Atlantic Employers' Counsel

LEGAL DEVELOPMENTS OF INTEREST TO BUSINESS IN ATLANTIC CANADA

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The Editors' Corner

One day, the line between mental and physical disabilities may not be so pronounced, but, for now, distinctions are still drawn between Employee A with, for example, diabetes and Employee B with, for example, depression. Both employees are dealing with serious health conditions but Employee B's condition can present additional challenges because it can be difficult to "see" and difficult to understand. Mental health awareness has come front and centre in recent years and employers are well-advised to educate themselves, and their employees, on the importance of addressing mental health concerns at work. "Addressing" can mean anything from offering support, providing accommodation, distinguishing between culpable and non-culpable behaviour and ensuring that appropriate policies are in place to address mental health concerns and provide a safe and productive work environment.

This edition of the AEC focuses on Mental Health in the Workplace. As an employer, what duty do you have to determine whether, or to what extent, an employee is coping with a mental health issue? What is a mental health issue? Does it include "stress"? What are the boundaries of accommodation and when, if ever, is discipline for workplace misconduct related to the mental health issue appropriate? We hope this edition provides some insight into this evolving area of labour and employment law - for everyone's benefit, mental health at work is something to keep top of mind.

Mental Health and the Duty to Accommodate

It is often challenging for an employer to deal with employees who are struggling with a health issue. Illness and disability affecting employees can cause staffing/ absenteeism challenges and morale problems with other employees. Barriers to managing the return to work process and re-integration into a productive workforce

often arise. From a legal perspective, there are obligations under the common law, collective agreements (if applicable) and human rights, occupational health and safety, and (potentially) workers' compensation principles should also be taken into consideration.

Determining when the duty to accommodate mental health issues in the workplace arises – and the threshold for undue hardship – can be particularly difficult.

While an employee may appear fine physically, they may nevertheless be struggling. Further, there remains significant stigma associated with mental illness and employees may be reluctant to acknowledge their issues, or may even be unaware that mental health issues are at play. This in turn can lead to issues with obtaining appropriate medical information to facilitate accommodation. As such, employers have to carefully balance compassion, fairness, and legal obligations to properly accommodate employees.

The duty to accommodate has been found where the employer "ought" reasonably to have known that an employee was suffering from a disability. That is, adjudicators have found that the employer should have known of the employee's difficulties, without the request for accommodation having been made. These cases reinforce the fact that employers cannot ignore evidence of a employee's disability or potential disability.

Fair v Hamilton-Wentworth District School Board[1], is an example of how far employers may have to go to properly accommodate employees suffering with a mental disability, and the significant consequences that can arise if proper legal steps are not taken. In Fair, the complainant was employed as a supervisor who experienced a generalized anxiety disorder, and was eventually diagnosed with depression and PTSD. Her disability resulted from her highly stressful job position and her concern that she may be held personally liable for breach of the occupational health and safety legislation if she made a mistake regarding asbestos removal.

Ultimately, the Commission found that the employer failed to accommodate to the point of undue hardship, largely on the basis that the employer did not take sufficient steps to identify possible alternative options for the complainant (despite there being a supervisory role for which she was well suited). Other shortcomings included the employer refusing to meet with the vocational rehabilitation consultant for the purpose of examining potential work activities with the employee, refusal to provide the employee with a copy of the essential duties of her job, and a failure to hold a return to work meeting with the employee until three months after it was first requested.

The remedy in this case was significant: the Commission ordered reinstatement to a suitable alternative employment, including a seniority adjustment, a calculation of lost wages from June 2003 until the date of reinstatement (about a decade later), $30,000 as compensation for the injury to the complainant's dignity, and repayment of all out-of-pocket medical and dental expenses that would have been covered by employee benefit plans, all totaling over $400,000 (!). Given that 10 years had elapsed from the date of the complainant's last employment, reinstatement was particularly challenging.

Fair emphasizes the thorough examination of alternate duties and working arrangements that must be considered in the accommodation process.

Another recent Ontario case, ***Bottiglia v Ottawa Catholic School Board***[2], highlights the potential consequences where an employee fails to meaningfully engage in the accommodation process There, the complainant was a superintendent of schools with the Ottawa Catholic School Board who was diagnosed with Unipolar Depressive

Disorder (including anxiety features) which led to heated debate about the form of accommodation that would be offered to him culminating in his resignation.

