advancement due to the discriminatory adverse impact of government policy. The cost to human dignity, productivity and the advancement of people with disabilities is immeasurable.

Green and *Furlan* demonstrate that although an employer or educational institution may "think" it is meeting its duty to accommodate, courts will look carefully at the facts, and when appropriate, impose a standard that requires employers to be more creative and flexible.

Although an employer may see itself as a champion of human rights, courts will not accept mere words or 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; and its legal duties to accommodate. *Green* demonstrates that employers cannot allow bureaucratic structures, poor communication, lack of clarity re defined areas of responsibility, and inflexible and inadequate "policy" to rationalize its inability to address inequities in the workplace.

⁵⁶ *Id.* at 5

⁵⁷ *The Attorney General of Canada v Nancy Green and Canadian Human Rights Commission*, *supra* note 46 at 5

⁵⁸ *Id.* at 2

⁵⁹ *Id.* at 11

Employers and academics must be proactive and assess attitudes, work environments, policies and practices to determine their impact on employees and students with disabilities. *Furlan* and *Green* speak volumes to this legal and social obligation.

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