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Political beliefs the next protected ground?

Recent judgment leaves door open on question of whether political opinion is a creed

| BY THOMAS GORSKY |

IT IS often said discrimination is illegal, but in reality this is too simplistic a proposition. Human rights legislation, such as the Ontario Human Rights Code, does not make discrimination *per se* illegal. Rather, it prohibits defined categories of discrimination (known as prohibited grounds). Many are familiar with some of the prohibited grounds of discrimination such as disability and gender. Other grounds are less well known, with one of the least familiar being "creed."

HUMAN RIGHTS

The meaning of creed was reviewed by the Ontario Court of Appeal in *Jazairi v. Ontario (Human Rights Commission)*, where a university professor who was an Arab Muslim claimed he was denied a promotion because of his views on the Israeli-Palestinian conflict. The court found discrimination against an employee on the grounds of the mere expression of a political opinion does not constitute a prohibited ground of discrimination under the code.

"Even if it can be said that political opinion may constitute creed, there is no evidence that the applicant's views amount to a creed. I am not prepared to find that the applicant's political views, no doubt shared by others in society, amount to a creed merely because the applicant is from Iraq. On the facts in this case, the applicant's submission that political and religious commitments may be so aligned as to constitute 'creed' is not established. Whether a political perspective, such as communism, that is made up of a recognizable cohesive belief system or structure may constitute a 'creed' is not at issue and is not being determined," said the court

This decision was not particularly helpful as a guide for future situations, because it only held what creed was not, with no attempt made to define what creed actually was. Since that time and until very recently there appear not to have been any cases decided in Ontario courts involving the distinction between discrimination based on creed (illegal) and discrimination based on mere political opinion (permissible).

Is political belief a component of creed?

In November 2012, creed received judicial consideration in the Ontario Superior Court of Justice in *Al-Dandachi v. SNC-Lavalin Inc.* SNC-Lavalin had been sued for wrongful dismissal, but the former employee's claim also included the following allegations:

"The plaintiff states that he believes in peace, unity, tolerance and the absence of compulsion within religion as aspects of his sincerely held religious beliefs as a Muslim. The plaintiff states that it is a fundamental aspect of his faith that there should be no compulsion in religion and, as such, as part of his Muslim faith, he believes that there

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In This Issue

Conviction after worker seriously injured overturned — twice

AN ONTARIO court has overturned an employer's health and safety conviction for an accident where a demolition worker was seriously injured by a falling piece of duct work.

Simcoe, Ont.-based Rassaun Steel and Manufacturing Co. had a contract to remove equipment — which the company had originally installed a couple of years earlier — from a non-operational foundry in Woodstock, Ont., in 2006. On Sept. 10, 2006, several employees were removing fans, conveyors, shaker cleaners and other pieces of equipment and preparing them for transport. The equipment was connected by a system of duct work that was attached to the fan assembly and weighed about 2,000 pounds. As it turned out, there was also a buildup of sand inside the ducts that contributed to their weight and instability. The workers didn't inspect the welds of

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Ask an Expert with **Lorenzo Lisi**

Aird & Berlis LLP, Toronto

Have a question for our experts? Email **carswell.celt@thomsonreuters.com.**

ACCOMMODATION: Employee who refuses to seek accommodation

Question: If an employee has performance and behavioral issues in the workplace that are the result of drinking, but the employee doesn't make any claim that he is an alcoholic, does the employer have to consider the possibility of accommodation before considering discipline? What responsibility is there to determine if there is a disability?

Answer: Dealing with "hidden" or "invisible" disabilities is one of the greatest challenges an employer can face when it comes to accommodating its employees.

Where an employee is suffering from alcohol dependency or substance abuse, it is often a condition of the disability itself that the employee will not self-disclose. They will often try to keep their condition a secret for as long as possible in the hope it will either not be discovered or they can manage their work and life without others knowing.