Despite the School Board's efforts and proposed accommodations and the fact that the parties had agreed to an independent medical examination, the Tribunal held that the complainant failed to meet his obligation to cooperate in the accommodation process – largely on the basis that he had failed to provide reasonable medical information about his work-related restrictions, which were such that the employer was unable to properly assess potential accommodations.

Bottiglia demonstrates the importance of making legitimate attempts to obtain information about the employee's prognosis and functional limitations affecting the employee's ability to work. An IME can be an appropriate strategy if the medical information provided by the employee is sparse and/or of questionable objectivity.

It is also key to remember that employees have an obligation to cooperate in the accommodation process. Employers are not required to comply with an employee's ideal accommodation just because similar options exist. Additionally, if the employee decides not to return to work when appropriate accommodation is offered, it is unlikely the employee's case will succeed.

While no hard and fast rules exist, the following are some limits on the employer's duty to accommodate:

- A causal connection must exist between the employee's mental disability and the conduct complained of. If the behaviour is not caused by the disability, then the duty to accommodate may not be triggered.
- Employees must cooperate when reasonable alternatives are provided to them in the workplace for accommodation purposes, and employers are not required to cater to one specific form of accommodation desired by an employee.
- Employees must cooperate when employers request information from them for the purpose of assessing the employees' limitations and any accommodation required.
- Employers are not obligated to continue to employ persons who are unable to fulfill basic employment obligations for the foreseeable future.
- Employers are not required to construct completely new positions or to provide employees with meaningless work where the employee is incapable of anything else.
- The duty to accommodate does not require a change in the fundamental essence of the employment relationship; namely, productive work in exchange for wages.

Ultimately, the duty to accommodate seeks to strike a balance between the right of the employee to not be discriminated against and the right of the employer to carry on a workplace that is both productive and safe.

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[1] 2014 ONSC 2411

[2] 2015 HRTO 1178

The Duty to Inquire: the Problem With Turning a Blind Eye

You have heard this scenario before: An employee is constantly showing up late (or not showing up at all), being insubordinate or argumentative, or worse - completely unmanageable, so the employer then dismisses the employee. The employee then files a grievance or a human rights complaint stating that he or she suffers from a disability and the dismissal was discriminatory. Next thing you know, the employer is liable for failing to accommodate the employee's disability-despite the fact that the employee failed to mention that he or she suffered from a mental illness. Even though the employer did not know that the employee required accommodation, it was determined that the employer "ought to have known".

The first step in avoiding this finger-pointing and scolding is to understand "disability". According to human rights legislation, disability is a ground of discrimination. Mental health, addictions, temporary physical limitations such as a broken arm, chronic health concerns, episodic health issues such as multiple sclerosis or HIV are all considered to be disabilities regardless of whether they temporarily or permanently affect an individual.

The second step in preventing a discriminatory termination or disciplinary action is to understand the concept of the "duty to inquire". Typically an employee has the responsibility to inform the employer that he or she requires accommodation because of a disability. When the employer is aware, or reasonably ought to be aware, that a disability is negatively affecting an employee's work performance, the employer has a duty to inquire about the situation and accommodate the disability to a point of undue hardship.

It might seem counterintuitive. A person's state of health and wellness is traditionally considered personal information and it would be invasive to inquire. To be clear, an employer does not have the right to know what specific disability the individual has, although that may come to light; the employer only needs to know how to accommodate the employee. An employer will not be sheltered from liability where it turned a blind eye to tell-tale signs of disability.

What is the "duty to inquire"?

Based on current case law, the scope of the duty requires that an employer:

- Obtain all relevant information about the employee's disability. This includes information about the employee's current medical condition, prognosis for recovery, ability to perform job duties, and capabilities to perform alternate work.

- Consider whether a disability could be affecting a long-term employee's decision to resign. If so, an employer should discuss the reasoning behind the decision and remind the employee of the options and benefits available.

- Consider the language used by an employee when offering a resignation or otherwise describing his or her ability to perform. For example, language such as: "I'm unable to cope with the workload"; "I don't know what I was thinking"; or "I didn't feel as though I had any alternatives" may be red flags that the employee was not capable of making a reasonable decision at the time.

- Beware of a change in an employee's behaviour. Where an employee does something that is "so outrageous, out of character or unexpected" that a reasonable person would suspect that he or she is experiencing symptoms of a disability, ask about it.

