Employment Law:
Accommodation Issues North of the Border

International Municipal Lawyers Association

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Today's Agenda

- **Leaves of Absence – a note**
- **Accommodation in Canada:**
  - Principles of Accommodation
  - Determining Disability
  - Access to Medical Information
  - Return to Work
  - … or not – Frustration of Contract

Principles of Accommodation



Human Rights Legislation

- Discrimination on the basis of any protected ground is prohibited by legislation in each province.
- Every person has a right to equal treatment with respect to employment without discrimination because of disability

Accommodation

- Where an employer's rule, policy or practice discriminates against an employee on the basis of a protected ground, an employer has a duty to accommodate an employee's requirements to the point of undue hardship

Undue Hardship

- Very high standard to meet
  - "Undue hardship" includes:
    - Intolerable financial costs (bankruptcy)
    - Serious disruption to business
    - Health and safety risks

The Basics of Accommodation

- May require changes to terms and conditions of workplace or job functions to overcome limitations and allow the performance of job functions
- Must be highly individualized, tailored to the employee's specific needs
- Duty is substantive and procedural

The Accommodation Process

- All workplace parties have a role to play in the accommodation process including:
  - The Employer
  - The Employee
  - The Union (if applicable)
  - Co-workers
- Obligation to accommodate ultimately rests with Employer

The Roles of the Workplace Parties

- **The Employer:**
  - Determine if employee's own job can be appropriately modified
    - Determine "core functions" and whether employee can perform, with or without accommodation
  - Look for available work, the core functions of which employee can perform with or without accommodation

The Roles of the Workplace Parties

- **The Employer:**
  - Consider bundling tasks from other jobs to create meaningful work the employee can perform
  - Some arbitrators have suggested the need to consider moving incumbents to make way for accommodated employee
    - Far from universal approach

The Roles of the Workplace Parties

- **The Employer:**
  - Obligation ongoing: if accommodated work not available now, document ongoing attempts
    - Keep in touch with employee to determine changes in restrictions
  - Process is as important as outcome
    - Document all steps to satisfy Tribunal

The Roles of the Workplace Parties

- **The Employee:**
  - Alert employer to the need for accommodation in most cases…
  - Participate in the accommodation process (but not responsible for finding solution)
  - Attempt modified work except where to do so puts employee at risk

The Roles of the Workplace Parties

- **The Employee:**
  - Provide medical information
  - Attend at doctor's to have subsequent questions answered
  - Accept reasonable accommodation that keeps him or her closest to pre-accommodated rate
    - Employee doesn't get to 'pick & choose' the work they desire

The Roles of the Workplace Parties

- **Co-Workers:**
  - May have to carry greater share of the ‘load’ if certain tasks must be removed from employee’s day to day job

The Roles of the Workplace Parties

- **The Union (if applicable):**
  - Participate in accommodation process, potentially including agreement to amend application of certain collective agreement provisions (*i.e.*, job posting)

Additional Considerations for Unionized Employees

- Collective Agreement Obligations:
  - Common provisions:
    - No discrimination based on disability
    - Seniority
  - Practical impact of obligations:
    - Shift schedules
    - Job assignments
    - Job postings

Additional Considerations for Unionized Employees

- If conflict between duty to accommodate and seniority rights:
  - All parties (including union) have obligation to participate in accommodation process
  - Accommodation duties prevail over the collective agreement (but not to the point of displacing another worker)

What is a Disability?

- Must fall within the statutory definition of a protected "disability" under human rights legislation
- Defined to cover a broad range and degree of conditions, both permanent and temporary
  - In Ontario there is a very specific (non-exhaustive) list
  - In British Columbia not specified

What is a Disability?

- Broad definition
- Includes physical and mental impairments
- Work-related and non-work related injuries
- Includes alcohol addiction and drug addiction
- Common ailments, such as the flu, cold, and bronchitis, are generally not considered "disabilities"

Are Stress and Anxiety Disabilities?

- Generally not disabilities in their own right
- Accommodation may not be required simply because of medication or counseling
- But could be a symptom of another disability

Are Stress and Anxiety Disabilities?

- ***Matheson v. Okanagan Similkameen School District No. 53* 2009 BCHRT**
  - The employee alleged that she had a medical history of panic and anxiety attacks and depression
  - She never disclosed this to her employer and believed that she wasn't required to tell her supervisor about her disability
  - However, on 2 occasions, the employee told her employer that she was suffering from "stress"

Are Stress and Anxiety Disabilities?