This presents an obvious problem for employers. On the one hand, employers don't want to be prying into their employees' lives. On the other, they are concerned with any health and safety risks in the workplace as a result of the employees' condition.

Under the Ontario Human Rights Code, employers must accommodate an employees' disability to the point of "undue hardship." The term "disability" is broadly defined and has been found to include alcoholism. Factors considered in determining whether an accommodation is to be considered undue hardship include the financial cost, the impact on any collective agreement, the impact on other employees as a result of the accommodation, the size of the employer's operation and interchangeability of the workforce and facilities, and any safety issues which may arise from the accommodation.

For example, undue hardship might be demonstrated where the accommodation would necessitate a complete reorganization of the workplace, or result in the creation of a new position for an employee which has tasks which have no value to the employer at all — in other words, a "make work project." Another example might be where the accommodation might cause a health and safety concern to other employees, such as where an employee who suffers from alcoholism who might have driving duties as part of his job.

The fact an employee has not disclosed the disability — in this case alcoholism — does not relieve the employer of its duty to accommodate. Where an employer is in possession of information or knowledge about an employee's condition and from that information it either knew or "ought to have known" the employee was suffering from a disability, it may trigger the obligation to accommodate, even where the employee does not disclose.

This doesn't mean the employer has to guess. Instead, it imposes an obligation to make an assessment based on what is seen, and determine if the next step of inquiring into a possible problem is necessary. To meet this obligation, there are a few steps to be considered. First, view the misconduct or behavioral issues objectively. If a reasonable person would believe there are concerns with alcoholism of an employee (slurred speech, the smell of alcohol, complaints from other employees) then consider addressing it as a disability and formulating an accommodation plan.

Second, consider an offer of assistance to the employee based on a concern she is suffering from alcoholism, such as a referral to an employee assistance plan or other organization which is suited to assist. Should the employee insist there is no problem, provide her with the information anyway and offer continued assistance in the future if necessary.

Finally, if ongoing employment may be a serious safety issue due to the condition, consider imposing conditions which will either make it necessary for the employee to seek assistance prior to a return to work.

TECHNOLOGY: Social media activity by employees

Question: If an employee lists herself as an employee of the company on her personal social media account, does the employer have any right to monitor the employee's online activity or request certain standards to be maintained?

Answer: The use of what is broadly defined as "social media" by employees has created new risks in the workplace. These include potential damage to a company's reputation — where employees either casually or with intent make and post comments about the workplace, customers or suppliers), loss of confidential company information, and potential loss of productivity.

The use and control of an employee's use of social media as it relates to employment goes beyond whether an employer can monitor an employees' social media account and record what she is saying about the workplace. It centres around whether that conduct can be worthy of discipline, despite the fact that it can be done on the employee's own time.

In a recent Alberta case, a Canada Post employee was terminated as a result of vengeful and hateful posts on her Facebook page which referred to Canada Post management. A grievance

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Whistleblowing RBC employee wins reinstatement

Reprisal for employee's reservations about client loan started campaign featuring negative appraisals and denial of short-term disability benefits

| BY BRAM LECKER |

AN ONTARIO arbitrator has ruled that an employee who was dismissed for allegedly abandoning his employment while on an unauthorized medical leave was entitled to reinstatement, back pay and costs on a full indemnity basis.

WRONGFUL DISMISSAL

Devinder Verma was a financial planner at the Royal Bank of Canada (RBC). In November 2007, Verma became concerned about a client's lack of documentation in support of a mortgage loan. His branch manager, on the other hand, was eager to facilitate the loan. When Verma expressed his reservations about the client's eligibility for the loan, the branch manager engaged in a series of reprisals, including accessing Verma's computer to complete the mortgage application, as well as criticizing him to a supervisor.

The supervisor accepted the criticisms uncritically. In particular, he became concerned that Verma's accent created a communication barrier with clients. The supervisor encouraged Verma to take courses to improve his English language speaking skills and suggested that Verma would not be in his position long if he failed to do so.

