

The Duty of Reasonable Accommodation and Gender Equality

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The concept of equality in Canadian law has evolved from an emphasis on intentional discrimination to a broader concern for constructive or "adverse effects" discrimination. A rule or practice can violate principles of equality or non-discrimination not because of some evil motive on the part of an actor, but because it has a disproportionately adverse impact on a disadvantaged group. The change was an important development in order to make progress towards true equality of opportunity for disadvantaged groups.

This concept of equality, first developed in the application of human rights legislation,¹ has since appeared in the interpretation of the *Canadian Charter of Rights and Freedoms*² and the application of non-discrimination clauses in collective agreements.³ Nevertheless, Canadian law remains relatively undeveloped in the treatment of adverse effects discrimination. Clearly, though, not every rule is at risk because some disadvantaged group suffers particular detriment from it, for an important component of the concept of adverse effects discrimination is the duty of reasonable accommodation. The Supreme Court of Canada first discussed this duty in *O'Malley* in 1985,⁴ but more detailed examination did not come until 1990 in *Central Alberta Dairy Pool*.⁵ Both cases involved complaints of religious discrimination under human rights legislation, filed because the employer's expectations about work performance conflicted with the tenets of the complainant's religion. In *Central Alberta Dairy Pool*, where an employee sought time off for a religious holiday, Wilson J. took the opportunity to discuss the concept of reasonable accommodation in the following words:

The onus is upon the respondent employer to show that it made efforts to accommodate the religious beliefs of the complainant up to the point of undue hardship.

I do not find it necessary to provide a comprehensive definition of what constitutes undue hardship but I believe it may be helpful to list some of the factors that may be relevant to such an appraisal. I begin by adopting those identified by the board of inquiry in the case at bar - financial cost, disruption of a collective agreement, problems of morale of other employees, interchangeability of work force and facilities. The size of the employer's operation may influence the assessment of whether a given financial cost is undue or the ease with which the workforce and facilities can be adapted to the circumstances. Where safety is at issue both the magnitude of the risk and the identity of those who bear it are

*relevant considerations. This list is not intended to be exhaustive and the results which will obtain from a balancing of these factors against the right of the employee to be free from discrimination will necessarily vary from case to case.*⁶

While the Court applied these principles in *Central Alberta Dairy Pool* to find that the employer should have excused the employee from work on certain religious holidays, the decision leaves many questions about the scope of the duty of reasonable accommodation in future cases. This is not surprising, for there are a myriad of scenarios in which accommodation will be an issue, involving the disabled, women, and religious minorities. This paper explores some of the complex issues that arise in the application of the duty of reasonable accommodation to problems facing women in the workplace.

An effort to anticipate the impact of the duty of reasonable accommodation on gender equality in the workplace could take one into a vast list of potential issues, including rotating shift schedules and their impact on child care responsibilities,⁷ height and weight requirements for jobs, and commission selling in retail operations.⁸ The list could go on and on, particularly if one adopted a very generous concept of equality that would require redress of the disadvantages borne by women as a group.⁹ However, it is unlikely that adjudicators will find violations of equality rights in many of these areas, for the social restructuring entailed will often generate an adjudicative response of deference to the legislative branch.

Rather than adopt a broad brush approach to accommodation and gender equality, I have concentrated, in this paper, on two important circumstances in which women are clearly disadvantaged by workplace practices and in which the duty of reasonable accommodation will arise: the treatment of reproductive hazards and the interaction of affirmative action and seniority, especially in times of layoff.¹⁰ In the first case, there is a potential tension between maternal and fetal interests, best resolved by a right to transfer temporarily to a safer job. But there are problems with rights of transfer, which will be discussed, not the least of which is their potential impact on the interests of other workers, especially if accompanied by bumping rights. The

interests of co-workers are even more vulnerable in the affirmative action context, if the duty of accommodation requires the modification of a seniority system in order to achieve employment equity objectives.

I. REPRODUCTIVE HAZARDS AND ACCOMMODATION

In the regulation of hazardous substances in the workplace, governments, employers and unions face difficult policy choices. Ideally, exposure to such substances would be limited to a "safe" level at which there would be no danger to health. However, that ideal is sometimes impossible to achieve, as there is no known or achievable "safe threshold". Therefore, exposure limits must be set at what is determined to be an acceptable level of risk.¹¹ For other substances, levels of safe exposure vary for different classes of individuals. With some substances, such as lead, scientific studies over the years had shown women to be at greater risk than men, especially in relation to their ability to bear healthy children.¹² Many of these studies have since been put in question, because of their inadequate inquiry into male reproductive health. Even so, there remains, without question, one entity who is more susceptible to damage from exposure to certain toxins in the workplace, and that is the developing fetus.¹³ In circumstances where there is a danger to the fetus, difficult value questions must be asked: should exposure levels to the toxin be set at a level to protect the fetus, or should the levels be set so as to provide protection for the average worker? If the latter, how should pregnant women be treated - excluded from the workplace; allowed to choose whether to stay, on the principle of informed consent; or given rights of transfer? Moreover, is it enough to protect the pregnant worker? Should potentially pregnant women be excluded from the workplace, because the fetus is most susceptible in its first few weeks of development, when a woman may not know that she is pregnant?¹⁴

