

Audiocast 2017

[A. Introduction]

**Dora:** Hello, I'm here today with **Cherie** Robertson / Jeff Poirier, a Senior Policy Analyst with the Ontario Human Rights Commission. Cherie / Jeff will give an overview of the Ontario Human Rights Commission's updated Policy on ableism and discrimination based on disability.

**Cherie:** Hello everyone. This Policy is based on the Commission's 2001 Policy and Guidelines on Disability and the Duty to Accommodate ... which was our most popular policy. It has guided employers, housing providers and service in the day-to-day operations of disability accommodation, and it's been cited and followed by many human rights legal decision-makers.

**Dora:** ...and for good reason ... it's filled with detailed information on the Code ground of disability and the duty to accommodate. What will you be covering?

**Cherie:** I'll go through what's new in disability law and the duty to accommodate. This covers the evolving legal definition of "disability"; different forms of disability-related discrimination; and, appropriate forms of accommodation.

**Dora:** And this includes Supreme Court of Canada decisions on disability law as well as updates in disability studies.

**Cherie:** Yes! While people with disabilities have experienced significant gains over the years, they still face serious barriers to equality and continue to have difficulty accessing employment, housing and various services.

In 2012, Statistics Canada reported that compared to Ontarians without disabilities, people with disabilities continue to have lower educational achievement levels. A higher rate of unemployment, and are more likely to have low income status; and are less likely to live in adequate, affordable housing.

[B. What is "Disability"?)

**Dora:** And that partially explains why the ground of "disability" continues to be the most frequently cited ground of discrimination under the Code ... and in human rights claims made to the Human Rights Tribunal of Ontario. At the same time, I think that many of us don't really understand what disability means.

**Cherie:** Uh, huh .... the term "disability" covers a broad range and degree of conditions. The Policy explains that a disability can occur at any point in your life ... at birth ... be caused by an accident ... or it may develop over time.

Here are few more statistics. According to Statistics Canada 14% of Canadians who are 15 years and older ... about 3.8 million Canadians ... have a disability that limits them in their daily activities. In Ontario that number is slightly higher, at 15.4%. The average age when a disability occurs is in the early 40s.

**Dora:** ... and disabilities would increase steadily as we get older.

**Cherie:** Section 10 of the Code has various definition of disability that both present and past conditions, as well as situations where a person is perceived to have a disability.

**Dora:** How about an example of a perceived condition or disability:

**Cherie:** Sure .... a man had treatment for cancer. His doctor gives him a clean bill of health to return to work full-time. But he's not scheduled for full shifts because the employer thinks the hours are too much for him to handle.

**Dora:** How would the Code apply here?

**Cherie:** The Code protects the employee because the employer's actions are based on a perception that the man still has a disability that prevents him from working full-time.

**Dora:** And that's because human rights case law has established that "disability" is to be interpreted broadly ....

**Cherie:** Yes, let me show you what that means. The Code covers situations where a person is discriminated against because of a belief that he or she will develop a disability in the future. The Policy sets out the OHRC's position that the ground of disability also includes anticipated disabilities, such as including discrimination based on a person's genetic testing results. A person who doesn't have a disability now may be treated negatively because of a perception that he or she will develop a disability, become a burden, pose a risk, or require accommodation later on.

There are referred to as anticipated disabilities, and anticipated disabilities may affect older people too because it's often assumed they'll eventually become disabled, even though the majority of older people don't have such limitations.

**Dora:** So, what we need to take away is that we have to remember to focus on the current abilities of a person and the situation's current risks ... not on the limitations or risks that may or may not arise in the future.

**Cherie:** Absolutely. Disabilities can also be temporary, sporadic or permanent and whether a temporary condition amounts to a disability depends on the facts of each situation. The Supreme Court of Canada has stated that everyday illnesses or normal ailments, such as a common cold, are not generally considered disabilities under human rights legislation.

**Dora:** Are all types of temporary condition excluded under the Code?

**Cherie:** No, they're not. In one situation, the Human Rights Tribunal of Ontario found that injuries from a slip and fall that took almost three weeks to heal, and a miscarriage, both constituted disabilities within the meaning of the Code.

**Dora:** What was the name of that case?

**Cherie:** It's a 2016 decision .... Mou -- M-O-U -- and MHPM Project Leaders.

**Dora:** Thank you. I understand that there are also disabilities that aren't always obvious.

**Cherie:** Sometimes the nature or degree of a disability makes it "non-evident" or invisible to other people. This could cause a person's disability to be mislabeled and misunderstood. For example, people who are deaf, deafened or hard of hearing are often misperceived as having mental health disabilities, even when this is not the case. Chronic fatigue syndrome, back pain, and many forms of mental illness may not be readily noticeable conditions. And epilepsy is an example of a disability that may be hidden because it is episodic.