Verma began taking the required courses and requested that he be transferred to Mississauga or Brampton, where his other language skills could be used. Ostensibly willing to help, the supervisor asked Verma for a resumé for a senior account manager position. However, Verma believed this position was of lower status and salary. He consequently became distrustful of the efforts to help him. RBC didn't provide any evidence to suggest Verma was mistaken in his belief.

On April 14, 2008, Verma submitted a five-page letter to RBC's Human Resources Advisory Group expressing concerns that he was experiencing reprisals for whistleblowing, was a victim of racial discrimination and his book of business was being filtered for best potential clients. Shortly thereafter, Verma went on stress leave for which he received short term disability benefits.

Supervisor challenged worker immediately upon return to work

Verma returned to work in early May 2008. The supervisor immediately challenged him to improve his sales figures and increase his clientele. The supervisor did not, however, communicate his expectations in a clear and convincing manner.

Verma failed to meet the performance expectations and received a formal verbal warning on Feb. 17, 2009. The supervisor clearly indicated that Verma's job was in jeopardy if his performance did not improve. Following the meeting, Verma experienced difficulty sleeping, stress, anxiety and depression. He went on another stress leave two days after the verbal warning.

On March 9, Verma returned from the leave. Three days later, the supervisor gave him a negative performance appraisal and made comments that were abusive and unprofessional, which resulted in Verma experiencing further symptoms of anxiety and depression and caused him to be unable to work. On this occasion, Verma's request for short-term disability benefits was declined by Manulife — the benefits provider — and RBC. As a result, Verma abruptly returned to work on May 15 in an effort to protect his employment. However, Verma was unable to remain at work and quickly returned to sick leave.

On May 26, 2009, the supervisor sent a letter to Verma advising him that he was on unauthorized leave. The letter stated that Verma's employment was in jeopardy if he failed to return to work. On June 22, 2009, MacDonald sent a letter to Verma advising that he had been terminated for cause and he was not eligible to be re-hired by RBC.

In the circumstances, the arbitrator found that RBC's conduct was precipitating the symptoms which impaired Verma's ability to succeed at work. The dismissal was unjust and RBC was ordered to reinstate Verma with compensation for lost pay and benefits since his dismissal. While the bond of trust between Verma and his supervisors was irreparably ruptured, RBC had the ability to remove Verma from the toxic work environment by placing him under new supervision at another branch, said the arbitrator.

Significantly, RBC had conferred on Manulife the responsibility to determine whether or not an employee should receive short term disability benefits. The arbitrator held that Manulife's decision to deny Verma's claim for benefits caused Verma to suffer additional stress and anxiety and RBC was responsible for Manulife's recommendations and their consequences. CELT

For more information see:

- *Verma v. Royal Bank of Canada* (Can. Lab. Code adj.).

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CASE IN POINT: ACCOMMODATION

Stressed firefighter fights firing

Firefighter claimed bad attendance record was caused by mental disability but arbitrator found he really just handled his personal problems poorly

BACKGROUND

Too little too late

WHEN should an employee raise the issue of a disability and request accommodation? When should an employer consider accommodation? Should an employer wait for a direct request or take a hint? These are all questions with which employers can wrestle when it comes to figuring out the duty to accommodate employees with disabilities.

Is an employee dropping hints enough? And what really constitutes a disability? An Ontario firefighter's claim that he had a disability — after he was dismissed — seemed to be a little late coming, and the nature of the disability left the fire department a little mystified. It was left to an arbitrator to sort it all out.

| BY JEFFREY R. SMITH |

AN ONTARIO firefighter's dismissal for missing work without permission has been upheld by an arbitrator, despite the firefighter's claim he suffered from a disability and the fire department knew about it.