These difficult questions about reproductive hazards have not been well debated in Canada. Too often, employer practice has been to exclude not only pregnant women from exposure to substances which might harm a developing fetus, but all women capable of bearing children.¹⁵ This policy adopted by some employers has been duplicated in certain government regulations.¹⁶ The motivation was not malevolent - far from it, for the desire was to protect the fetus and future

children (whether because of a concern for potential tort liability or benevolent paternalism). However, the policies imposed serious costs on women's equality in employment.

Such policies have become vulnerable to legal challenge, both under non-discrimination clauses in collective agreements that prohibit sex discrimination, through human rights legislation, and, in the case of government regulations, through the equality guarantee in section 15 of the *Canadian Charter of Rights and Freedoms*. The danger with these cases, as I shall show, is that women may lose, even as they win. This point is well illustrated by an examination of two decisions: *Wiens and Inco*, a determination of a board of inquiry under the Ontario *Human Rights Code*,¹⁷ and *Johnson Controls*, a judgement of the United States Supreme Court.¹⁸

Wiens signalled a departure from an earlier policy of the Ontario Human Rights Commission, which had stated, in response to a complaint of sex discrimination by male workers against a policy excluding women capable of bearing children from a battery plant, that there was no sex discrimination.¹⁹ In *Wiens*, a complaint of sex discrimination came before a board of inquiry because the employer, Inco, refused to hire women capable of bearing children in the pressure carbonyl processing area in one of its nickel refineries. The complainant was successful, despite the company's argument that the policy was necessary to protect the fetus and, therefore, should constitute a *bona fide* occupational qualification. This argument was rejected, as the policy was found to be over-inclusive, because it prohibited the employment of **all** women capable of bearing children, whether or not they had plans to do so.²⁰ Moreover, there was not a "real and significant risk" to the fetus. The adjudicator assumed that the problem with the policy was its extension to all fertile women, rather than targeting those pregnant or seeking to become pregnant.²¹ He assumed that birth control methods would be effective to prevent unplanned pregnancies. Even if a woman became pregnant, it was unlikely that she would be harmed before she relocated elsewhere.²² The substance of concern to the employer, nickel carbonyl gas, was not normally present in the workplace air. Since it was a highly toxic gas, it was used in a totally enclosed process, and there was constant air monitoring in order to detect any gas leaks, as well as a regular safety inspection routine. These circumstances led the inquiry to determine that it was

unlikely that a pregnant woman would be exposed to the substance, and even if she were, it was doubtful that the fetus would be injured.²³

The thrust of the *Wiens* case is to recognize that the employer has a proper concern for fetal health which can justify, in some cases, restrictions on women's employment activities. While the decision of the United States Supreme Court in *Johnson Controls* is similar in its ultimate holding that the exclusionary policy was discriminatory, its reasons provide a real contrast. *Johnson Controls* held that an exclusionary policy barring all women capable of bearing children from jobs in a battery plant violated the *Civil Rights Act* (Title VII), as amended by the *Pregnancy Discrimination Act*.²⁴ The employer argued that the risk of damage to the fetus from lead exposure warranted exclusion, either out of a desire to protect the fetus or to escape possible tort liability. This was rejected by the Court, which held that a bfoq (*bona fide* occupational qualification) defence could be invoked only if sex discrimination was reasonably necessary to the normal operation of the particular business. In this case, the danger to the fetus was in no way connected to the normal operation of making batteries. Safety concerns could only arise where sex or pregnancy actually related to the employee's ability to perform the job. In Blackmun J.'s words in the majority opinion:

*Decisions about the welfare of future children must be left to the parents who conceive, bear, support, and raise them rather than to the employers who hire those parents.*²⁵

The employer's concern about tort liability was dismissed, as not having been shown to be a real problem, provided that the employer fully informed women of the risks in the workplace. As well, even if it cost more to hire fertile women, that was not a defence under Title VII.²⁶

At this point, the majority in the U.S. Supreme Court ended its reasons. In contrast, the board in *Wiens*, having found that the exclusionary policy directed at all fertile women did not constitute a bfoq, nevertheless went on to ask whether the employer would suffer undue hardship if women of childbearing potential were allowed to work in the plant. This seems to be

inconsistent with general human rights jurisprudence, which provides that there is no defence to direct discrimination other than the bfoq.²⁷ The concerns about tort liability and the employer's right to evince concern for fetal health can only enter into the bfoq equation - and in *Johnson* they did not work, nor did they here.²⁸

These cases, especially *Johnson*, are unquestionably an important victory for women's equality in the workforce, yet, from another perspective, they may also be a loss. To the extent a court or board finds that dangers to the fetus are irrelevant to the employee's ability to do a job and, therefore, pregnancy and/or fertility do not constitute a bfoq, job opportunities for women are expanded. No longer can they be evaluated as workers on the basis of their reproductive cycle; instead, a case like *Johnson Controls* instructs that their individual ability to do the job is the key question.

