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COMPLEX ACCOMMODATION REQUESTS (MENTAL HEALTH AND FAMILY STATUS) AND A QUICK CASELAW UPDATE

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Complex Accommodation Requests: Mental Health

I. Duty to Accommodate

II. Duty to Inquire

III. Duty to Disclose – Medical Information/IME

IV. Best Practices

V. Recent Developments

I. Duty to Accommodate Mental Health

Ontario Human Rights Code, the term disability is defined very broadly, and expressly includes:

- a condition of mental impairment or a developmental disability (s. 10(1)(b));
- a learning disability, or a dysfunction in one or more of the processes involved in understanding or using symbols or spoken language (s. 10(1)(c)); and
- a mental disorder (s. 10(1)(d)).

I. Duty to Accommodate Mental Health

Wide range of mental health illnesses and conditions:

- Personality disorders
- Bipolar disorder
- Obsessive-compulsive disorder
- Post-traumatic stress disorder
- Depression, anxiety related conditions

- Learning disabilities
- Attention Deficit Disorder
- Autism
- Drug dependency
- Alcoholism

I. Duty to Accommodate Mental Health: Unique Features

- Denial may be part of the disability
- Gradual onset may make it difficult to identify
- Social stigma leads to poor communication reluctance to provide information
- Invisibility
- Many mental illnesses are not immediately identifiable in the workplace
- Employer uncertainty as to whether employee misconduct, unusual behaviour, or chronic absence is due to poor performance or a disability

II. Duty to Inquire: Objectives

-What information does the employer need to have before the duty to accommodate is triggered?

-What is the legal effect of an employee not disclosing a need for accommodation until discipline has been threatened or imposed?

II. Duty to Inquire: when is it triggered?

In order for the duty to accommodate to be triggered, it must be shown that the employer knows, or ought reasonably to have known, that an employee is suffering from a disability, thus prompting the duty to inquire.

Where an organization is aware, or reasonably ought to be aware, that there may be a relationship between a disability and someone's job performance, or their abilities to fulfil their duties as a tenant or service user, the organization has a 'duty to inquire' into that possible relationship before making a decision that would affect the person adversely.

II. Duty to Inquire

- Determination of whether the employer's duty to inquire has been triggered will depend on the facts of each case

- **Mental Health:** In 2014, Ontario Human Rights Commission issued new policy on mental health disabilities and addiction:

  - Commission notes the reluctance of those with psychological disabilities to disclose their condition due to associated stigma

  - Some cases, an employer may be required to pay special attention to situations that could be linked to mental disability

II. Duty to Inquire

Signs of Mental Illness at Work:

- Consistent late arrivals or frequent absences
- Lack of cooperation or a general inability to work with colleagues
- Decreased productivity
- Increased accidents or safety problems
- Frequent complaints of fatigue or unexplained pains
- Decreased interest or involvement in one's work
- Displays of anger or blaming others
- Difficulty concentrating, making decisions or remembering things

II. Duty to Inquire: Case Study

BG v. Jones Lang LaSalle Real Estate Services, Inc. (2014 OHRT)

- Employee suffered from chronic depression and anxiety
- Approximately two years after commencing employment, the Employee took steps to have a memo inserted into his personnel file outlining the nature of his disability
- Several years later, the Employee was terminated for, among other reasons, not serving all brokers equally, not working collaboratively and not showing initiative
- Employee filed a complaint with the Ontario Human Rights Tribunal

II. Duty to Inquire: *BG v. Jones* cont.

Decision: Discrimination

- Tribunal found based on medical evidence that the Employee's health issues were linked to the reasons for his dismissal

- The Tribunal found that it was "more probable than not" that the Employer knew about the Employee's disability and symptoms prior to termination
  - Standard practice was to review termination with HR
  - Even though the memo was not located, Tribunal found that HR had the requisite knowledge of disability prior to termination

- Employer should have met with Employee to learn about disability and determine if any accommodation was possible prior to terminating his employment

