Mental Health And The Duty To Accommodate



Employers can face many challenges when dealing with employees who are struggling with a mental 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), human rights, occupational health and safety, and (potentially) workers' compensation principles should be considered.

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 accommodate mental health issues (to the point of undue hardship).

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 an 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. 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.

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