Yet there is a potential problem here for the woman who becomes pregnant, or who wishes to do so, and who works in an area where there are potential dangers to the fetus -the lead battery plant or a nuclear plant. Women do not generally wish to expose their unborn children to known risks. But what if the woman wants to transfer out of the hazardous job during pregnancy or, while she is trying to become pregnant (a more problematic situation, since the length of absence required is unknown). One reading of the *Johnson* case is that she has no right to do so - she must choose between her job and the fetus. This is equality - but equality with a vengeance.²⁹

In Canadian law, the woman would probably have a right to refuse the work, either under common law, arbitration jurisprudence or statutory rights to refuse.³⁰ But a right to refuse is only that, and she will likely want more - a right to relocate so as to continue to earn her living during her pregnancy. Such a right has not been legislated in Canada outside Quebec.³¹ It may be possible, however, to construct an argument for transfer based on the concept of adverse effect discrimination and the duty to accommodate as set out in *Central Alberta Dairy Pool*, which could be employed in a human rights complaint or in the application of a non-discrimination clause in a collective agreement.³²

Such an argument succeeded in *Emrick Plastics*, where a board of inquiry under the Ontario *Human Rights Code* upheld a complaint of sex discrimination, because an employer refused to transfer a pregnant woman out of a spray painting job, which her doctor had considered dangerous to her developing fetus.³³ Jobs were available in the plant's packing area, and the risk to her was acceptable in the doctor's opinion. However, the employer demanded that the doctor actually visit the plant and certify that there was no danger to the fetus. In the absence of such an opinion, the employer placed the employee on leave. The board held that there was adverse effect discrimination on the basis of sex, because the employer insisted that all spray painters, even those who were pregnant, must continue to do the job, even if other work was available. Requiring pregnant workers to do so "dictated that pregnant workers had to bear a risk which non-pregnant workers did not face".³⁴ Therefore, the employer had a duty to accommodate, which it had violated. Accommodation required that she be provided with another job, if one was available for which she was qualified, or offered a respirator for her own job.³⁵

This decision is now under appeal, and one can see the potential difficulties with its reasoning. Undoubtedly, the attack on the decision will invoke an analogy between disability and pregnancy. The question will be asked whether this case requires an employer to provide alternative employment for an employee who has been disabled from performing her own job. In the case of pregnancy, the disability is temporary; in other circumstances, the disability may be permanent. Must the two types of employee be treated in the same way, and given another job from that which they filled before their disabling condition arose?

Think, for example, of the secretary working every day with a video-display terminal. When pregnant, she might well seek reassignment because of the conflicting medical evidence about the dangers from the machine. Her transfer would be temporary, lasting through the pregnancy. In contrast, an employee who develops eye problems may need to be transferred from work with a VDT permanently. Is an employer rule requiring them to do their job discriminatory, and must their claims to accommodation be heeded through provision of another position?³⁶

The case law on accommodation to date is not very helpful, as most of the cases have dealt with religious discrimination, in situations where the employee seeks changes to the scheduling of his or her own job.³⁷ The desire to transfer from a job is more likely to arise in relation to disability, where an employee, through illness or disabling accident, can no longer perform his or her job. Does the employer have a duty to provide another position?³⁸ Neither the legislation in Ontario nor the guidelines of the Ontario Human Rights Commission on dealing with disability are helpful. Both assume that an employer can expect an employee to do the essential duties of the job sought or filled, provided efforts at accommodation have been made.³⁹

Emrick raises a much more difficult issue, because it requires the employer to provide a new job. If upheld, it creates a potential right for pregnant women (if not disabled workers as well) to transfer that is analogous to the rights of disabled workers legislated in the Ontario *Workers' Compensation Act*.⁴⁰ Nevertheless, there is a way to defend the outcome by looking at the employer's practice with the lens suggested by the Supreme Court of Canada in *Brooks*.⁴¹ According to Dickson C.J., pregnancy should not be equated with sickness nor an accident, although it does affect a woman's health and provides a legitimate health-related reason for absence from the workplace.⁴² Pregnancy is acknowledged to be a condition that benefits the whole of society, yet one that often imposes disproportionate costs on the women who bear the children.⁴³

With this perspective in mind, consider again the facts of *Emrick*. If the pregnant employee cannot transfer out of her hazardous job, she is forced to risk her child's health or to suffer economically because of pregnancy. The rule against transfer penalizes women as a group, because it effectively deprives them of access to a whole set of jobs - often higher paying than women's traditional occupations - when some sort of temporary accommodation would provide the protection needed. The analogy between pregnancy and disability is inappropriate - for the woman will be able to return to her job after the pregnancy, while the disabled employee in my example requires a permanent accommodation, as he/she is no longer qualified to do the essential aspects of the job.

