
Disability Accommodation Relating to Mental Health and Return to Work

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Agenda

- What is (and is not) a Mental Disability?
- The “Duty to Inquire”
- Obtaining the Right Medical Information
- Accommodation Strategies
- Ending the Employment Relationship

WHAT IS (AND IS NOT) A MENTAL DISABILITY?

What is a Mental Disability?

- Every person has a right to equal treatment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences, marital status, family status or disability (s.5(1) HR Code)
- This includes perceived disabilities

What is a Mental Disability?

- Disability under the *Human Rights Code* includes a mental impairment or disorder
- According to DSM-5, a mental disorder is:
“a syndrome characterized by clinically significant disturbance in an individual’s cognition, emotion regulation, or behavior that reflects a dysfunction in [...] mental functioning. [...] usually associated with significant distress is social, occupational, or other important activities.”

What is a Mental Disability?

- There is no definitive list identifying which mental illnesses are disabilities and which are not
- “Mere personal characteristics or normal ailments” are not typically considered mental illnesses. (*Montreal (City)*, (2000) 185 D.L.R. (4th) 385)

Examples of Mental Disabilities

Generalized
Anxiety
Disorder

Bipolar Disorder

Mood
Disorders

Eating
Disorders

Alcoholism

Drug
Addiction

Depression

Post-
Traumatic
Stress
Disorder

Schizophrenia

Obsessive
Compulsive
Disorder

Stress and Anxiety

- Not disabilities in their own right
- BUT could be a symptom of another disability
- Not enough that an employee has been prescribed medication or is seeking counseling
- Employee is required to participate in the process by providing medical information outlining restrictions and limitations

Stress and Anxiety

“A bare assertion of pain or anxiety is not a sufficient basis upon which to allege that one has a mental disability. Pain is a common experience, and may be a symptom of a condition, usually physical though possibly also mental, which may qualify as a disability. It is not itself a disability...the complainant has not stated that he has been diagnosed with an anxiety disorder. The fact that the complainant may have been prescribed antidepressants is not alone a sufficient basis upon which to find the existence of a mental disability, as such medications may be prescribed for many reasons.”

Dow v. Summit Logistics and RWU Local 580 (2006 BCHRT)

Stress and Anxiety

■ *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?*

Stress and Anxiety

■ *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

Stress and Anxiety

■ *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.”

THE DUTY TO INQUIRE

Duty to Inquire

- The duty to accommodate a mental disability applies where the employer knows or should have known about the disability
- In certain cases, an employer will have a “duty to inquire” where they have reason to believe the employee’s actions or conduct at issue may derive from a mental disability

Duty to Inquire

“[A]n observer need not be a psychologist or psychiatrist to realize that the employee was probably mentally disabled. A motorist need not be a mechanic to conclude that his or her car would benefit from a tune-up when it repeatedly stalls in traffic. Some things are so obvious that one does not need to be an expert to figure them out.”

United Food and Commercial Workers, Local
401 v Canada Safeway Ltd. (1992), 26 LAC (4th) 409

Duty to Inquire

- The duty to inquire may be triggered where:
 - The employee's behaviour is a marked departure from his/her normal conduct;
 - The employee has previously disclosed a mental disability and demonstrated similar behaviour at that time; or
 - There is other evidence pointing to a disability (e.g. the employee comes to work repeatedly smelling of alcohol)

Duty to Inquire

- Where the behaviour of an employee would otherwise give rise to discipline, the duty to inquire requires the employer to first meet with the employee to canvass whether there may be a disability at play before acting on the otherwise culpable conduct
- Failure to do so may be found to be a breach of the duty to accommodate

OBTAINING (THE RIGHT) MEDICAL INFORMATION

Obtaining Medical Information

- An employer has the right to obtain relevant information about an employee's mental disability
- In cases of accommodation, the employee is required to provide:
 - Sufficient information to explain his or her fitness to work (*e.g.* restrictions), and
 - The nature of the accommodation sought

Obtaining Medical Information

- The employer may request:
 - Information about the general nature of the illness
 - Whether the illness is permanent or temporary
 - The estimated time frame for improvement (if known)
 - Functional restrictions and limitations
 - Possible alternative duties in as much detail as possible
 - How the medical conclusion was reached (diagnostic or other objective tests)
- Generally, the employer will not be entitled to diagnosis