II. Duty to Inquire: Disclosure AFTER Discipline

- An employee's failure to inform the employer promptly of a disability is not a sufficient basis to avoid its duty to accommodate

- An employer's duty to accommodate is triggered once the employer becomes aware of the employee's disability – *even if this is after discipline has been threatened or imposed*

  - **Once informed of the disability, the employer must fulfill the procedural component of its duty to accommodate by exploring options for accommodation that may well entail revisiting its prior actions or prior plans of actions with regard to employee**

II. Duty to Inquire: Constructive knowledge

- Employee obligation to provide notice – employer cannot accommodate where legitimately unaware of disorder
- The duty to accommodate arises when employer knows, or reasonably ought to know, that employee's work is being, or will be, affected by a disability
- What is 'legitimately unaware'?
  - Employee repeatedly refuses to identify mental disability
  - Medical information does not identify mental health restrictions

Other Cases

- *Mellon v Canada (Human Resources Development)*, 2006 CHRT 3
- *Krieger v Toronto Police Services Board,* 2010 HRTO 1361
- ADGA Group Consultants Inc. v Lane, (2008) 91 OR (3d) 649

III. Duty to Disclose: An Employer's Right

Employers may request medical information in order to:

- Determine whether an illness is bona fide.
- Determine eligibility for benefits.
- Evaluate return to work decisions and accommodation needs.

An employer may be entitled to the following medical information:

- General nature of the illness
- Permanent or temporary prognosis and expected improvement
- Functional restrictions or limitations
- Treatment and medication, including side effects

An employer may be entitled to more information in cases of mental disability. i.e. IME

The focus should always be on the functional limitations of the disability rather than on a person's diagnosis.

III. Duty to Disclose: An Employer's Right

Complex Services Inc. (2012, Ont Arb)

- Employer was accommodating the Grievor's physical disability when the Grievor requested accommodation for a mental disability.
- The Grievor refused to provide any medical documentation to the Employer due to privacy concerns.
- The Employer placed the Grievor on a medical leave of absence.
- The Grievor grieved that the Employer failed to accommodate her.
- Held that the employee has an absolute right to keep medical information private.
- But an employee cannot expect accommodation if he or she withholds the necessary information that establishes the disability and the accommodation required.

III. Duty to Disclose

Bottiglia v Ottawa Catholic School Board, (2017 ONSC)

- Employee in this case had gone on sick leave due to a unipolar depressive disorder with anxiety features for 2 years
- Employee's psychiatrist suddenly advised the employer that the employee could return to work within the following two months
- In light of the contradicting information, the employer requested that the applicant participate in an IME
- Divisional Court affirmed an employer's ability to demand participation in an IME of an employee who provides insufficient medical information
- The employer was engaged in a good faith accommodation process and that it was unreasonable for the applicant to refuse to undergo the IME under the circumstances

III. Duty to Disclose: Summary

Procedural obligations fulfilled:

- Reasonable / numerous attempts to ascertain employee's restrictions.
- Asked for medical documentation:

Lack of cooperation
+ No medical evidence
+ No reasonable knowledge

No duty to accommodate

IV. Best Practices

Employer Obligations

- The employer is in the best position to determine how to accommodate employees without undue hardship - therefore the employer bears the responsibility for doing so.
- Accept the request in good faith.
- Obtain expert opinion where needed.
- Take an active role to ensure that all possible accommodation options are investigated.
- Keep records of accommodation requests and responses.
- Deal with accommodation requests in timely manner.

IV. Best Practices

Employer Obligations

- Limit requests for information only to that required to better respond to the accommodation request (i.e. work restrictions versus medical diagnosis).
- Maintain the confidentiality
- Meet modified job standards once accommodation is provided.
- Discuss disability only with those who need to know.