But how far does an employer have to go in accommodation of the pregnant woman? In *Central Alberta Dairy Pool*, the Supreme Court indicated that the employer must make efforts to accommodate up to the point of "undue hardship", a concept determined by a consideration of factors such as "financial cost, disruption of a collective agreement, problems of morale of other employees, interchangeability of work force and facilities".⁴⁴ While it might seem that reasonable accommodation would require that the pregnant employee be allowed to transfer to a job for which she is qualified and which is open, problems start to arise as the interests of other employees are threatened. What if the collective agreement requires the posting of vacancies?

Gohm v. Domtar, a decision of an Ontario board of inquiry, suggests that the collective agreement does not provide an automatic defence to a claim that accommodation cannot be provided.⁴⁵ There, both the employer and the union were found to have violated the Code's prohibition of religious discrimination because they failed to accommodate the complainant's religious beliefs. Although she offered to work Sundays rather than Saturdays, since that was consistent with the tenets of her religion, the union insisted that she be paid overtime rates for the Sunday work and the employer refused to do so. The employer was found in violation for not paying the premium rate, while the union was in violation for not consenting to the straight time arrangement on Sundays.

While *Gohm* does indicate a lack of sympathy for the collective agreement's terms, it should not be read as dismissing the collective agreement as a valid consideration in determining the scope of the duty of accommodation. In *Gohm*, it is important to note that departure from the terms of the collective agreement had no detrimental effect on other workers. All the employer and union were asked to do was to make a special arrangement for an employee who wanted to work Sundays - a contrast from the desire of many employees who do not want to do so, and who welcome overtime rates for Sunday work as a deterrent to employer scheduling of work on that day.

Contrast that scenario with the problem where a transfer for the pregnant employee infringes the collective agreement rights of other workers. The job posting provisions in a collective agreement are designed to give employees a chance to compete for better positions. To give preference to the pregnant employee is to deprive those other employees of access to these positions, at least temporarily. Neither *Gohm* nor the discussion in *Central Alberta Dairy Pool* necessarily require that those rights be sacrificed, although some will argue that the transfer should be permitted despite the job posting provisions, since it is only temporary.

What if the job is lower paying? In fairness to other employees doing the same job and to the employer, all she could ask would be the job rate. More difficult is the question whether she should be allowed to bump another employee, and if so, only a more junior employee? Employers will argue that it is unfair to allow her to do so, for this could set in motion a train of displacements that inevitably become costly and disruptive, not only to the employer, but more importantly to the other employees displaced.

A further important question is whether the transfer should be regarded as temporary or permanent. If it is temporary, as the woman will undoubtedly desire, this creates a problem for the employer's operations, since her permanent job may have to be filled on a temporary basis for well over a year - through the pregnancy, maternity leave and then possibly parental leave.

The difficult issues surrounding a right of transfer for pregnant employees suggest that a human rights complaint process that develops a duty to accommodate on a case by case basis is not the most efficacious way to proceed to deal with reproductive hazards. Indeed, other jurisdictions might well consider the Quebec legislated rights to protective reassignment that cover not only pregnancy, but the nursing period as well. With such a regime, there can be refinements that consider the competing claims of employers, the women seeking protection and other employees. Most importantly, the legislation can and has, in Quebec, come up with ways to balance those interests that a board of inquiry does not have available. The best example of such

a balance is the provision of compensation to women who cannot be transferred to another job, financed through the equivalent of the workers' compensation system.⁴⁶

II. AFFIRMATIVE ACTION AND SENIORITY

Many of the difficult issues of accommodation that arise with reproductive hazards are duplicated in the treatment of seniority systems, where the interests of target groups often come into serious conflict with others who have longer periods of tenure in the workplace.

Accordingly, benefits and burdens in the workplace in relation to seniority is a long established and highly valued principle. This is especially true in the organized sector, where collective agreements usually spell out certain rights that accompany seniority, such as preference in promotions, protection in layoffs, and priority access to benefits, such as vacation or shift scheduling. Even in the unorganized workplace, there is a tendency to confer benefits in accordance with length of service.⁴⁷

There are a number of reasons to use seniority as an organizing principle in the workplace.⁴⁸ For the worker, the use of seniority to determine entitlement to benefits reduces the arbitrariness that can come with managerial discretion. Length of service provides an objective, definitive method of allocating benefits to which all workers can aspire. Secondly, the use of seniority is attractive because it provides benefits in a way that many feel is intuitively correct - that is, the longer service employee is regarded as "earning" more favourable treatment through demonstrated loyalty to the workplace and acquired on-the-job experience.

