



# What's New in HR Law

## Court of Appeal Finds University Discriminated Against Disabled Student

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### Bottom Line

In a [recent decision](#), the Court of Appeal for Ontario found that the University of Waterloo (the “University”) discriminated against a student applicant on the basis of disability in its decision to refuse admission. This decision provides helpful insight into the propriety of educational institutions’ student admission processes. However, more generally, it also offers helpful guidance for employers across all sectors as to the distinction between the procedural and substantive aspects of the duty to accommodate.

### Background

Rich Longueépée, the Respondent, brought an application to the Human Rights Tribunal of Ontario alleging discrimination under the Ontario *Human Rights Code*. The application alleged that the University had discriminated against him on the basis of disability in refusing him

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admission to the Faculty of Arts. The Respondent was a survivor of institutional child abuse and suffered severe physical, psychological, and sexual trauma during his childhood.

The Respondent attended Dalhousie University several years before he applied for admission to the University. At Dalhousie, the Respondent achieved grades that were below the University's minimum admission requirements for transfer students. Accepting that the Respondent achieved his grades at a time when he had undiagnosed and unaccommodated disabilities, the University's admissions committee considered the Respondent's application. The Respondent's application package consisted of academic transcripts, information about his volunteer work, and reference letters. After considering the application, the Admissions Committee concluded that the application did not demonstrate that the Respondent had the ability to succeed at the University, and he was refused admission.

### **The Tribunal's Decision**

The Tribunal accepted that the University's grades-based admission standard had a discriminatory effect on the Respondent. However, having established a *prima facie* case of discrimination, the Tribunal identified the issue to be determined as whether the University had accommodated the Respondent in the admissions process, up to the point of undue hardship.

Ultimately, the Tribunal dismissed the Respondent's application, finding that the University met both the procedural and substantive components of its duty to accommodate. The Tribunal found that the University met the procedural component of its duty by conducting an individualized assessment that considered the Respondent's application, despite it being submitted late and after all the student positions in the Faculty had been filled.

Regarding the substantive component, the Tribunal concluded the University met its obligation by assessing whether the Respondent could be successful in his academic studies. The Tribunal found that the Admissions Committee, which undertook the assessment, was entitled to rely on the Respondent's past academic grades despite those grades being achieved at a time when the Respondent had undiagnosed and unaccommodated disabilities.

### **Judicial Review: Divisional Court**

On judicial review, the Divisional Court concluded that the Tribunal erred in finding that the University reasonably accommodated the Respondent. The Divisional Court applied the three-step test prescribed by the Supreme Court of Canada in *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 S.C.R. 868 ("*Grismer*"), to determine whether a *prima facie* discriminatory requirement is reasonable and *bona fide*. Under the *Grismer* test, the University had to establish:

1. that the grades standard for transfer students was adopted for a purpose or goal rationally connected to the function being performed;

2. that it adopted the grades standard in good faith in the belief that it was necessary for the fulfillment of that purpose or goal; and
3. that the standard was reasonably necessary to accomplish its purpose, in the sense that the University could not accommodate persons with the Respondent's characteristics.

The court found that the University met the first two steps of the test. However, with respect to the third step, the court found that the University failed to accommodate the Respondent as the Admissions Committee had based its decision solely on the Respondent's Dalhousie grades. Because the grades were achieved when the Respondent's disabilities were undiagnosed and unaccommodated, the Admissions Committee had to assess the application in its entirety, or establish undue hardship. The Divisional Court remitted the matter back to the Admissions Committee with directions.

## **The Court of Appeal**

On appeal, the University raised a number of arguments, one of which was that the Divisional Court erred in its application of the reasonableness standard of review.

The Court of Appeal found that the Divisional Court identified the correct standard of review. Regarding the reasonableness of the Tribunal's decision, the Court of Appeal agreed with the Divisional Court's analysis with respect to the errors made by the Tribunal. Similar to the Divisional Court, the Court of Appeal applied the three-step test set out by the Supreme Court of Canada in *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3 ("*Meiorin*").

Based on the *Meiorin/Grismer* tests, the Court of Appeal found that the University met the first two components of the test. The University's grades-based system for transfer students was rationally connected to the admissions process as a predictor of the ability to succeed at university. Further, the standard was adopted with an honest belief that it was necessary to ensure that admitted students would have the ability to succeed. However, the Court of Appeal found that the relevant issue before the Tribunal was whether the University had accommodated the Respondent in its admissions process.

The Court of Appeal emphasized the need to fulfill both the procedural and substantive components of the duty to accommodate, highlighting that the procedural component typically involves the identification of the process or procedure to be adopted in providing the accommodation. Because this component requires an understanding of the person's needs, and requires that person to provide information, the procedural component is often referred to as the "accommodation dialogue".

Regarding the substantive component, the Court of Appeal emphasized that it involves the consideration of possible accommodations that could be used to address the person's needs, including the option of undertaking an individualized assessment in the case of a discriminatory

standard. The substantive component also refers to steps taken to implement the accommodation, up to the point of undue hardship.

With respect to the matter at hand, the Court of Appeal noted that there was no indication that the University engaged in an “accommodation dialogue” with the Respondent, or undertook any other measures to assess how his disabilities might impact his ability to meet the University’s grade standard. Instead, the University decided that the Respondent’s application would be assessed by the Admissions Committee to determine his ability to succeed at the University.

Regarding the substantive component, the Court of Appeal held that there was no indication that the Admissions Committee made any effort to understand how the Respondent’s disabilities might have affected his Dalhousie grades, or to analyze whether his grades, interpreted in light of his disabilities, might assist in showing his ability to succeed at the University. Additionally, the fact that the Admissions Committee considered only the Respondent’s unaccommodated grades was inconsistent with the “holistic” and “individualized” process that had been described by the University’s witnesses. Furthermore, there was no evidence that the Admissions Committee had engaged with the additional materials provided in the Respondent’s application package.

Based on the above, the Court of Appeal held that the Tribunal’s decision had the effect of failing to recognize that the University, although embarking on a process to provide accommodation, had a duty to carry through with the process to accommodate the Respondent. An additional shortcoming identified was the fact that the Tribunal recognized an undue hardship defence, even though the University did not argue or present evidence on undue hardship. Ultimately, the Court of Appeal found that the Tribunal effectively bypassed the third step of the *Meiorin/Grismer* test.

## **Check the Box**

While the courts acknowledge that educational institutions should be afforded a measure of deference with respect to their core academic decisions, including admissions, such deference does not insulate decision-making from scrutiny.

This decision highlights the central importance that human rights play in the provision of services in the education sector. However, it also helpfully unpacks the distinction between the procedural and substantive components of the duty to accommodate, and reinforces the need for all employers, regardless of the sector in which they operate, to ensure that both are met in the context of any accommodation process.

## **Need more information?**

For more information about employers’ human rights obligations and the duty to accommodate, please contact [Tawanda Masimbe](#) at 416.408.3221 or your regular lawyer at the firm.

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