IV. Best Practices

Employee Obligations

- Employee must advise the employer of the need to accommodate
- If accommodation is for medical reasons:
  - Employee must provide medical proof to the employer's satisfaction
  - Employee must continue to provide updated medical evidence
- Employee must cooperate with accommodation efforts
- Employee must accept reasonable offers of accommodation

IV. Best Practices

Employee Obligations

- Inform the employer of their need for accommodation (the employer need not know what the disability is).
- Cooperate in providing the necessary information.
- Answer questions regarding relevant limitations, and provide medical documentation if required.
- Participate in discussions with the employer.
- Cooperate with any experts who are required to manage the accommodation process.

IV. Best Practices

Ways to Accommodate

- Teamwork arrangement to ensure employee not working alone
- Workplace supervision and communication with family members to monitor unusual behaviour
- Excusing the employee from work to seek rest, professional assistance or treatment
- Educating and sensitizing other employees, managers and supervisors
- Predictable and routine shifts

IV. Best Practices

- Talk openly with employee about your concerns
- Offer assistance
- Make your expectations clear
- Document all interactions
- When corrective action is needed, consider the role the disability may have played
- Request medical information with specific responses to questions concerning restrictions, possible modifications, and prognosis
- Limit requests for information only to that required to better respond to the accommodation request (i.e. work restrictions versus medical diagnosis).
- If safety is an issue, send the employee home/hospital pending proof of fitness to return

V. Recent Developments: KB v. SS (2016, BCHRT)

- The complainant alleged that the respondent employer discriminated against him on grounds of mental and physical disability
- The complainant worked for the employer for 10 years before suffering a stroke which resulted in cognitive deficits
- The complainant engaged in a graduated return to work, with accommodation for his physical restrictions
- The complainant became increasingly verbally aggressive, disrespectful and antagonistic to others in the workplace
- The employer's response was progressive and disciplinary. Following his third suspension, the complainant went on an extended medical leave until his termination

V. Recent Developments: KB v. SS (2016, BCHRT)

- The Tribunal dismissed the complaint as the employee failed to disclose relevant information regarding his mental health to his employer
- Specifically, the complainant knew that his condition and the medication he was taking could exacerbate his behavioural symptoms, however he failed to advise his employer of this fact
- The Tribunal noted that there was no medical opinion provided to indicate that a reluctance to disclose was a feature of the complainant's illness

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> In this case, the Complainant was required to hold up his end by providing the necessary information to enable the Employer to begin the process of considering what accommodation, if any, was possible in the circumstances in respect of the Complainant's mental disability, and/or what other options may be open to it in the circumstances. The Complainant did not fulfill his duty when, being in possession of medical information that was relevant and necessary for the Employer to consider its options, including what accommodation may be possible to the point of undue hardship, the Complainant failed to disclose it.
>
> B(K.) v S(S) 2016 BCHRT 61 at para 136.

V. Recent Developments: Strudwick v. Applied Consumer & Clinical Evaluations Inc. (2016 ONCA)

- Case sets a higher bar on damages
- Awarded $70k aggravated and $55k punitive damages
- After an employee became deaf, the employer refused to properly accommodate
- Employer belittled and humiliated employee with respect to becoming deaf
- 15 service year employee earning 12.85/hr was also awarded 24 months' notice, likely elevated due to employer's poor treatment of employee
- Over $246k in total damages awarded

Complex Accommodation Requests: Family Status

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Family status discrimination – Two standards

Federal

- The Federal Court of Appeal in 2014 set out the test for *prima facie* discrimination on the basis of family status as:
  - there is a child under the individual's care/supervision;
  - childcare obligation → legal responsibility rather than personal choice;
  - reasonable efforts made to meet the childcare obligations; and
  - the workplace rule interferes in a manner that is more than trivial or insubstantial with the fulfillment of the childcare obligation.