Kim Elliott was a firefighter with the Windsor, Ont., Fire and Rescue Service who was hired in 1991. Between 1995 and 2004, Elliott was disciplined several times for attendance problems, including not notifying the service of absences, multiple instances of being late for his shift, changing shifts without permission and improperly summoning on-duty firefighters to his home for assistance. Along with various verbal and written reprimands, Elliott was suspended four times for varying lengths of time. Despite the fact he was considered to be doing a good job performance-wise, on March 29, 2004, Elliott was given a warning letter following a suspension for an unauthorized absence that stated if he missed any more work without permission, he would likely be dismissed.

In all, Elliot's attendance record relating to unauthorized absences was the worst in the Windsor fire department. This caused great concern with the department because a certain number of firefighters were required to operate each fire truck and if anyone was missing, a truck was taken out of service. Shifts were typically 24 hours long twice a week, so a one-shift absence without a replacement could make a truck unavailable for 24 hours. Following an absence in 2003, Elliott was asked if he had any medical problems that could prevent him from coming to work on a steady basis. Elliott said he did but wanted it kept between him and the chief and deputy chief and mentioned problems with his marriage as well as legal and financial difficulties. The deputy chief suggested a follow-up meeting with the union but that didn't happen.

Medical leave for stress

In late 2001 and early 2002, Elliott was off work for several months on an approved medical leave for "severe and incapacitating stress." His claim for long-term disability benefits included a diagnosis of adjustment disorder caused by financial and marital problems, job pressures and community difficulties.

When Elliott was given medical clearance by his psychologist to return to work in 2002, the fire department made it clear that his discipline record would continue where it left off and it would not be a clean slate. The psychologist stated this would not be a problem and Elliott didn't indicate he had any disability that needed to be accommodated or would affect his attendance at work.

In late June and early July 2004, Elliott missed five shifts without informing the fire department. Elliott was called into a meeting to discuss the absences and he said "there were barriers" that sometimes kept him from going to work, but he would try to improve his attendance. He also said that he was under a doctor's care and would provide a note. The department asked him to provide medical evidence to explain and validate his absences.

Elliot brought in a letter from his psychologist that stated Elliott had not been treated during his absences and couldn't comment on his stress level. The doctor said he had treated Elliott in the past for "chronic stressors that periodically create significant difficulties for him." The department also learned a little later that Elliott had been in jail during the last three shifts he missed due to a breach of his bail terms following an arrest for an altercation with his ex-wife.

On July 30, 2004 — a week after the meeting to discuss the absences — Elliott was late for work without an acceptable reason. On Aug. 13, his

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CASE IN POINT: ACCOMMODATION

Firefighter claimed department was aware of his mental problems

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employment was terminated. Elliott contested the termination, arguing his chronic mental problems constituted a mental disability, as when he was provoked emotionally he was unable to think rationally or consider the consequences of his actions. He said the fire department was aware of his mental and emotional problems — he had told the deputy chief about his personal problems and his related depression and anxiety, as well the problems leading to his medical leave — and that he was being treated by a psychologist and his dismissal was the result of his attendance problems, which were caused by his mental disability.

The fire department argued there was no evidence supporting a disability or anything that would prevent Elliott from at least notifying it of his absences. It said there were no indications his attendance would improve in the future, so the only possible accommodation would be to simply allow Elliott to be absent without permission, which wasn't possible in the fire department's workplace environment. The fire department also pointed out the alleged disability wasn't raised until after the termination and no accommodation had been formally requested before — despite the many previous instances of discipline for attendance problems. In addition, the psychologist didn't formally diagnose a disability for Elliott.

Vagueness about mental disorder

The arbitrator noted when Elliott was at work, he was considered to be doing a good job. Also, though he may have mentioned some of his problems and had to take a medical leave, at no point did he indicate that he couldn't perform his full duties and need accommodation when he was at work. Also, if the mental disorder caused Elliot's absences, he didn't indicate that was the case other than for his medical leave in 2001, said the arbitrator, which suggested if his disorder was a disability, it didn't interfere with his work and wasn't easy to recognize.

