



# Do Employer's have to Accommodate Chemical Sensitivities?

## Fact Sheet

*With more and more CUPE members being diagnosed with chemical sensitivities, Locals have begun to ask, "What is a chemical sensitivity and do employers have a duty to accommodate it?" This article will briefly answer these two questions. As duty to accommodate law changes very frequently, this article should not be used as a definitive opinion on the arbitral jurisprudence (most recent theory and philosophy of law). Like the law on duty to accommodate, medical science is also changing frequently; it is important to keep informed on the latest developments.*

### What is a chemical sensitivity?

The standard terminology for this condition is Multiple Chemical Sensitivity ("MCS"). It is a medical condition that is caused by exposure to low levels of chemicals. These sensitivities range from an intolerance to fragrances used in soaps and perfumes, to severe allergic reactions to common work place products. Substances include pesticides, synthetic fabrics, scented products, petroleum products, paints and smoke. There are many other products as well.

Six factors have been identified for the diagnosis of MCS. These are:<sup>[1]</sup>

1. Symptoms are reproducible with repeated exposures.
2. The condition persists for a significant period of time.
3. Low levels of exposure (lower than previously or commonly tolerated) result in increased sensitivity.
4. The symptoms improve or resolve completely when the triggering chemicals are removed.
5. Responses often occur to multiple chemically unrelated substances.

6. Symptoms involve multiple-organ symptoms (runny nose, itchy eyes, headache, scratchy throat, ear ache, scalp pain, mental confusion or sleepiness, palpitations of the heart, upset stomach, nausea and/or diarrhea, abdominal cramping, aching joints).

### If you have a member who has MCS, is there a duty to accommodate?

In a recent decision by the Alberta Court of Appeal<sup>[2]</sup>, it was reaffirmed that the employer and employees both have responsibilities in the duty to accommodate process. In that case, a legal secretary who had MCS, was deemed to have been properly accommodated by her employer when the employer took the following steps:

1. Employees (co-workers) were asked to refrain from the use of perfumes and fragrances.
2. The employee was permitted to use a washroom in the office sick room rather than the public washroom.
3. Air cleaners were placed in her work area.
4. The employee was allowed to use charcoal-filtered air masks.
5. The employee's work hours were changed so that she could avoid contact with crowds.
6. The employer also subsequently advised the employee that her work location would be changed so that she could be stationed somewhere with less contact with others.

However, the employee had concerns over the employer refusing to implement her specialist's recommendations, as well as the employer later discontinuing her use of the office sick room

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washroom. She refused to return to work due to these concerns. The employee then filed a complaint with the Alberta Human Rights Commission, but refused to allow the investigator to speak to her physicians during the investigation. She then filed a complaint with the Chief Commissioner of Alberta Human Rights Commission, and petitioned the Alberta Court of Queen's Bench (in which she was successful). The employer sought to appeal with the Alberta Court of Appeal.

The Alberta Court of Queen's Bench decided that:

"...the Commission's conclusions with respect to whether the employer had discharged its duty to accommodate the complainant fell within a range of possible, acceptable outcomes."

As per an excerpt from Lancaster,

"...the Court held that in all the circumstances it was reasonable for the Commission to conclude that J.B.'s refusal to try out the new work environment amounted to a failure to cooperate. Citing *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970, the Court pointed out that a complainant has a duty to assist in securing an appropriate accommodation and that 'when an employer has initiated a proposal that is reasonable and would, if implemented, fulfill the duty to accommodate, the complainant has a duty to facilitate the implementation of the proposal.'"

Therefore, as per the leading *Central Okanagan School District No. 23 v. Renaud* decision, and numerous decisions subsequent to this, it was reaffirmed that the employer and the employee both have obligations in the duty to accommodate process. As stated in Lancaster,

"An employee is, without justification, obligated to try out a reasonable accommodation offered by an employer in good faith and which is in accordance with his or her medical restrictions."

While each case is dependent on the facts, chemical sensitivities may fall under the duty to accommodate process, subject to the above.

It is important to contact your National Representative in order to ensure that members are in receipt of advice based on the most current jurisprudence and CUPE Policy, in accordance with your applicable collective agreement and past practices. ■

### **References:**

1. "Multiple chemical sensitivity: a 1999 consensus". *Arch. Environ. Health* 54 (3): 147-9. 1999. PMID 10444033.
2. *J.B. v. Fraser Milner Casgrain LLP*, Alberta Court of Appeal, Ronald Berger, Jack Watson and Frans Slatter, December 19, 2008, [2008] A.J. No. 1433 (QL)  
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