

**BRIEF SUBMISSIONS ON THE *EMPLOYMENT STANDARDS ACT*
FROM A DISABILITY RIGHTS PERSPECTIVE**

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**Prepared in Response to the
Changing Workplaces Review Special Advisors' Interim Report
Ministry of Labour**

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Changing Workplaces Submissions

About ARCH

ARCH Disability Law Centre (ARCH) is a specialty legal aid clinic dedicated to defending and advancing the equality rights of persons with disabilities in Ontario. ARCH provides legal services to help Ontarians with disabilities live with dignity and participate fully in our communities. We work with Ontarians with disabilities and the disability community on law reform and policy initiatives, community development, legal advice and referrals, public legal education and precedent-setting litigation. In all of its work, ARCH adopts a broad and liberal approach to defining disability that includes past and perceived disabilities.

ARCH welcomes the opportunity to provide submissions on the *Changing Workplaces, Special Advisors' Interim Report (Changing Workplaces)* and to comment and provide recommendations from a disability rights perspective.

A Paradigm Shift¹

First and foremost, ARCH encourages the adoption and understanding of disability from a social model and rights model of disability (“social and rights model”) perspective, as opposed to a bio-medical/individual approach. Adopting a social and rights model perspective, means understanding that disability is socially constructed, as opposed to an intrinsic attribute that results from a physical, sensory, psychiatric, cognitive or intellectual impairment and that must be cured or treated.² Therefore, disability under the social and rights model is thought of as a product of inaccessible social, political, environmental, attitudinal and economic conditions.

The social and rights model also recognizes that persons with disabilities may not in fact experience limitations in everyday activities, but that they may experience limitations

¹ *Hinze v. Great Blue Heron Casino*, 2011 HRTO 93, paras. 19-22

² Law Commission of Ontario, *The Law As It Affects Persons With Disabilities. Preliminary Consultation Paper: Approaches to Defining Disability* [LCO Persons with Disabilities Paper] [2009], online: Law Commission of Ontario www.lco-cdo.org.

created by assumptions about disabilities based on stereotypes and prejudices.³ Furthermore, it must be recognized that discrimination is often socially constructed, in that it is not the disability itself that must be resolved, but society's *reaction to* the disability.⁴

The United Nation's *Convention on the Rights of Persons with Disabilities (CRPD)* speaks to the social model of disability in its Preamble:

Recognizing that disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others.⁵

It is ARCH's submission that any changes to legislative and policy amendments must begin with an understanding of disability from a social model perspective. ARCH encourages legislation like the *ESA* incorporate human rights principles and language into its provisions.

The Underrepresentation of Persons with Disabilities in the Workplace

Persons with disabilities still do not have equal access to the labour market despite both comprehensive human rights legislation⁶ and Canada's ratification of the *CRPD* in 2010. Persons with disabilities are still more likely to be unemployed or underemployed. They are more likely to experience turnover, work part time, be stuck in entry-level jobs and experience job insecurity.⁷

³ *Quebec (Commission des Droits de la Personne et des Droits de la Jeunesse) v. Montreal (City); Quebec (Commission des Droits de la Personne et des Droits de la Jeunesse) v. Broisbriand*, 2000 SCC 27 paras. 77-84.

⁴ *Granovsky v Canada (Minister of Employment and Immigration)*, 2000 SCC 28, paras. 29-30.

⁵ UN GAOR, 61st Sess., 76th Mtg., UN Doc. GA/10554 (2006), online:

<http://www.un.org/disabilities/convention/conventionfull.shtml>

⁶ *Human Rights Code*, R.S.O. 1990, c. H. 19

⁷ Breward, K. *Accommodation Requesting in the Workplace*, Canadian Journal of Disability Studies, Vol. 5.1 (January 2016) online: <http://cids.uwaterloo.ca/index.php/cids/article/view/248>

Persons with disabilities currently make up only 47.1% of the employment force, compared to 73.8% of persons without disabilities.⁸ The statistics are particularly staggering when it is taken into consideration that besides the number of persons with disabilities who are currently employed,⁹ an estimated 411,600 are unemployed but have the potential to work. Half of the 411,600 potential workers are postsecondary graduates.¹⁰

The reasons for this discrepancy are multifold, however in these submissions ARCH will focus primarily on two reasons that persons with disabilities are underrepresented in the workplace: (a) barriers to access to the workplace, and (b) barriers within the workplace. The proposed remedy to these barriers is the strengthening of *ESA* legislation by adopting a social and rights model of disability and the inclusion of human rights language within *ESA* provisions.