**Dora:** I want to ask you about the term 'social handicapping'.

**Cherie:** Disability-based discrimination may be as influenced by perceptions, myths and stereotypes, as on the existence of actual functional limitations. The Supreme Court of Canada has referred to this as "social handicapping". Here's an example. A person with multiple physical disabilities was denied a 1st floor apartment that would have accommodated her needs. Her physical disability prevented her from cleaning and maintaining her apartment, but the landlord assumed this was due to mental health issues. Based on his perception, the landlord felt the woman should be living in long-term care and denied her the apartment.

**Dora:** What was the case and how was it decided?

**Cherie:** It's a 2012 decision ... Devoe, spelled D-E-V-O-E, against Harris, The Human Rights Tribunal of Ontario rejected this assumption and said the landlord had imposed a "socially constructed" disability on the woman.

**Dora:** In this updated Policy, the title includes the word Ableism.

**Cherie:** There's a reason for this. Ableism, negative attitudes, stereotypes and stigma often underlie the negative treatment that people with disabilities face. The Policy makes it clear that the Code is contravened when any of these result in discrimination.

I'd like to talk more about "Ableism" -- ableism is about attitudes in society that devalue and limit the potential of people with disabilities. Ableism may be conscious or unconscious, and may be embedded in institutions, systems or the broader culture of a society. These beliefs can lead to inaccurately assessing personal characteristics, or to organizations developing policies, procedures or decision-making practices that exclude or marginalize people with disabilities.

**Dora:** The Policy discusses other ways in which people with disabilities may be negatively treated ... and ... so often ... we're simply unaware of that behaviour.

**Cherie:** Our own beliefs, for example, can result in labels and stereotyping.

People with disabilities who receive government services and supports have said that they may be treated with suspicion and often contempt ... as though they are trying to "game" the system or obtain benefits that they are not really entitled to. This often happens to people with disabilities who have low incomes.

**Dora:** We have a separate module on disability, so for today could you highlight some different forms of discrimination based on disability.

[C. Forms of discrimination]

**Cherie:** People with a disability may encounter many types of discrimination. The discrimination could be direct, when individuals or organizations specifically exclude people with disabilities from services, housing, employment opportunities, etc.

Discrimination could also be Indirect, and may be carried out through another person or organization. For example, a private school would be "indirectly" discriminating if it gave instructions not to recruit students with disabilities because they may have accommodation requirements.

And it is often subtle. People with stereotypical views about people disabilities don't usually freely voice their views to explain their behaviour. Sometimes rules, standards, policies, practices or requirements that seem neutral have an "adverse effect" on people with disabilities. An example would be a policy of not hiring people who have time "gaps" in their résumés. This could have an adverse effect on people who have had to take time off work for reasons related to a disability.

Discrimination may include harassment. Here's an example that involves a tenant who was a woman with cerebral palsy. Her landlord would enter her apartment when she was not there; turn off the hallway light when she was partly down the stairs; and would

bang repeatedly on her ceiling. A human rights tribunal found that the landlord had harassed her and made verbal slurs about her disability.

**Dora:** and when a comment or action poisons the workplace?

**Cherie:** ... that could be poisoned environment. The Policy has this example: a man has chronic back pain and asked to take time off work so he could recover from a bad flare-up. His manager wasn't happy about this and wouldn't help him apply for short-term disability leave. At a staff meeting, the manager said that the man was "faking" his condition to get time off work. Do you think this behaviour could amount to a poisoned work environment based on disability? ... The answer is "yes". The comments and conduct of the manager during the meeting created a poisoned environment for the employee with the disability.

**Dora:** And what about systemic discrimination?

**Cherie:** Systemic discrimination is all too common in discrimination against people with disabilities. The Policy includes an example from the B.C. Human Rights Tribunal ... a municipality that had a business improvement association program. It hired "ambassadors" to stop people from sleeping on public property and panhandling in public parks, alleys and sidewalks. In the data collected, they used words like "crazy," "deaf" and "native" to describe some people who were asked to leave these areas. A court ruled that the program disproportionately affected people with physical and mental health disabilities and people with Aboriginal ancestry.

[Vancouver Area Network of Drug Users v. British Columbia Human Rights Tribunal, 2015 BCSC 534 (CanLII) at 107]

**Dora:** The Policy also recognizes "intersectional discrimination" as a unique type of discrimination that is based on two or more Code grounds.