The problem with seniority systems is their potential conflict with the goals of affirmative action or, as it is better known in Canada, employment equity.⁴⁹ Those programmes seek to diversify the workplace, providing greater job opportunities for groups identified as disadvantaged in society - in Canada, generally, women, native people, the disabled, and visible minorities. The objective of such programmes is to increase not only the hiring of those groups in entry level jobs, but to ensure their presence throughout an organization, so as to reach an appropriate level of

representation. In the view of some, that number would reflect their representation in the applicant pool; in the views of others, it would be equivalent to their representation in the general population.⁵⁰

Seniority systems in the workplace affected by employment equity programmes create several kinds of potential barriers. They are structured to give preference and protection to long service employees, and in many workplaces, those employees will be males, and often from Caucasian backgrounds. To the extent that promotion is based on a collective agreement provision specifying that the senior qualified person gets the job, there is an obstacle to the promotion of the newer entrants to the workplace who are from the target groups, even if they are as well qualified or even better qualified than the longer term employee.

Moreover, seniority systems can create disincentives for target group members to seek certain non-traditional jobs, with the impact varying according to the type of seniority provision in the collective agreement. Some agreements provide for seniority to accumulate only within a classification or a department; others, within a bargaining unit; and still others on a plant wide basis. If the seniority system is drawn up along departmental lines or accords credit in accordance with service in a particular bargaining unit, there is a problem for the target group member who seeks to transfer to a new department or bargaining unit with the employer if the result is a loss of the seniority already built up with the employer. This is a particular problem for women who wish to transfer out of traditional white collar clerical jobs into plant units, which may well not recognize their length of service with the employer.⁵¹ Thus, plant wide seniority systems are much more compatible with the objectives of employment equity.⁵²

Seniority also comes into conflict with employment equity in times of recession and retrenchment when layoffs occur. Often the members of the target group are the first to go because of their shorter seniority, leaving the workplace looking as it did before the employment equity programmes were implemented.

The interesting question for purposes of this paper is whether seniority systems are vulnerable to attack under human rights legislation because of their adverse effects on the target groups. Certainly, in some workplaces, the facts will dramatically reflect this detrimental effect, especially when those laid off are the members of the new groups, while the older white males stay.

If seniority systems are open to attack, what is the extent of the employer's duty to accommodate? Again, it is useful to recall the *Central Alberta* and *Domtar* cases.⁵³ While the resolution of the conflicts between workers' interests is far from easy, the least difficult case is the system for the accumulation of seniority rights. There is a strong argument that the recognition of employer-wide seniority is an acceptable compromise of the interests of the equality seeking groups' interests and those in the workplace targeted, for the incumbent employees are only being asked to dovetail their seniority with other long time employees of the employer.⁵⁴

More difficult is the use of seniority to determine layoffs. The argument has been made by Colleen Sheppard that seniority should not govern layoffs. She argues that the employer must consider other alternatives such as job sharing, super-seniority for the target group, and employer justification of the layoff before a government board.⁵⁵ Job sharing may indeed be a possible alternative in some occupations, and it has sometimes been adopted voluntarily, especially in short term situations where the impact can be cushioned by unemployment insurance benefits. However, there are times where job sharing is unattractive, if both parties face serious financial hardship. As Fallon and Weiler note, it is no answer to permanent readjustment.⁵⁶ In circumstances where one employee must leave if another is to stay, one must face the issue whether the junior employee should be favoured over the older employee because of employment equity objectives. I share with Fallon and Weiler the view that the seniority system should prevail in cases of layoff, despite its impact on target groups.

There are good reasons for this conclusion. First, the more senior employee has built up a property interest in his job, which should not be cast away in the interests of broader societal

objectives aimed at redesigning the workplace at his personal expense.⁵⁷ To do so is to require an individual to bear the cost of a social engineering scheme, when the costs should properly be spread among the members of the society.

Some will argue that the senior employee is not an innocent victim of reverse discrimination, because he is a member of an advantaged group, white males. Therefore, he has no right to complain when he is displaced, because he has long been advantaged by the subordination of the target groups.⁵⁸

This argument rests on a misplaced assumption about group guilt and group rights. There is an assumption that the target group members have been the victims of discrimination and disadvantage that must be compensated. One might well argue that this is a false assumption, for employment equity policy in Canada does not rest on a finding of wrongdoing by an employer. Rather, it is based on a commitment to barrier removal so that target group members can compete more fairly in the workplace in the future. Thus, it is concerned with future distribution of positions, and not compensation for past discrimination.⁵⁹

But even if the assumption is correct that the society and employers have not been sufficiently responsive to the needs of the target groups, and that there is an element of compensation for certain groups in these programmes, that does not translate into an automatic right of the target group members to be favoured and the individual white male's interests to be subordinated. Indeed, it is grossly unfair to give them preference in the workplace over a longer serving employee, who has invested time and loyalty in that workplace, and who may well be less advantaged, on an individual level, than members of the target group. Think, for example, of the more senior factory worker who has come to Canada from Eastern Europe or Italy. Why should he be asked to cede his place to a more junior employee from the Philippines or India because he or she is from a visible minority group? To claim that he is "privileged" because of his race ignores the similarity of his experience to the visible minority worker, for both, as immigrants, face the difficulties of adjusting to a new language and culture.