For the purposes of these submissions, ARCH will focus on the language and provisions of the *ESA*, and not the *Labour Relations Act*.

The Nature of Disability

We cannot speak about persons with disabilities in the workplace without first acknowledging the varied aspects of disabilities. Disabilities can be permanent, temporary or episodic. They can be physical, sensory, psychiatric and/or intellectual; they can be visible or non-visible, as in the case of many mental health disabilities and learning disabilities; and, they can be disabilities with well-known histories, or they may be emerging disabilities such as multiple chemical sensitivities (“MCS”) and electromagnetic hypersensitivity (“EHS) which are more recently being studied and examined.

⁸ Arim, R., 2013, *A Profile of Persons with Disabilities among Canadians Aged 15 Years or Older, 2012* Canadian Survey on Disability, 2012.

⁹ This latest data is from 2012.

¹⁰ Till, M., Leonard, T., Yeung S., and Nicholls G., 2015, *A Profile of the Labour Market Experiences of Adults with Disabilities among Canadians Aged 15 Years and Older, 2012*. Statistics Canada, catalogue no, 89-654-X2015005.

Each person with a disability has their own needs and may require their own accommodations. Moreover, no two persons with the same disability will require the same accommodations, nor will they have the exact same lived experience. As such, accommodating a person with a disability must take place on an individualized basis.¹¹

(a) Barriers to Access to the Workplace

Prior to addressing the need for stronger protection for persons with disabilities in the workplace under employment legislation, we must touch upon the fact that persons with disabilities do not have equal access to entering the workplace.

Barriers include lack of access to important areas such as education, transportation and housing. While these areas are outside the scope of employment legislation, they are still essential to consider when discussing access to the labour force by persons with disabilities.

In particular, these barriers can include (i) attitudinal barriers by prospective employers and (ii) a lack of accommodation during the application and interview process that can cause adverse consequences to prospective employees with disabilities.

(i) Attitudinal Barriers

Attitudinal barriers vary, but often stem from an ableist¹² belief system that devalues and limits the potential of persons with disabilities.¹³ Ableist attitudes often adopt the medical model understanding of disability and perceive disability as an “anomaly to normalcy” rather than an inherent and expected variation in the human condition.¹⁴

¹¹ Ontario Human Rights Commission *Policy on Ableism and Discrimination Based on Disability*, June 27, 2016, p. 30 [OHRC *Ableism Policy*] online: http://www.ohrc.on.ca/sites/default/files/Policy%20on%20ableism%20and%20discrimination%20based%20on%20disability_accessible_2016.pdf

¹² *Ibid.*, p. 10

¹³ *Ibid.*

¹⁴ Rioux, M.H. and Valentine, F. *Does Theory Matter? Exploring the Nexus Between Disability, Human Rights, and Public Policy*, in *Critical Disability Theory: Essays in Philosophy, Politics, Policy, and Law*, (Vancouver: UBC Press), 2006, 47 at 51, as cited by the OHRC *Ableism Policy* at p. 10.

Persons with (different) types of disabilities will experience (different) barriers and the removal of these barriers requires a proactive and/or individualized approach. For instance, a person with a non-visible disability will experience a higher burden of proof to explain their unrecognizable disability. Non-visible disabilities can include physical disabilities like chronic fatigue syndrome, fibromyalgia and back pain or can be mental health and addictions related disabilities like depression, anxiety and alcohol and drug addictions. Employers tend to want more “proof” of the disability and are sometimes reluctant to accommodate an employee by varying their position or a workplace policy because the disability is not perceived to be as “real”.¹⁵

Attitudinal barriers, such as stigma, can create a hostile work place for persons with disabilities. Experiences of stigmatization that result in prejudiced behaviour towards persons with disabilities can lead to the discrimination of a person with a disability. Fear of stigma that follows the disclosure of a disability may prevent a person with disabilities from requesting accommodations from employers.¹⁶ Removal of attitudinal barriers such as stigma from the workplace will create a more inclusive environment for persons with disabilities.

