

# Accommodating disabled workers

*New Ontario legislation provides accessibility to disabled workers*

By Joe Conforti

People with disabilities have the right to equal treatment. This protection is guaranteed by human rights legislation in all Canadian jurisdictions and includes equal access to employment and the right to freedom from harassment in the workplace.

Under existing laws, employers have a duty to consider the needs of disabled persons. This

means designing buildings, processes, programs and job responsibilities inclusively. If existing physical structures, systems or attitudes create barriers then they must be removed. Where it is impossible to remove barriers without undue hardship, special arrangements or "accommodation" must be made so the disabled can fully participate

But workers with disabilities continue to experience barriers in participating in society, including the workplace. Ontario alone has 1.9 million people with disabilities, a number which is expected to increase as the general population ages.

In an effort to further identify, remove and prevent barriers, the province enacted the *Ontarians With Disabilities Act, 2001 (ODA)*, mandating various organizations to make additional efforts to improve opportunities for the disabled.

On Sept. 30, 2002, certain provisions of the *ODA* were proclaimed into force setting out specific obligations on the part of the province, municipalities and the broader public sector, including public transit organizations, school boards, hospitals, colleges and universities.

## Key definitions

As the objective of the *ODA* is to remove barriers to persons with a disability, understanding the meanings of these terms is essential.

Under the *ODA*, a disability is:

- any degree of physical disability, infirmity, malformation or disfigurement caused by bodily injury, birth defect or illness. This includes, for example: diabetes mellitus; epilepsy; brain injury; paralysis; amputation; lack of physical co-ordination; blindness or visual impediment; deafness or hearing impediment; muteness or speech impediment; physical reliance on a guide dog or other animal or on a wheelchair or other remedial device;
- mental impairment, disorder or a developmental or learning disability; and
- an injury or disability for which benefits were claimed or received under workers' compensation legislation.

A barrier is anything that stops a person with a disability from fully taking part in society including:

- physical barriers;
- architectural barriers;
- information or communications barriers, attitudinal barriers, technological barriers; and
- barriers created by policies or practices.

Examples include a lack of elevators in a building, assumptions that persons with disabilities cannot perform a certain task, failure to offer different ways to complete a task or to complete the essential elements of a job.

## Government responsibilities

The *ODA* requires the government of Ontario to:

- develop barrier-free design guidelines for buildings the government buys, leases, builds or renovates;
- consider the accessibility of equipment, supplies or services the government is buying for itself, its employees or the public;
- accommodate the accessibility needs of government employees and those taking part in the selection process for

employment;

- provide training to managers and supervisors regarding the *ODA* and the government's obligations regarding accessibility and employment; and
- develop and publish annual accessibility plans for each ministry considering barriers to people with disabilities and ways to prevent or remove them.

## Responsibilities of other organizations

Municipalities, public transportation providers, hospitals, school boards, colleges and universities are required to establish plans which must include:

- a report on the measures the organization has taken to identify, remove and prevent barriers to the disabled;
- the measures in place to ensure the organization assesses its proposals for bylaws, policies, programs, practices and services to determine their effect on accessibility; and
- a description of the organization's process for reviewing its practices and the measures the organization intends to take in the coming year to identify, remove and prevent barriers.

## Guidelines and enforcement

Accessibility plans are to be developed annually and will be accessible to the public. The deadline for the first accessibility plans is Sept. 30, 2003.

Newly created bodies, the Accessibility Directorate and the Accessibility Advisory Council, will assist in providing resources and implementing regulations to provide guidance to organizations in the establishment of accessibility plans.

The *ODA* provides for offences and fines of up to \$50,000 for failure to meet certain requirements. In addition to direct fines for offences, the *ODA* requires the provincial and municipal governments to consider accessibility when

*Continued on page 2976*

# Dangerous precedent for employers

...continued from page 2971

employer in this case. Nevertheless the trial judge found Saunders was entitled to three-months' additional damages for unfair dealing.