Protection of seniority does not constitute arbitrary deference to the claims of a favoured group, but the recognition of a neutral system designed to protect long service. Its benefits are available to all, and the members of the target group will, in time, also welcome its protection.

CONCLUSION

The issues of reproductive hazards and seniority systems present two difficult and important issues for the law relating to adverse effect discrimination and the duty of reasonable accommodation. While women and other equality seeking groups are concerned about protection from toxic substances that can harm a fetus and about the negative impact that seniority systems may have on their advancement in the workplace, the legal treatment of these issues must be sensitive to the interests of co-workers whose perceived entitlement to certain benefits in the workplace is threatened if the duty to accommodate ignores the terms of collective agreements. The message from the Supreme Court of Canada is clear, however: the duty to accommodate requires consideration of the impact of accommodation on the morale of other employees and the terms of a collective agreement. Nothing can threaten that morale more than a frontal attack on the rights of other employees, whether in the interference with job posting provisions or the downgrading of the protection and benefits accorded by seniority. At the same time, the adjudicator cannot ignore the claims for greater access to employment opportunities for women. A balancing of interests is required that must result in difficult value choices.

FOOTNOTES

1. *Ontario Human Rights Commission v. Simpsons-Sears Ltd.* (1985), 23 D.L.R.(4th) 321 (S.C.C.) - commonly called the *O'Malley* case.
2. *Law Society of British Columbia v. Andrews* (1989), 56 D.L.R.(4th) 1 (S.C.C.).
3. For example, *Re Rothmans, Benson & Hedges Inc. and Bakery, Confectionery & Tobacco Workers Union, Local 325-T* (1990), 10 L.A.C.(4th) 1 (R. Brown).
4. *Supra* note 1.
5. *Central Alberta Dairy Pool v. Alberta (Human Rights Commission)* (1990), 72 D.L.R.(4th) 417 (S.C.C.).
6. *Ibid.* at 439.
7. *Re Toronto Star Newspaper Ltd. and Southern Ontario Newspaper Guild* (1990), 12 L.A.C. (4th) 273 (Brent) - rotating shift schedule did not constitute adverse effect discrimination against women.
8. *Equal Opportunities Commission v. Sears, Roebuck & Co.*, 839 F.2d 302 (7th Cir. 1988).
9. This is the approach, for example, of Kathleen Lahey in "Feminist Theories of (In) Equality" in K. Mahoney and S. Martin, eds., *Equality and Judicial Neutrality* (Toronto: Carswell, 1987) 71 at 83.
10. It should be noted that the latter issue, affirmative action and seniority, is of interest not only to women, but to other equality seeking groups who are the beneficiaries of employment equity measures.
11. Some of the difficult issues that arise in setting health and safety standards are discussed in C. Tuohy, "Regulation and Scientific Complexity: Decision Rules and Processes in the Occupational Health Arena" (1982) 20 *Osgoode Hall L.J.* 562.
12. The lead studies have been criticized, as have others, because they failed to look at the possible risks to males and focused only on women's reproductive health (see, for

example, Society for Occupational and Environmental Health, *Conference on Women and the Workplace*, Proceedings (1976) at 219).

13. In explaining why its lead regulation contained stricter provisions relating to the exposure of women capable of bearing children in contrast to those pertaining to other workers, the Ontario Ministry of Labour noted that children under four years are particularly vulnerable to lead (Ontario Advisory Council on Occupational Health and Occupational Safety, *Fourth Annual Report*, 1981-82, at 51).
14. For further discussion of these issues, see K. Swinton, "Regulating Reproductive Hazards in the Workplace: Balancing Equality and Health" (1983) 33 U.T.L.J. 45; Ontario Advisory Council on Occupational Health and Occupational Safety, *Seventh Annual Report*, 1984-85, at 48 (report on reproductive hazards); M. Levitsky, "Protecting Workers from Reproductive Hazards" (1986) 1 C.J.W.L. 488.
15. A good example is found in the arbitration of a policy grievance concerning the exclusion of female workers from the battery department in *Re General Motors of Canada Ltd. and United Automobile Workers, Local 222* (1979), 24 L.A.C. (2d) 388 (Palmer). The arbitrator held that the policy was non-discriminatory.
16. See, for example, the Ontario lead regulation discussed in Swinton, *supra* note 14. The federal regulations on exposure to ionizing radiation have been changed since that article was written to impose more protective standards only for pregnant women, when once they included all women capable of bearing children (*Atomic Energy Control Act*, R.S.C. 1985, c. A-16; *Atomic Energy Control Regulations*, C.R.C. 1978, c. 365, as am. by SOR 85/335, ss. 19(4) and (5), Schedule II, requiring the pregnant employee to inform her employer as soon as she is aware of her pregnancy and imposing more protective dose limits).
17. *Re Wiens and Inco* (1988), 9 C.H.R.R. D/4795 (Ont. - Cumming).
18. *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW v. Johnson Controls, Inc.* (1990), 111 S.Ct. 1196.
19. Advisory Council, *supra* note 13 at 107, noting that the Human Rights Commission considered that the protection of