Lastly, attitudinal barriers, including assumptions about the ability of persons with disabilities, must be reassessed as being inherently ableist. When an employee has a disability and when that disability is disclosed, this does not necessarily mean that their day-to-day tasks will be impacted, especially when they are provided with reasonable accommodations or modifications to their position.

(ii) Accommodations during the Application and Interview Process

Accommodation during the application and interview process is one of the few areas in which the *ESA* can create provisions that would provide prescriptive guidelines for employers to follow when interviewing prospective employees with disabilities. Including such provisions in the *ESA* would increase accessibility to the labour market for persons

¹⁵ *Nova Scotia (Workers' Compensation Board) v. Martin*, 2003 SCC 54, [2003] 2 SCR 504

¹⁶ *ADGA Group Consultants Inc. v. Lane*, [2008] O.J. 3076 (*Lane*); *Thompson v. Selective Personnel*, 2009 HRTO 1224.

with disabilities and would be a step closer to “leveling the playing field” for applying and interviewing for job opportunities. Moreover, these provisions would assist employers in knowing their responsibilities to accommodate prospective employees and would create a more inclusive hiring process.

Employers must be encouraged and expected to make the job-seeking and job-securing process as inclusive as possible. This can include making application forms and job advertisements more accessible for example, accessible fonts, large print options, make job ads available in Word format, PDF, and braille, include image descriptions in any videos, and asking interviewees if they require accommodation during the interview itself, i.e. accessible meeting spaces, live captioning (CART), attendants and/or ASL interpreters.

Providing accommodations to prospective employees during the interview and application process falls in line with the Human Rights Commission of Ontario’s policies on accommodation.¹⁷

(b) Barriers in the Workplace

Persons with disabilities currently employed may face multiple barriers within the workplace that lead to their withdrawal from the workforce or their unjust dismissal. For the purposes of these submissions, ARCH will focus on (i) harassment within the workplace, and (ii) the lack of accommodations in the workplace.

(i) Harassment within the Workplace¹⁸

There are currently no provisions within the *ESA* that touch upon the practice of harassment within the workplace. While there are provisions in the *Occupational Health*

¹⁷ OHRC Accommodation policy and procedure: online: <http://www.ohrc.on.ca/en/policy-primer-guide-developing-human-rights-policies-and-procedures/7-accommodation-policy-and-procedure>

¹⁸ *Strudwick v. Applied Consumer & Clinical Evaluations Inc.*, 2016 ONCA 520 is an excellent example of the protection that can, and should be provided to persons with disabilities when they experience harassment and discrimination in the workplace. However, this protection is found under the *Code* and adjudicated upon by virtue of s. 46. 1. Stronger human rights language is required within the *ESA* itself (further discussion on this point is provided, further below).

*and Safety Act*¹⁹ and the *Code*²⁰ which provide for the duties of employers and the protection to employees, respectively, the *ESA* should have some provisions that address the adverse consequences of harassment experienced by certain groups within the workplace.

Harassment is defined under the *Code* as engaging in a course of vexatious comment or conduct that is unwelcome²¹, and can take many forms. The fact that the Act stays silent on an issue that affects marginalized groups within the workforce is concerning and must be addressed.

Harassment can include unwanted comments with respect to the nature of the employee's disability, a questioning of the "realness" of an employee's non-visible disability, difference in treatment because of an employee's disability and harassing an employee over their accommodation requests which may include modified duties.

Similar to how each disability will experience different barriers, each disability may also experience different types of harassment that are particular to that disability. For example, persons with emerging disabilities like MCS who work in an environment void of a scent-free policy may experience triggers by a colleague's consistent use of scented products despite the employee with a disability's disclosure and request for accommodation.²²

ARCH encourages the *ESA* to adopt an understanding to issues that would create more barriers for persons with disabilities, and that may create a poisoned environment that may eventually lead to the resignation²³ of a person with a disability.

¹⁹ R.S.O. 1990, c. O.1 at Part III.0.1

²⁰ s. 5(2) of the *Code*.

²¹ OHRC *Ableism policy*, p. 23; see also: s. 10(1) of the *Code*

²² Liz Rice's ("Scent Smart") submissions to the *Changing Workplaces* Report provides a comprehensive analysis of bullying and harassment in the workplace as experienced by persons with MCS. This scenario is borrowed from her submissions, where she provides further examples at p. 3.

²³ It is recognized that resignation because of a poisoned environment can sometimes give rise to a claim for constructive dismissal under the *ESA*.