The arbitrator found when Elliott went on his 2001 medical leave, the fire department was told he was being treated for stress and emotional problems. However, he was cleared to return to work as normal at the end of the leave and there was no indication there would be ongoing problems. This did not qualify as notice of a disability, said the arbitrator. Also, though the psychologist indicated on the long-term disability claim that Elliott had a mental disorder, he didn't tell the employer of this diagnosis.

"While it (advised) of various stressful matters, the existence of stress in a person's life is common," said the arbitrator. "The existence of stress and problems in dealing with that stress is not commonly viewed as being an indication that the person has a mental disorder."

The arbitrator also found the problems Elliott discussed with the deputy chief regarding his family and financial problems were not diagnosed as disability-related and could not be considered notice of a disability. The same could be said for Elliott's comments about "barriers" in his disciplinary meeting in July 2004, when he didn't provide any specific information about his problems.

The arbitrator noted all people had to deal with issues in their personal lives and organize their time and priorities. While some are better than others at this, being bad at it — such as Elliott seemed to be — could not be considered a mental disorder. Some mood problems could be related to a mental disorder, but Elliott failed to prove this was the case for him. Though Elliott's way of handling his problems was unfortunate or even dysfunctional, this didn't demonstrate he had a mental disorder that disabled him, said the arbitrator.

"I accept that (Elliott) had an 'inability to follow through' in dealing with his problems and had trouble focusing 'on the underlying reasons and motivations that lead him into difficulty,'" said the arbitrator. "But I do not think that the term mental disorder in the (Human Rights) code was intended to mean problems in dealing with stressful situations nor to mean an inability or unwillingness to address those unfortunate responses."

The arbitrator found the fire department was not made aware of a disability by Elliott. It was reasonable to request medical information supporting his absences and, without it, it had a right to discipline Elliott. Given Elliott's past disciplinary record for absences and his previous warning, dismissal was an appropriate level of discipline for Elliott's five-shift absence in June and July 2002. ■

For more information see:

■ *Windsor (City) and WPFFA (Eliott), Re*, 2012 CarswellOnt 14245 (Ont. Arb. Bd.).

Employment law blog

Canadian Employment Law Today invites you to check out its employment law blog, where editor Jeffrey R. Smith discusses recent cases and developments in employment law. The blog includes a tool for readers to offer their comments, so discussion is welcome and encouraged.

Recent topics include large jury awards, calling in sick procedures, tough bosses, the disability threshold and employees who leave work without permission.

You can view the blog on www.employmentlawtoday.com.

Employee fired after expressing views on radio

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should be a separation between religion and the state.

"The plaintiff opposes the armed conflict in Syria as a Syrian Canadian and Muslim who believes in peace, unity, tolerance and the absence of compulsion in religion, because he views the armed conflict as a movement by religious extremists who seek to lead Syria towards religious extremism. As a Muslim and as a Syrian Canadian whose identity is tied to Syria, the plaintiff has strong views opposing religious extremism and religious control over Syria."

The employee's claim went on to allege his termination of employment arose as a consequence of a radio interview in which he expressed his views concerning the military conflict in Syria. He claimed his termination constituted illegal discrimination, contrary to the code. SNC-Lavalin brought a preliminary motion to strike these allegations from the claim on the basis the plaintiff's characterization of his beliefs was merely an expression of his political views, not protected in the code. Due to court procedural rules, SNC-Lavalin was not permitted at this stage of the lawsuit to contest whether the alleged reason for termination was accurately stated.

The judge dismissed SNC-Lavalin's motion, commenting on the earlier Court of Appeal decision: "The Court of Appeal expressly left open the question whether or not some other system of political opinion could amount to a creed. I am unable to conclude that the views and opinions of the plaintiff could not amount to a creed. That issue, in my respectful view, cannot be determined on a pleadings motion, especially having regard to the allegations contained in the amended statement of claim."

Caution to employers

It has been a long-held axiom the right to terminate employment is the prerogative of the employer. And while the *SNC-Lavalin* case did not determine the reason for termination alleged by the employee would actually constitute discrimination on the basis of creed, there is a caution to employers.