(Johnstone v Canada (Border Services Agency))

Provincial

- The HRTO standard for evaluating family status discrimination:
  - The employee must show a negative impact based on a family need that results in a real disadvantage to the parent/child relationship and the responsibilities that flow from that relationship, and/or to the employee's work;
  - Assessing the alleged impact must be done contextually and may include consideration of other supports available to the applicant – this is a reduced threshold from considering whether the employee can "self-accommodate", the standard established in *Johnstone*
  - If the applicant can prove discrimination, the onus shifts to the employer to show that the applicant cannot be accommodated without undue hardship.

(Misetich v Value Village Stores Inc.)

Family Status

***Johnstone v Canada (Border Services)*, 2014**

- "Prohibited grounds of discrimination generally address immutable or constructively immutable personal characteristics, and the types of childcare needs which are contemplated under family status must therefore be those which have an immutable or constructively immutable characteristic."

- Must distinguish between parental obligations which form "an integral component of the legal relationship between a parent and a child" (e.g. leaving a young child at home without supervision to pursue employment) versus personal family choices (e.g. extracurricular sports events, family trips).

- Personal family choices will not typically trigger a claim to discrimination resulting in an obligation to accommodate by an employer.

Family Status – Recent Developments

Peternel v. Custom Granite & Marble Ltd., 2018 ONSC

- Employee worked for company for roughly three years before going on maternity leave
- The defendant offered her a substantially similar role in the company that required her work days start at 8:30am
- Plaintiff argued that her previous schedule was 10:00am-5:00pm, the defendant argued that her start time was always 7:30am but latitude was shown for child care needs and 8:30 was permissible
- Plaintiff refused to return to work and brought an action for wrongful dismissal, including discrimination based on family status

Family Status – Recent Developments

Peternel v. Custom Granite & Marble Ltd., 2018 ONSC

- Judge accepted defendant's evidence that, because of changing business circumstances, the flexible arrival time was no longer feasible, and the 8:30 a.m. start time was not discriminatory based on family status
- The judge pointed to the refusal of the plaintiff to provide information of her child care needs. Accommodation is a joint process requiring cooperation between both parties
- Employer was robbed of their ability to accommodate her because of the lack of information provided
- The action was dismissed in its entirety

Family status discrimination – *Still evolving*

- The law on family status discrimination is not settled.

- Employers must continue to be vigilant in making a reasonable effort to engage employees with family obligations, including, where necessary, obtaining particulars about an employee's family status needs.

- Employers must also keep in mind that employees are not entitled to their preferred accommodation (though that may ultimately be what is implemented). The employer must provide a reasonable accommodation that fits the need of the employee, but may not necessarily match the employee's "first choice".

Meeting Accommodation Needs: *Broad and Flexible Approach*

Examples of accommodating caregiving obligations (Canadian Human Rights Commission):

- Start and end times that change
- Telework
- Compassionate, discretionary or other leave to care for sick family members
- Shift changes or compressed schedule
- Extended maternity leave
- Job sharing
- Part-time shift work with pro-rated benefits
- Sharing job duties

Examples of accommodating mental health needs:

- Flexible scheduling
- Changes in supervision
  - Modifying the way instructions and feedback are given. For example, written instructions may help an employee focus on tasks
  - Having weekly meetings between the supervisor and employee may help to deal with problems before they become serious
- Allowing extra time to learn tasks
- Modifying job duties - exchanging minor tasks with other employees
- Using technology
- Modifying work space or changing location
  - Allowing an employee to relocate to a quieter area where they will be free from distractions
  - Allowing an employee to work at home

5 Quick Caselaw Updates

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1. Enforceability of Termination Provisions

I. ***Nemeth v. Hatch Ltd.*, 2018 ONCA 7**

II. ***Amberber v. IBM Canada Ltd.*, 2018 ONCA 571**

Nemeth v. Hatch Ltd., 2018 ONCA 7

- Plaintiff's termination clause:

  … employment may be terminated by either party with notice in writing. The notice period shall amount to one week per year of service with a minimum of four weeks or the notice required by the applicable labour legislation.