the health of a fetus was a "reasonable and *bona fide* qualification for an employer to limit employment opportunities for women capable of bearing children".

20. *Supra* note 17 at D/4815.
21. The adjudicator stated, "This is not to say that an employment policy excluding women who are pregnant, or are actively endeavouring to become so, would not be a bfoq." (*ibid.* at D/4815).
22. *Ibid.* at D/4816. This assumes that there is a right to relocate - something Inco conceded that it would permit (at D/4799), but not necessarily available for all workers, as discussed *infra*.
23. *Ibid.* at D/4816.
24. 78 Stat. 241, as am. by 92 Stat. 2076, 42 U.S.C. s. 2000e (k).
25. *Johnson Controls*, *supra* note 18 at 1207.
26. *Ibid.* at 1209. This point was disputed by the three judges dissenting on this and other points at 1210-1211.
27. *Supra* note 5 at 436, where Wilson J. notes that there is no duty of accommodation associated with the bfoq defence. Note that the Ontario Code has been changed since *Wiens* to require such accommodation (see *infra* note 29).
28. *Supra* note 17 at D/4819.
29. *Supra* note 17, did not deal with this issue since it was assumed that there would be a right to transfer. The adjudicator also assumed that the employer could take a protective role on behalf of the fetus, provided a woman was pregnant or potentially pregnant and there was a known risk. I described this approach as the "perils of protection" in the article cited in note 9. The perils may be somewhat alleviated if there is a duty of accommodation associated with the bfoq defence, as there is now in the Ontario *Human Rights Code*, S.O. 1981, c. 53, s. 23(1)(b) and 23(2), and if that duty includes a right to transfer, as discussed *infra*.
30. Right to refuse law is discussed in Swinton, *supra* note 14 at 69-71. In *Barss and Crown in Right of Ontario* (1981), 345/81, the Ontario Grievance Settlement Board stated that a

pregnant woman should be able to refuse work with a VDT (video display terminal) because of fears for her fetus. See also *Re Health Labour Relations Association of British Columbia (Surrey Memorial Hospital) and Hospital Employees Union Local 180* (1985), 29 L.A.C. (3d) 421 (Larson).

31. Quebec has a legislated right to re-assignment for pregnant women and nursing mothers which can be invoked when the woman's conditions of work create a risk for her fetus or her baby. See *Occupational Health and Safety Act*, S.Q. 1979, c. S-2.1, as am. S.Q. 1985, c. 6, ss. 39-48, described further in S. Belanger, "Le retrait preventif de la travailleuse enceinte" (1986) 1 C.J.W.L. 498 and G. Trudeau and J.P. Villagi, "Le retrait preventif de la femme enceinte en vertu de la Loi sur la sante et la securite du travail: ou en sommes-nous?" (1986) 46 R. du B. 477.
32. *Supra* note 5.
33. *Heincke v. Emrick Plastics* (1990), 91 C.L.L.C. para. 17,010 (Ont.- Hovius).
34. *Ibid.* at 16,236.
35. *Ibid.* at 16,237.
36. Arbitrators faced with such a scenario often find a way to create a right of transfer through a concept of constructive dismissal - that is, if the employer does not provide some alternative work to the disabled employee, there has been no just cause for discharge. However, this approach is not uniform among all arbitrators. Contrast *Health Labour Relations*, *supra* note 25 and *Re Pacific Press Ltd. & Vancouver/North Westminster Newspaper Guild Local 115* (1984), 14 L.A.C. (3d) 79 (Somjen).
37. See, for example, *Supra* note 5, where the employee sought certain religious holidays off.
38. Generally, the cases dealing with modification address a particular job. See for example, *Re Marianhill and Canadian Union of Public Employees, Local 2764* (1990), 10 L.A.C. (4th) 201 (R. Brown), where an arbitrator, applying human rights law concepts, required that a registered nursing assistant with diabetes be allowed to work only on a certain shift with such restrictions on her dispensing of medicine as the employer desired. See also *Re Rothmans, Benson & Hedges Inc. and Bakery, Confectionery & Tobacco Workers*

Union, Local 325-T (1990), 10 L.A.C. (4th) 1 (R. Brown).