(ii) Accommodations in the Workplace

Not all persons with disabilities require accommodations in the workplace. As such, it should not be assumed that because an employee has a disability, they will request accommodations. Whether accommodations are requested or not, however, does not change the fact that appropriate accommodations should be made readily available once the request is made.

Disclosure of a disability and a request for accommodation in particular for persons with non-visible disabilities may not be made during the application process, the interview process or immediately following their acceptance of a job offer. This may be because of a fear of stigma from past experience,²⁴ or because a need for accommodation does not immediately arise after successfully gaining employment. Without disclosing a disability, the employee will not receive the necessary accommodation and as such may not be able to perform to the best of their ability. Barriers that prevent an existing employee from disclosing a disability for the purposes of accommodation, such as stigma, must be removed from the workplace.

Once a request for accommodation is made, the employer must accommodate the employee up to the point of undue hardship.²⁵ The concern is that employers are not well informed with respect to appropriately accommodating an employee with a disability. Modifications to certain job duties or finding alternative work are sometimes perceived by employers as a burden; rather, modified duties are a way in which an employer can maximize on their employee's skills and talents by accommodating their disability.

²⁴ Lane, *supra*, note 16, OHRC *Ableism Policy* p. 10

²⁵ *Hydro-Québec v. Syndicat des employées de techniques professionnelles et de bureau d'Hydro-Québec, section locale 2000 (SCFP-FTQ)*, 2008 SCC 43 at paras. 14 and 16.

A Proposed Remedy: Reconciling Human Rights Legislation and the ESA

The introduction of s. 46.1 into the *Code* built a bridge between employment legislation and human rights protection in Ontario. Over the last 8 years²⁶ this section has gained traction and has become a substantive tool that the superior court has used to award damages to persons who have a discrimination claim alongside a civil cause of action.²⁷ Essentially, s 46.1 is demonstrative of the protection that can, and should be provided to employees who have experienced discrimination in the workplace.

Despite this progress, s. 46.1 cannot, and should not, be the only time the civil sphere touches upon issues having to do with discrimination in the workplace. This is especially true when considering that there is a pattern of caution by plaintiffs when invoking s. 46.1 and that, when it is invoked, it is only successful on very few occasions.²⁸

As such the *ESA* itself should become more comprehensive by weaving human rights language within its mandate and provisions. A starting point, for example, would be a strong preamble that adopts language from human rights legislation, including the *CRPD*. Section 27 of the *CRPD*, for instance, begins as follows:

States Parties recognize the right of persons with disabilities to work, on an equal basis with others; this includes the right to the opportunity to gain a living by work freely chosen or accepted in a labour market and work environment that is open, inclusive and accessible to persons with disabilities. States Parties shall safeguard and promote the realization of the right to work, including for those who

²⁶ It appears that for the first several years the focus in s. 46.1 cases was on jurisdiction and the courts clarifying its meaning and utility to plaintiffs, see: Pinto, A. *Report of the Ontario Human Rights Review 2012*, (*Report of the Ontario Human Rights Review*), (MAG), November 2012, online: https://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/human_rights/

As of 2012, only 14 cases had specifically relied on s. 46.1 and that time, none of them had been successful.

²⁷ See: *Wilson v. Solis Mexican Foods Inc.*, 2013 ONSC 5799 and *Strudwick*, *supra* note 18.

²⁸ *Report of Ontario Human Rights Review*, *supra* note 26

acquire a disability during the course of employment, by taking appropriate steps, including through legislation ...²⁹

As such, ARCH recommends that, in amending *ESA* legislation, a social model and rights understanding of disability be adopted and should be supplemented with the inclusion of human rights language within the legislation.

Conclusion

The Changing Workplaces Report provides an opportunity for creating provisions that have the potential to provide stronger protection to marginalized employees that do not fall within the scope of the *ESA* as it stands today. Persons with disabilities often find themselves facing barriers in their attempts to access entry into the workplace, and find further barriers once they have successfully gained employment in the labour force. In order to protect marginalized employees, including persons with disabilities, ARCH recommends that any amendments to the *ESA* should acknowledge barriers to access and barriers within the workplace. The *ESA*'s mandate and provisions should reflect in their language a commitment to human rights principles, generally, and to a broader, social and rights model understanding of disability as well.

²⁹ *CRPD*, *supra* note 5.