- Plaintiff was paid his minimum *ESA* entitlements following a without cause termination.
- Plaintiff alleged wrongful dismissal and sought reasonable notice at common law:
  - Provision does not expressly exclude right to common law; and
  - Termination provision is unenforceable: Contacts out of *ESA* – no reference to severance pay

  Alternatively, Plaintiff seeks 19 weeks' notice.
- Lower court: Plaintiff's action dismissed. Employer's interpretation of termination provision upheld. Plaintiff appealed.

Nemeth v. Hatch Ltd., 2018 ONCA 7

Held:

- Appeal allowed in part, but termination provision enforceable.
- Presumption of common law entitlement rebutted if contract "clearly specifies some other period of notice" that accords with the *ESA.*
- Silence on a particular entitlement (severance, benefits, etc.) did not contract out of *ESA*.
- The clause did, however, give rise to two possible interpretations. The one most favourable to the employee should be preferred. Plaintiff was awarded 19 weeks' notice (less 8 weeks' already paid).

Takeaway:

- Welcome news to employers on how Courts will interpret termination provisions that are silent on entitlements to benefits / severance, etc.,
- However, all termination provisions should be drafted cautiously and precisely to avoid challenges.

Amberber v. IBM Canada Ltd., 2018 ONCA 571

- Termination clause:

  …IBM will provide you with notice or a separation payment in lieu of notice of termination equal to the greater of (a) one (1) month of your current annual base salary or (b) one week of your current annual base salary, for each completed six months worked from your IBM service reference date to a maximum of twelve (12) months of your annual base salary. This payment includes any and all termination notice pay, and severance payments you may be entitled to under provincial employment standards legislation and Common Law. Any separation payment will be subject to applicable statutory deductions. In addition, you will be entitled to benefit continuation for the minimum notice period under applicable provincial employment standard legislation. In the event that the applicable provincial employment standard legislation provides you with superior entitlements upon termination of employment ("statutory entitlements") than provided for in this offer of employment, IBM shall provide you with your statutory entitlements in substitution for your rights under this offer of employment.

  [emphasis added]

Amberber v. IBM Canada Ltd., 2018 ONCA 571

- Plaintiff commenced a wrongful dismissal action seeking common law notice period of 16 months. With respect to the termination provision, the Plaintiff argued:
  - provision contracted out of the ESA;
  - provision failed to rebut presumption of common law;
  - IBM did not comply with termination provision, cannot then rely on it.

- IBM: motion for summary judgment to enforce the termination provision (precluding plaintiff's claim for common law reasonable notice).

- Motion Judge: Termination provision is ambiguous. Does not rebut presumption of common law. Motion dismissed. IBM appealed.

Amberber v. IBM Canada Ltd., 2018 ONCA 571

Held:

- Appeal allowed.
  - The termination provision was clear and unambiguous.
  - The clause must be read and interpreted as a whole. The motion judge incorrectly subdivided the termination clause into constituent parts and interpreted each part individually.

Takeaway:

- The basic principles of contract interpretation apply in reviewing a termination clause.
- In particular, a termination clause should be interpreted as a whole based on the clear and express language agreed to by the parties.
- "The Court should not strain to create an ambiguity where none exists."

2. Notice Periods: Way Beyond the 24-month "Cap"

Dawes v. Equitable Life Insurance Company of Canada, 2018 ONSC 3130

- "With no comparable employment opportunities, in particular, I would have felt this case warranted a minimum 36 month notice period."

Dawes v. Equitable Life Insurance Company of Canada, 2018 ONSC 3130

- Michael Dawes (plaintiff):
  - Senior Vice President;
  - 37 years of service (entire working life with same employer);
  - 62 years of age;
  - $249,000, plus bonuses under the company's STIP and LTIP plans.
- Plaintiff's employment terminated without cause:
- Employer offered Plaintiff 24 months' notice.
- Plaintiff brought a wrongful dismissal action seeking 30 months' notice.