- Review the benefits packages and alternatives to resignation available when an employee who may have a disability tells you they want to resign. Ensure that the employee is aware of long-term or short-term disability packages, provide him or her with the employee assistance line, remind him or her that health coverage includes counselling, or provide details of whatever form of assistance may be available.
- Consider an employee's request to rescind a resignation and return to work as a request for accommodation.
- Proactively intervene in other employee's negative comments or harassment directed at an employee with a disability. For example, if an employee frequents the washroom because of a gastro-intestinal ailment, is often absent from work or is, on occasion, less productive at work due to depression, do not tolerate other employees making negative comments. It may lead to differential treatment, exclusion, and an overall toxic work environment.
- Require that an employee that is unmanageably disruptive, or substantially unable to perform the job, take a temporary leave of absence to obtain the necessary medical information to allow the employer to determine how best to accommodate the employee.
- Be flexible. If possible, do not rush the employee back to work. There are as many solutions as there are circumstances, so try to come up with an accommodation strategy that suits both the employer and the employee.

The duty to accommodate does not include:

- Accommodation beyond the point of undue hardship. Where there is evidence specific to the harm that the employee is causing to the workplace and the risks of continuing to employ the individual would not be reduced to an acceptable level by accommodation, the employer is justified in terminating the employee without triggering human rights legislation.
- Undue hardship arises where an employee is totally incapable of performing the job for a prolonged and indefinite period of time. The employer's duty to accommodate ends where the employee is no longer able to fulfill the basic employment obligations.
- An employer may discipline an employee for cause when there is no nexus between the poor behaviour or performance and a disability.
- An employer is entitled to sufficient, legitimate, and up to date medical information in order to justify medical leaves and accommodation.
- An employee is entitled to reasonable accommodation – not perfect accommodation, or accommodation of the employee's choosing. For example, an employer does not have a duty to create a new job for an employee with a disability.

Why inquire?

Beside the obvious - that an employer could be held liable for failing to accommodate a disabled employee to a point of undue hardship - failing to inquire into a person living with a disability could contribute to a toxic work environment. No one wants this. Productivity may suffer, other valued employees may leave, and employees may generally contribute less to the culture of the workplace.

Further, it is possible that all the employee needs, to be a productive member of your team, is to know that there is room, through the accommodation process, for that employee in the workplace.

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The Scope of Accommodation of Mental Health Issues - What About Stress?

There is growing understanding of the need to accommodate mental health issues in the workplace, not only due to human rights obligations but also to optimize employee productivity. However, the boundaries of employers' obligations from a human rights perspective are not always clear. This article focuses on stress-related accommodation requests: is an employer obliged to accommodate an employee having difficulty coping with stress? While the answer is generally no, recent exceptions to this rule in the case law confirm the importance of treating stress-related accommodation requests seriously.

Does Stress Trigger a Duty to Accommodate?

Human rights legislation in the Atlantic Provinces provides no explicit protection for "stress". However, physical and mental disabilities are prohibited grounds of discrimination which trigger an employer's duty to accommodate. The critical question, then, is whether and when "stress" constitutes a disability so as to require accommodation.

The case law confirms that if stress (and related symptoms such as anxiety, insomnia, etc) reach a degree of severity and permanence so as to interfere with the employee's ability to function at work or to perform certain job duties, it can be characterized as a disability requiring accommodation.

However, limits are imposed to make this characterization the exception rather than the rule. The bare assertion that stress is affecting one's ability to function at work is not sufficient. Similarly, an employee with an aversion to specific job tasks, even if strong enough to negatively affect his or her health, is not enough to constitute a disability. Rather, clear medical documentation demonstrating that the employee is physically and/or psychologically unable to perform some or all work-related tasks will almost always be needed before he or she is entitled to accommodation for stress-related symptoms.

Practical Implications

The following tips can help manage employee requests for accommodation of stress-related illnesses:

- Treat stress-related accommodation requests seriously and with sensitivity: Be conscious of skepticism and stigma associated with stress-related illnesses. Stress-related requests for accommodation should not be dismissed off-hand. Normal procedures should be followed (request for medical documentation, etc) to ensure each request is considered on its own merits.

- Be attentive to signals an employee is having difficulty coping with stress: Changes in employee performance, impatience, irritability, heightened interpersonal conflict, attendance problems, frequent reports of headaches, indigestion, fatigue, insomnia or non-specific illness, or an employee dropping hints about stress levels, should not be ignored. While employers are not required to diagnose employee health problems, a failure to investigate obvious signs of stress-related illness, particularly prior to disciplining an employee, could result in a human rights complaint.