Obtaining Medical Information

- If the employer receives subjective or unclear medical information, first step is to seek clarification from the employee's doctor
- This will need to go through the employee, unless consent received to interact with the doctor directly
- Put request in writing, asking specific questions

Obtaining Medical Information

- With a written request, consider:
 - Providing context for the request (e.g. a history of the absenteeism pattern or behaviour that is being exhibited)
 - Outlining the behavioural and cognitive requirements of the job and asking for the assessment to be conducted with those in mind
 - Paying for the doctor's assessment

Obtaining Medical Information

- Where the medical information received is conflicting, unclear, or lacks objectivity, or where employee or doctor are unresponsive, an employer is entitled to additional information
- This additional information may be collected through a third party medical review or, in certain cases, an independent medical examination

Obtaining Medical Information

■ Third party Review

- An occupational physician or specialist who will review the employee's medical information and consult with the treating physician to provide the employer an assessment of the employee's prognosis
- Require employee consent
- Less intrusive than an IME but will often be able to get the information you need

Obtaining Medical Information

- Independent Medical Examination (IME)
 - A “last resort” due to privacy interests
 - Generally, an IME is only permissible where:
 - Lesser means of attempting to obtain the medical information have been unsuccessful; or
 - The nature of the condition requires a specialized examination

Obtaining Medical Information

- An IME will always require consent
- In unionized workplaces, consider whether the collective agreement speaks to the right to request an IME
- As a middle ground, if an IME is being sought, consider providing the employee with a choice of doctors to allow perform the assessment

ACCOMMODATION STRATEGIES

Accommodation Strategies

- Mental disability accommodation is difficult largely because:
 - Restrictions are usually cognitive in nature – harder to specify or define
 - Mental condition may be impacted by work- and non-work related factors
 - Symptoms can be dynamic and unpredictable

Accommodation Strategies

- Establish the essential duties of the job
- Consider the possible challenges
- Understand the supervisor's goals and concerns – and train them!
- Review the medical information
- Establish a shared understanding
- Consistently revisit and tweak as necessary

Accommodation Strategies

■ Modification to Job Duties

- Exchange of minor tasks

■ Scheduling

- Flexibility in start or end of working hours

- Part-time shifts

- Frequent or timed breaks

- Short- or long-term leaves of absence

Accommodation Strategies

■ Training

- Extra time or resources to learn tasks
- Individualized training courses

■ Supervision or Management

- Adjustment to method of communication for instruction and/or feedback (*e.g.* written)
- Regularly scheduled meetings

Accommodation Strategies

- Plan for a relapse or setbacks
- Consider how you will respond to:
 - New issue in the employee's condition
 - Change in the employee's restrictions or prognosis
 - Conflict that may arise (*e.g.* performance issue or misconduct)

ENDING THE EMPLOYMENT RELATIONSHIP

Undue Hardship

- Duty to accommodate restrictions and limitations imposed by disability is to the point of undue hardship
- Onus is on the employer to demonstrate undue hardship
- Evidence needs to be objective and direct

Undue Hardship

- The *Human Rights Code* stipulates only three factors to consider in assessing undue hardship:
 - Financial cost
 - Sources of outside funding, if any
 - Health and safety requirements

Undue Hardship

■ Financial cost

- Would the accommodation, if implemented, pose a risk to the financial viability of the organization?

■ Health and safety risks

- Will accommodating the individual pose an actual and identifiable risk to the individual, other employees, clients or the public?

Frustration of Contract

- Concept is that the employment relationship comes to an end, through the fault of no one, because it is ‘frustrated’ by outside circumstances
- In this case, the existence of the employee’s disability and its impact on the individual’s ability to work

Frustration of Contract

- Need very clear medical evidence to support the position the employment relationship is frustrated
- Must indicate there is **no reasonable prospect** the employee will be able to return to work in **the foreseeable future**

Frustration of Contract

- If frustration exists, there is no obligation to provide reasonable notice of termination (or pay in lieu)
- However, must provide termination pay and severance pay (if applicable) in accordance with the *Employment Standards Act*
- Consider whether a Release is still valuable

Best Practices

- Don't rely on stereotypical assumptions of mental disability
- Proactively speak to your employee where there is suspicion of a mental health issue
- Get the right medical information
- Investigate appropriate accommodation
- Tread carefully before ending the employment relationship



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