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Return To Work Accommodation for Mental Health Illnesses and Conditions

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The Accommodation Process

1. Employer receives the initial return to work request
2. Employer determines appropriate accommodation measures
3. Employer implements measures and follows up to ensure consistency



The Duty to Accommodate Disabilities

- Human rights legislation protects employees from discrimination on the ground of disability
- This includes both physical and mental disabilities
- A wide range of mental health illnesses have been held to constitute a “disability”

The Duty to Accommodate Generally

- Employee makes out a prima facie case of discrimination
- Onus then shifts to the employer to justify its conduct or its workplace rule
- It is as part of this justification that the duty to accommodate arises
- There are both procedural and substantive aspects to the duty to accommodate



1. Initial Return to Work Request

- Employers may face several difficult scenarios, including:
 - a) Employee privacy concerns regarding their medical information
 - b) Insufficient or unreliable medical information
 - c) Unclear or ambiguous medical information



a) Employee Privacy Concerns

- Employees may raise privacy concerns when their absence is associated with some form of mental illness
- Employees may be concerned about possible stigmatization as a result of their disability



Complex Services Inc. v. O.P.S.E.U., Local 2783, 2012 CanLII 8645 (ON LA)

- As part of her return to work, the grievor requested various accommodations in respect of a mental health issue
- One of these requests was that all communications from the employer would go through the grievor's union representative
- The employer was not provided with any medical documentation to support this accommodation request



Complex Services Inc. v. O.P.S.E.U., Local 2783, 2012 CanLII 8645 (ON LA)

- When referred to the company's occupational health doctor, the grievor refused to sign a consent form
- The employer became concerned about the nature of the grievor's illness and its impact on her ability to work safely
- The employer put the grievor off work on a temporary medical leave of absence



Complex Services Inc. v. O.P.S.E.U., Local 2783, 2012 CanLII 8645 (ON LA)

- The union filed a grievance alleging discrimination and harassment
- The employer filed a grievance alleging that the union and grievor had failed to meet their obligations with respect to the duty to accommodate under the *Human Rights Code* (the “Code”)
- The union grievance was dismissed, while the employer’s grievance was allowed

Complex Services Inc. v. O.P.S.E.U., Local 2783, 2012 CanLII 8645 (ON LA)

- The Board noted that while privacy and confidentiality are important in respect of the duty to accommodate, **“an employer is entitled to access sufficient information for legitimate purposes**, including to be assured that the employee is able to continue or return to work, or to provide necessary appropriate accommodation – to ensure that the employee can work without jeopardizing her safety, or that of other employees...”



Implications

- While employees have the right to keep medical information private and confidential, refusing to disclose it to the employer may interfere with the employer's ability to properly accommodate the employee
- In such circumstances, it may be appropriate for employers to refuse to allow the employee to return to work until such information is provided
- Employers are entitled to request and employees are obliged to provide sufficient reliable medical information to enable the employer to satisfy its obligations under the collective agreement (if there is one) and the *Code*



b) Insufficient or Unreliable Medical Information Provided

- When medical information is provided, employers are not always required to accept it as is
- Employers may be entitled to seek clarification or a second opinion



Bottiglia v. Ottawa Catholic School Board, 2015 HRTO 1178

- The employee, a Superintendent of Schools, had been absent for almost two years with a mental health disability
- He provided the employer with three conflicting medical notes in a span of six months regarding his ability to return to work
- The employer was concerned that the desire to return was linked to the end of his sick paid leave and that the physician was not providing a completely objective assessment of the employee's ability to return to work
- The employer requested that the employee attend an Independent Medical Examination (IME)
- The employee filed a human rights complaint alleging that the employer failed in its duty to accommodate his return to work



Bottiglia v. Ottawa Catholic School Board, 2015 HRTO 1178

- The Tribunal found that the request for the IME was reasonable in the circumstances
- The employer had a reasonable and bona fide reason to question the adequacy and reliability of the information the applicant provided and the legitimacy of the applicant's proposed accommodation