- ***Matheson v. Okanagan Similkameen School District No. 53* 2009 BCHRT**
  - Tribunal held:
    - Stress in itself is not a disability
    - "Workplace stress resulting from an employer investigating alleged performance problems or from a problematic relationship with a supervisor is not alone sufficient to constitute a disability for Code purposes"

Medical Information

- Employer is entitled to sufficient medical information including:
  - Detailed information about limitations and restrictions
  - Prognosis
  - Regular status updates
- Not entitled to diagnosis (not relevant)

Obtaining Better Medical Information

- Turn the doctor from an advocate into an educator
  - Provide a job description
  - Ask direct and specific questions about employee's restrictions, limitations and prognosis

Insufficient Medical Information

- Doctor/employee is unable or unwilling to provide necessary information?
  - Employer can offer access to more suitable provider
    - Concerned whether you are receiving best available care' *i.e.*, general practitioner vs. psychiatrist
    - Employee must consent

Insufficient Medial Information

- ***Crowley v. LCBO*, 2011 HRTO**
  - Employee was harassed by a customer at work and requested a permanent transfer to an LCBO store in Collingwood
  - Employee alleged that transfer was necessary to accommodate a mental disability
  - *Issue: Did the employee have a mental disability within the meaning of the Code?*

Insufficient Medial Information

- ***Crowley v. LCBO*, 2011 HRTO**
  - Medical Evidence included:
    - Self-report: "stress", "health problems", "mental and physical anguish such as sleep deprivation, nervousness and the inability to concentrate and perform efficiently at work"
    - Physician Letter: "harassment and stress resulted in significant psychological disability, manifesting as stress, anxiety, alterations in sleeping patterns"
    - Psychologist Letter: states that the employee meets the diagnostic criteria for Generalized Anxiety Disorder but does not elaborate upon how that conclusion was reached

Insufficient Medial Information

- ***Crowley v. LCBO*, 2011 HRTO**
  - "...[A] bare assertion of 'stress' and other symptoms by an applicant is not sufficient to establish a mental disability within the meaning and protection of the *Code*…there needs to be a diagnosis of some recognized mental disability or at least a working diagnosis or articulation of clinically-significant symptoms, from a health professional in a report or other source of evidence that has specificity and substance. That is lacking in this case."

Medical Information Tips

- *Be Critical*: Consider whether medical information provided answers your questions
- *Persevere*: If the employee/doctor puts up roadblocks consider an IME
- *Document*: Remember the procedural requirement of the duty to accommodate

Returning to Work



Return to Work and Best Practices

- When employee returning from medical leave, employer entitled to sufficient medical information to outline limitations (including expected duration) and confirm ability to safely return
  - "John can return to work on Monday" may not be sufficient
  - Dependent upon duration of and reason for absence

Return to Work and Best Practices

- Information regarding accommodation on 'need to know' basis
  - Employee's supervisor likely needs to know more than co-workers
  - In appropriate situations ask employee what may be shared with co-workers
    - Duration of modified work? General nature of restrictions?

RTW Considerations

- Signed off by all parties
- Frequent ‘check ups’ to ensure compliance or amend accordingly
- Ensure employee raises any concerns with modified work or compliance with plan

RTW Considerations

- Review regularly
  - Don’t inadvertently continue someone on permanent “modified” duties
  - Amend plan as necessary/required
  - Sign off on any changes to the plan

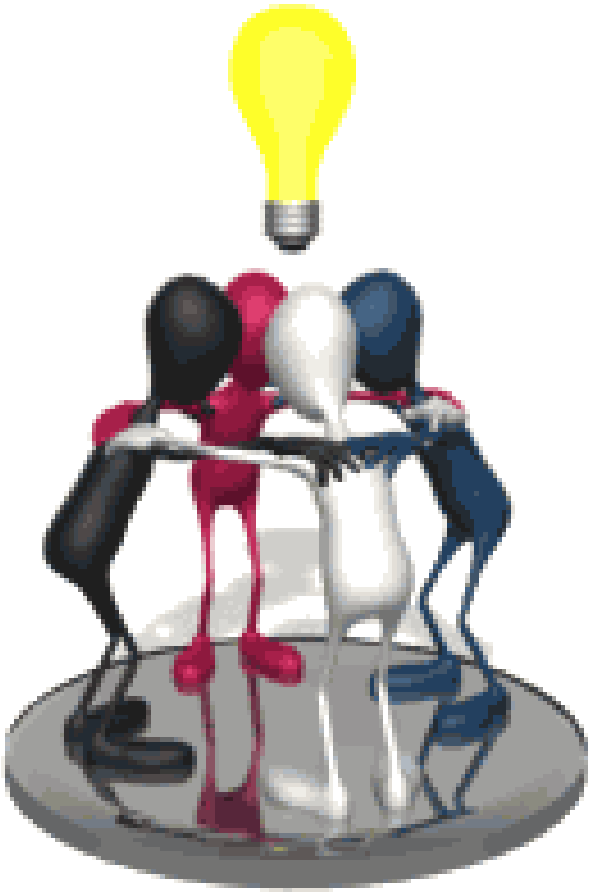
Frustration of Contract

- No reasonable prospect of return to work in the foreseeable future
- Need clear medical documentation to support this conclusion
- Also should consider the length of absence, the nature of the work and the disruption caused, and the existence of any disability plans

Termination of Employment

- Frustration of contract vs. accommodation to point of undue hardship
  - Different legal tests
  - Frustration is the end of the line
  - May have undue hardship without frustration but not *vice versa*

Concluding Thoughts



Concluding Thoughts

- Disability accommodation is not impossible
- Follow-up and document
- Be consistent and creative
- Know and use your resources
- Know your (potential) liabilities

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