39. Thus, the *Ontario Human Rights Code*, *supra* note 29, provides in section 16 that a person is not denied equality in employment on the basis of disability if he/she is incapable of performing the "essential" duties of the position. However, the employer must make efforts to accommodate up to the point of undue hardship before the individual should be deemed incapable of performing those duties. Further guidance on accommodation is found in "Guidelines for Assessing Accommodation Requirements for Persons with Disabilities Under the *Ontario Human Rights Code*, 1981, as Amended" (1989).
40. *Workers' Compensation Act*, R.S.O. 1980, c. 539, as am. by S.O. 1989, c. 47, s. 54b.
41. *Brooks v. Canada Safeway Ltd.* (1989), 59 D.L.R.(4th) 321.
42. *Ibid.* at 334.
43. *Ibid.* at 335. At 339, he stated:

Combining paid work with motherhood and accommodating the childbearing needs of working women are ever-increasing imperatives. That those who bear children and benefit society as a whole thereby should not be economically disadvantaged seems to bespeak the obvious. It is only women who bear children; no man can become pregnant. As I argued earlier, it is unfair to impose all of the costs of pregnancy upon one-half of the population.
44. *Supra* note 5 at 439.
45. *Gohm v. Domtar Inc.* (1990), 90 C.L.L.C. para. 17, 027 (Ont. - Pentney).
46. *Supra* note 31.
47. This section builds on an earlier study for the Royal Commission on Equality in Employment (Abella Commission), K. Swinton, "Restraints on Government Efforts to Promote Equality in Employment: Labour Relations and Constitutional Considerations" (*Research Studies*, 1985) at 273.
48. It should be noted that there are often restrictions on the weight to be given to seniority, especially in the case of

promotions and layoffs. For example, it is common to find that seniority governs in a promotion only if the senior employee is relatively equal to the best qualified junior employee.

49. The term was coined by the Abella report, Canada Royal Commission on Equality in Employment, *Report* (Ottawa: 1984) at 6-7.
50. Some of the design problems are discussed in E.B. Harvey and J.H. Blakely, "Strategies for Establishing Affirmative Action Goals and Timetables" in *Abella Research Studies*, *supra* note 47 at 113.
51. The problem caused by certain types of seniority lists is compounded by the practice in certain labour boards, such as Ontario's, of drawing up bargaining units along white collar/blue collar lines and separating plant and office units. For a discussion of that practice, see A. Forrest, "Bargaining Units and Bargaining Power" (1986) 41 *Rel. Ind.* 841.
52. See Laurell Ritchie, "Affirmative Action versus Union Security" in Canadian Industrial Relations Association, 19th Annual Meeting, vol.II, at 402-403.
53. *Supra* note 5 and *supra* note 45.
54. This suggestion will be resisted by the incumbents, for they will perceive a loss of an entitlement as others move into the seniority list above them.
55. C. Sheppard, "Affirmative Action in Times of Recession: The Dilemma of Seniority-Based Layoffs" (1984) 42 *U.T. Fac. L. Rev.* 1. Alternatives to layoff are also discussed in R. Fallon and P. Weiler, "Firefighters v. Stotts: Conflicting Models of Racial Justice" (1984) *S.C.Rev.* 1 at 60-62.
56. Fallon and Weiler, *supra* note 55.
57. Fallon and Weiler note that seniority is a property right that can be worth more than an employee's equity in his home (*ibid.* at 58).
58. See, for example, the critique of the language of "innocent" victims in K. Sullivan, "Sins of Discrimination: Last Term's Affirmative Action Cases" (1986) 100 *Harv. L. Rev.* 78 at 84 - 92.

59. In some cases, affirmative action, complete with quotas, will be imposed on a workplace as a result of a finding of discrimination (see, for example, *Action Travail des Femmes v. Canadian National Railway Co.* (1987), 40 D.L.R.(4th) 193 (S.C.C.) - that is, as a remedial proposition to put an end to discriminatory behaviour. Even in these cases, the seniority system should, for the most part, be protected. In times of layoff, the more senior employee should retain his rights based on seniority, even if the target group members are laid off, for it is the employer, not the individual worker, who should bear the guilt for the discrimination. Only if the target group member was herself a victim of discrimination by the employer could one justifiably interfere with the seniority system. This would be necessary in order to provide her with the seniority which she would have had absent discrimination. This "make whole" relief would not deprive the male employee of a benefit to which he was entitled.

In contrast, with most of the target group members benefited by such a programme, there is no record of discrimination against them personally. If there have been barriers to the advancement of their group, the costs have often been borne by their parents. It is unjust to give them an advantage over the innocent senior employee on the basis of a group membership which may well have given him little in the way of advantage. Indeed, there will be many white males less advantaged, on a personal level, than some members of the target group.