Implications

- Where an employee's request to return to work is accompanied by medical information indicating a sudden change in the employee's prognosis, employers may have reasonable grounds to question the objectivity of the information provided



c) Unclear or Ambiguous Medical Information Provided

- Medical information provided by an employee must help the employer understand the nature of the employee's restrictions
- Employers should seek clarification from the employee's physician if the information is unclear or ambiguous



Fair v. Hamilton-Wentworth District School Board, 2012 HRTO 350

- Employee was the School Board's Supervisor, Regulated Substances, Asbestos
- She went on a medical leave of absence in 2001 and was diagnosed with a generalized anxiety disorder, depression and PTSD
- In 2003, she made an effort to return to work
- The employer sought clarification about her restrictions and limitations from her physician and an independent psychiatrist
- The independent psychiatrist stated that she would not be able to function in a job which entailed responsibility for health and safety issues
- Two months later, the employer terminated her employment



Fair v. Hamilton-Wentworth District School Board, 2012 HRTO 350

- The Tribunal found that the information received was ambiguous and that the employer had an obligation to clarify the information before terminating the employee
- By not properly considering her for two positions, it was held that the employer had failed in its duty to accommodate her
- She was awarded reinstatement, 10 years of lost wages, and \$30,000 for injury to her dignity, feelings and self-respect



Implications

- Employers looking to terminate an employee should clarify any ambiguous medical information before doing so
- The failure to clarify may support a finding that an employer did not satisfy its duty to accommodate



2. Proposing and Implementing Accommodation Measures

- Employees are not entitled to their preferred form of accommodation
- Instead, they are required to accept a reasonable offer of accommodation when it is made by their employer



Croteau v Canadian National Railway Company, 2014 CHRT 16

- Employee had been out of the workplace for almost 10 years due to anxiety-related disorders
- He became increasingly paranoid and developed a conspiracy theory involving the employer
- The employer tried to accommodate the employee multiple times, but the employee repeatedly refused
- He insisted on the employer offering a specific remedy for alleged harassment in the workplace in order for him to return to work



Croteau v Canadian National Railway Company, 2014 CHRT 16

- The Tribunal found that the employee's failure to return to work was due to his failure to participate in the accommodation process, his insistence on a certain remedy when other reasonable offers had been made by the employer, and the fact that there was no available, suitable work for the employee that fit within his return to work restrictions
- In the end, the Tribunal found that the employer had established undue hardship under the *Canadian Human Rights Act* and the complaint was dismissed



Implications

- In some circumstances, the nature of the mental illness itself may restrict the employee's ability to recognize a reasonable offer of accommodation
- Where mental health issues are in play, it is not uncommon for conflicts to arise with co-workers which may have to be addressed in order to return to work
- Thus, there might be different kinds of measures to accommodate mental disabilities as compared to physical disabilities



3. Follow-Up and Consistency in Implementation

- Where an employee with a mental health disability returns to work through an accommodation plan, the employer must ensure that they follow up with the employee and consider their accommodation when making changes to the workplace



Ontario (Ministry of Community Safety and Correctional Services) and OPSEU (G.), Re, 2013 CarswellOnt 18170

- The grievor worked at a jail and had been successfully accommodated for five years in relation to mental health issues
- He had been working on an accommodated schedule in a position that had limited contact with inmates



Ontario (Ministry of Community Safety and Correctional Services) and OPSEU (G.), Re, 2013 CarswellOnt 18170

- The jail was slated for closure and was undergoing significant changes
- The Deputy Superintendent told the grievor that his accommodation was only intended to be short term and that if he was unable to work certain hours, he would be terminated



Ontario (Ministry of Community Safety and Correctional Services) and OPSEU (G.), Re, 2013 CarswellOnt 18170

- The arbitrator found that the employer's conduct was discrimination on the basis of disability
- By failing to take into account the grievor's mental health issues, the employer had failed in its duty to accommodate him



Implications

- When workplace change is contemplated that may affect an accommodated employee, especially those with mental health issues, employers must ensure that they consider the impact that such changes will have on that employee



Questions?

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