**Cherie:** Yes, it does. People's lives involve multiple, interrelated identities. And people with disabilities may be marginalized and excluded based on aspects of their identities that relate to Code grounds other than just disability. For instance, we know that women who have a disability experience unique forms of discrimination. Because they may be perceived as more vulnerable and unable to protect themselves, they may be singled out as targets for sexual harassment and sexual violence.

#### [D. Duty to Accommodate]

**Dora:** **Cherie**, in the next few minutes I'd like to discuss the duty to accommodate. On the OHRC's website there is specific training on the duty to accommodate. For today, could you briefly go over the key principles and concepts of the duty to accommodate.

**Cherie:** I'd be happy to. Under the Code, employers, housing providers and service providers have a duty to accommodate needs related to a disability to the point of undue hardship. The policy sets out the 3 principles of accommodation: respect for dignity, individualization, and Integration and full participation. I'll give you a quick explanation for each of these concepts:

Respect for dignity – people with disabilities must be provided accommodation in the way that most respects the dignity of the person. Respect and support for a person's autonomy is crucial. For example, an accommodation that shows little respect for the dignity of the person with a disability is an accessible entrance over a docking station or through a garbage room.

Individualization – each person's needs are unique and must be considered individually when an accommodation request is made. For example, the Supreme Court of Canada found that a workplace requirement that provided a maximum penalty for absences was discriminatory because it didn't take into account the individualized nature of the accommodation process.

And the third point is that accommodation should be developed and implemented with a view to maximizing a person's Integration and full participation. An example of a barrier-free and inclusive design could be a community pool assigning an additional swim instructor for a boy who has autism so that he gets extra support to access with the same programme.

#### [E. Forms of accommodation]

**Dora:** The Policy includes a section on forms of accommodation. The Policy says that forms of accommodation may include modifying or changing an organization's ... buildings, facilities and services; its policies and processes; a procurement or third-party contracts; its performance standards, conditions and requirements; the decision-making practices / work, housing or service culture, or its methods of communication.

**Cherie:** ... and the Policy provides several examples of accommodation in employment, services and in housing, I'll give a few quick examples.

In employment, accommodation could include: modifying job duties or policies; making changes to the building like installing ramps or hand rails; or additional training. In services, it could include modifying "no pets" to allow guide dogs or other service

animals; or multiple ways of contacting a service including by phone, in person and by regular mail or email. In housing, the accommodation could be allowing transfers between units or helping someone fill out an application form.

**Dora:** Thank you and there more examples in the Policy. **Cherie**, the public often wants to know about the kind of information an organization can ask for from a person with a disability who is making an accommodation request.

**Cherie:** Yes, this is often raised at public education events. The Policy has a section called Medical Information to be Provided which addresses the type and scope of information that organizations can ask for. While an organization must have enough information to allow it to meet the duty to accommodate, it must also look at the privacy implications of providing this information.

**Dora:** So, if I'm the person requesting accommodation what can I expect receive?

**Cherie:** You would expect to be advised that the person has a disability; about the limitations or needs associated with the disability; whether the person can perform the essential duties or requirements of the job, of being a tenant, or of being a service user, with or without accommodation; the type of accommodation that may be needed to allow the person to fulfill the essential duties or requirements of the job, and of being a tenant, or of being a service user.

In employment, you could expect regular updates about when the person expects to come back to work, if they are on leave. Please remember, that if you're requesting information you must intrude as little as possible on the person's privacy, while ensuring that you have enough information to make the accommodation.

**Dora:** Cherie, how is undue hardship connect to the duty to accommodate. The Code requires that organizations accommodate the needs of people with disabilities to the point of undue hardship.

**Cherie:** Undue hardship is an important concept to understand. There are three things to consider when assessing whether providing an accommodation would cause undue hardship. They are: cost; outside sources of funding, if any; and health and safety requirements, if any. There are no other factors that can be properly considered.

**Dora:** And... what could constitute undue hardship?

**Cherie:** The standard is high. There needs to be a high probability of substantial harm ... to anyone ..... but accommodating someone doesn't have to be costly. It could involve making policies or rules more flexible.

Business inconvenience, employee morale, third party preferences, etc. are not things would be considered in determining whether the undue hardship standard has been met. The Policy has a good discussion on undue hardship.

**Dora:** That's about all the time we have for this audiocast. Cherie, do you have any final comments?

**Cherie:** The last thing I'd like to say today is that organizations have a responsibility to take steps to design their programs, policies and environments inclusively, to take into account the needs of people from diverse backgrounds, with a range of unique identities. This is part of the duty to maintain environments that are free from discrimination and harassment.

**Dora:** Thank you Cherie. For more information of the Policy on ableism and discrimination based on disability, or to learn more about our policies or the Code, please visit our web-site at [www.ohrc.on.ca](http://www.ohrc.on.ca).