- Request medical documentation: As with any request for accommodation, the employer must understand the nature of the employee's limitations. In stress-related cases, medical evidence is essential to establish that stress-related symptoms reach the threshold of a disability.

- Consider preliminary motions to dismiss a human rights complaint: Despite recognition that stress can, in some instances, constitute a disability, such instances remain the exception rather than the rule. If faced with a human rights complaint for failure to accommodate stress, consider whether there is any medical evidence supporting the inability to perform job tasks due to stress-related symptoms. If not, it may be appropriate to seek early dismissal of the complaint on the grounds that it cannot succeed.

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Discipline and Mental Health in the Workplace

Disciplining employees who are suffering from mental illness can pose particular difficulty for employers. Although there is a duty to accommodate mental illness in the workplace in the same way as any other disability, misconduct related to a mental health issue is not immune from discipline. Employers are well advised to be aware of the relevant considerations, risks and obligations with respect to managing a disabled employee's performance. Implementing best practices can help to effectively navigate the intersection between disability and discipline.

Key questions to ask when considering discipline that may be related to mental health issue(s) include:

Does the employee have a disability as defined in the applicable legislation?

At the outset, the employer should consider whether the employee in question has a disability which is protected by the applicable human rights legislation. "Mental disability" is a protected ground in all four Atlantic Provinces and is broadly interpreted to include drug and alcohol dependency, learning disorders, panic attacks, depression and post-traumatic stress disorder.

Sudden changes in an employee's behaviour or performance may be an indicator that the employee is suffering from a mental disability which may need to be accommodated. Employers are under a duty to inquire if they suspect that an employee may be suffering from a disability requiring accommodation. If a previously "good" employee has started acting out of character, the employer should consider whether the employee's behaviour could be connected to a mental health issue prior to imposing discipline.

It is not uncommon for an employee to claim that they have a disability only after the employer begins managing the employee's performance. And, while it is natural to experience a certain level of stress and anxiety when one's performance is being scrutinized, the issue becomes whether this heightened stress and anxiety rises to the level of a disability protected by the applicable human right legislation.

Ordinary stress, without more, is not necessarily a disability within the meaning of the legislation (see other articles). In particular, stress arising from the workplace investigation of an employee's poor performance is not alone sufficient to constitute a disability for human rights purposes.

Are the employee's performance issues related to the disability?

Employees with mental disabilities are not immune from discipline. If there is no connection between an employee's performance issues and his or her disability, the employer may discipline the employee. A mental disability does not excuse unrelated disciplinable conduct.

However, where there is a causal link (i.e., a nexus) between an employee's behaviour and his or her mental disability, the employer is under an obligation to consider whether it can provide the employee with accommodations which may, in turn, improve that employee's performance.

Is accommodation possible?

Where there is a nexus between the misconduct at issue and the employee's mental health condition, the question whether accommodation, to the point of undue hardship, arises. That is to say, even if the misconduct would not have occurred but for the employee's illness or condition, an arbitrator or tribunal may nonetheless conclude that the employee is still responsible for their actions. As awareness of mental health issues increases, so too does the body of labour and employment law dealing with disciplinable conduct and mental health at the workplace. In considering whether accommodation to the point of undue hardship is possible the same considerations apply to mental illness as they do to physical illness (i.e., health, safety, to name a few). The following examples demonstrate the importance of context in establishing undue hardship:

- Reinstatement was ordered in a recent case where there was a direct threat of violence towards other employees on the basis that the violence was a "cry for help".
- Discharge of an employee who stole from the employer to support a cocaine addiction was upheld.
- A grievance related to an employee suffering from a major depressive disorder who threatened to kill his supervisor was allowed.
- Accommodating of an employee who communicated inappropriately with students based on an after-acquired diagnosis of a mental health issue would have resulted in undue hardship.

Although the threshold is high, establishing undue hardship is not impossible. The nature of the workplace, the position held by the employee and impact on the employers' operations are important to consider both when determining what accommodation (if any) is possible, as well defending any resulting complaint.

Best Practices

To minimize the risks associated with managing the performance of employees suffering from mental disability, employers should:

- Provide employees with information regarding community resources and supports, as well as resources available through their employment (employee assistance programs, private insurance benefits, etc.).
- Intervene carefully and address performance issues as soon as possible.
- Consider whether there is a nexus between the employee's behaviour or poor performance and the alleged mental disability.
- Take an active role in the search for suitable accommodation and all keep records of any alternatives considered or proposed.

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