While it is easy to understand why the trial judge wanted to compensate the employee for this abusive treatment, a general rule that a *Wallace* extension of the reasonable notice period is available in the absence of bad-faith conduct by the employer is a dangerous precedent.

For example in *Gismondi v. Toronto (City)* (2002) 16 C.C.E.L. (3d) 97 (Ont. S.C.J.) Gismondi was a professional engineer who had been working for the City of North York for 20 years prior to the

merger of the cities that now comprise Toronto. After the creation of the megacity, many positions became surplus. Guidelines were developed and put in place in order to ensure a fair process with respect to competitions for jobs. Gismondi applied for the position of manager, road operations and was granted an interview. He was not chosen for the position and his employment was subsequently terminated. The court awarded him 116-weeks' salary in lieu of notice. The quantum of damages included an addition to the notice period in accordance with the principles in *Wallace*. The court held the city had dropped the ball by failing to apply its own fair, open and equitable hiring criteria uniformly

across the board. Gismondi had asked at the end of his interview whether his previous performance appraisals would be reviewed and his references contacted. He was told the panel would consider all relevant matters. But none of his references were ever contacted, whereas the panel did speak with the references of the successful candidate. The court found the city had effectively treated Gismondi in a manner different from other candidates which, although not malevolent or egregious, entitled him to a lengthening of the reasonable notice period in accordance with the principles laid out in *Wallace*. This decision is being appealed to the Ontario Court of Appeal.

The possibility of an extension of the reasonable notice period for dropping the ball, differential treatment or simple unfairness in the absence of bad faith conduct creates new difficulties for employers. All kinds of decisions at the time of deciding to terminate employees results in unfairness. In the context of a large-scale downsizing, some employees are treated differently than others by definition. Some employees are terminated while others keep their jobs. *Wallace* pre-supposed additional liability would rest with the employer only where the unfairness to the employee was as a result of some bad-faith conduct on the part of the employer.

Since it appears the courts are now inclined to award a *Wallace* extension to the reasonable notice period in cases of simple unfairness, in the absence of bad-faith conduct, employers need to be even more vigilant in ensuring they treat employees equitably and with dignity and respect in the course of the termination. These decisions illustrate that courts may not care an employer did not intend to be unfair. If the actions resulted in unfairness to the employee, an extension of the reasonable notice period may follow.

*Chris Foulon is an employment law lawyer with Goodman and Carr LLP in Toronto. He can be reached at (416) 597-4088 or cfoulon@goodmancarr.com.*

## Impact on the private sector

...continued from page 2973

purchasing goods and services or when implementing government-funded capital programs.

### Impact on the private sector

Even though the legislation is not specifically directed at the private sector, employers will be impacted by the *ODA*.

The provincial government and all municipalities are required to consider accessibility in choosing which goods or services to purchase. This has the potential to affect many companies that contract with the government and will provide an incentive to implement accessibility plans compatible with the *ODA*. The *ODA* creates additional municipal powers which may, in turn, affect the private sector. It gives municipalities the power to require businesses to be accessible to the disabled as a prerequisite to obtain, hold or renew a license. New Municipal Accessibility Advisory Committees have the power to review draft site plans and drawings of proposed subdivisions.

The *ODA* also includes regulation-making authority that allows the lieu-

tenant-governor in council to permit the adoption of accessibility standards and codes by reference to new organizations not currently covered by the legislation.

As a result all employers should review systems and practices to remove any improper barriers and take steps to accommodate disabled workers.

It is important to recognize the *ODA* supplements, but does not replace, existing human rights legislation. The legislation also imposes substantial obligations on, and incentives to, employers to create and maintain barrier-free workplaces.

Fairness in employment will occur when employers integrate equity and accessibility practices into their workplaces. This does not require a reduction in the quality of the job expected — just an elimination of improper barriers.

*Joe Conforti is a partner at Goodmans LLP, an international business law firm. He practices primarily in the field of human resources management and other workplace issues. He can be reached at jconforti@goodmans.ca or at (416) 597-4177.*