Dawes v. Equitable Life Insurance Company of Canada, 2018 ONSC 3130

Held:

- Plaintiff awarded 30 months' notice.
  - When there is no comparable employment available, termination without cause is tantamount to "forced retirement".
  - Court found Plaintiff likely would have worked at Equitable Life until age 65.
  - "With no comparable employment opportunities, in particular, I would have felt this case warranted a minimum 36 month notice period."

Takeaway:

- Proximity of an employee to retirement may be considered by a Court in determining a reasonable notice period.
- Court: Given the societal trend of employees working longer, presumptive cap of 24-months' notice should "no longer apply."

3. Frustration Upheld

- *Roskaft v. RONA Inc.*, 2018 ONSC 2934

Roskaft v. RONA Inc., 2018 ONSC 2934

- Plaintiff: approved for STD and LTD benefits disability benefits by insurance provider, Sun Life.

- After three year absence, RONA terminated plaintiff's employment in 2015 for frustration based on:
  - December 2014 letter from Sun Life that Plaintiff was "permanently disabled"; and
  - Plaintiff's representations in 2014 that he could not return to work.

- Plaintiff's action for wrongful dismissal alleged RONA did not properly consider his ability to return to work, including by making any inquiries about his condition.

Roskaft v. RONA Inc., 2018 ONSC 2934

Held:

- Plaintiff's action dismissed. Frustration upheld.
- Court's responsibility in frustration cases is to consider the totality of the available evidence to determine whether there was a "reasonable likelihood of a return to work within a reasonable period of time."
- The December 2014 Sun Life Letter; Plaintiff's own representations; and, continued receipt of LTD benefits through trial were sufficient to prove frustration.

Takeaway:

- Ensure the information at the time of termination supports a conclusion of frustration of contract.
- Make inquiries of the employee to determine whether additional information should be considered prior to making a final decision, even though that was not required in this case.

4. Enforceability of Releases

- *Watson v. The Governing Council of the Salvation Army of Canada,* 2018 ONSC 1066

Watson v. The Governing Council of the Salvation Army of Canada, 2018 ONSC 1066

- Watson was employed as a manager of the Salvation Army of Canada's thrift store in Cambridge.
- At the end of her employment in August of 2011, she negotiated a severance package and received a payment pursuant to a Memorandum of Agreement. She also executed a full and final release.
- Watson brought an action against the Governing Council of the Salvation Army of Canada (the "Council") in August of 2016 in connection with acts of sexual harassment by a superior (David Court), who was also named as a defendant.
- The Council and Court sought summary judgment dismissing the action as against them on the basis that Watson had signed a full and final release in respect of all claims arising out of her employment.

Watson v. The Governing Council of the Salvation Army of Canada, 2018 ONSC 1066

Held:

- The motion was dismissed.
- The Release did not bar Watson's claim. The words "…arise out of … my employment" define the scope.
- Sexual harassment, intimidation and other improper conduct are not connected to employment, but are separate matters.

Takeaway:

- A release needs specific language to bar future claims for sexual harassment, intimidation and "other improper conduct".

5. Benefit Plans: After Age 65

- *Talos v. Grand Erie District School Board,* 2018 HRTO 680

Talos v. Grand Erie District School Board, 2018 HRTO 680

- Wayne Talos, the plaintiff, continued to work full time after the age of 65.

- Shortly after his 65th birthday, his extended health, dental, and life insurance benefits plan was terminated.

- Talos filed a human rights complaint alleging discrimination in employment on the basis of age.

- Talos also argued that that s. 25(2.1) infringed his equality rights under s. 15 of the *Charter.*

Talos v. Grand Erie District School Board, 2018 HRTO 680

Held:

- s. 25(2.1) of the *Human Rights Code* infringed upon s. 15 of the *Charter* and it was not saved by s. 1.

Takeaway:

- Policies that restrict benefits to employees on the basis of age, on the basis of s.25(2.1) of the *Human Rights C*ode must be re-visited and revised to comply with the law as it now stands given this finding of the Tribunal

Questions?


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