The *Jazairi* and *SNC-Lavalin* decisions both leave open the potential that political belief may fall within the definition of creed as interpreted under human rights legislation. In so doing, the decisions are examples of legislated protections increasingly restricting the ambit of the exercise of an employer's discretion to terminate employment.

Is political belief a component of creed? The answer is not yet clear. What is clear is courts are prepared to entertain the concept. As such, employers are well-advised to carefully consider whether a particular decision to terminate employment might be vulnerable to this evolving genre of legal challenge.

For more information see:

- *Jazairi v. Ontario (Human Rights Commission)*, 1999 CarswellOnt 2045 (Ont. C.A.).
- *Al-Dandachi v. SNC-Lavalin Inc.*, 2012 CarswellOnt 14471 (Ont. S.C.J.).

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ASK AN EXPERT

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by the union to reinstate the employee was dismissed by an arbitrator on the basis that such posts were inconsistent with a continued employment relationship.

Monitoring employee social media conduct raises two issues: what is permissible for employees to say via social media, and what does an employer do if an employee crosses the line with her comments? To address permissible conduct, employers have the right to ask that certain standards be maintained. In fact, employers are wise to create and implement a social media policy which explicitly sets out what can and can't be said. It should explain the company's approach to social media, remind employees of the nature and impact of what they publish, specifically prohibit speaking on behalf of the company without authorization, and warn that the use of social media will be monitored and the information collected may be used and disclosed for legitimate business purposes, including to investigate suspected breaches of the law or workplace policies.

Where an employee posts comments or information which may be deemed to harm the company's reputation or product, this use will be viewed as "off-duty conduct." To determine whether it can result in discipline, courts and administrative tribunals look at a number of factors, including whether the conduct rendered the employee unable to perform her duties, whether it led to the refusal or reluctance by other employees to work with the employee, whether there is a criminal code offence concerning the conduct and whether the conduct makes it difficult for the company to manage its workforce efficiently.

As difficult as it may seem to keep up with the pace of technology, it's important to remember that employers can still use vigilance and good old fashion policies and procedures to deal with the issues arising in the new workplace.

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MORE CASES

COMPILED BY JEFFREY R. SMITH

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the equipment and ducts because it would have been a long process that would have taken years.

The duct work was supported at three points — a clamp fixed to the ceiling, a brace connected to a column and a vertical cable. At one point, while the equipment was being removed, the duct work shifted so the vertical cable wasn't supporting it. One employee walked under the duct at the same time as another was unbolting the duct end that connected to the fan assembly. The duct collapsed and fell onto the walking employee, fracturing his skull, pelvis scapula, several ribs and thumb. The employee also had a collapsed lung and a torn aorta.

Rassaun was charged under Ontario's Occupational Health and Safety Act with failing, as an employer, to take every precaution reasonable to protect its workers. The charges stemmed out of the allegation that the company didn't properly ensure the overhead duct system was adequately supported while the workers dismantled or demolished it.

In 2008, Rassaun was convicted by a Justice of the Peace, which the company appealed. The conviction was overturned and a new trial was ordered to take place in 2011 on the original charge and another charge that Rassaun failed to ensure the measures and procedures prescribed by health and safety regulations were carried out. The company was convicted once again on the original charge and acquitted on the second charge. Rassaun appealed the second conviction on the ground that there was no "specific finding of fact" on what it did wrong. The Crown argued Rassaun had failed to establish due diligence on its part to prevent the accident.

The Ontario Court of Justice heard the appeal and found the buildup of sand inside the ducts could not have been expected, as it wasn't something that normally occurred. It was also not reasonable to inspect the welds due to the time it would have required. Since the duct collapse was caused by the sand buildup and poor welds, it wasn't a foreseeable accident that could have been planned for, said the court. Also, there was no evidence additional training for the workers would have done anything towards preventing the accident.

The court allowed the appeal and overturned Rassaun's conviction. See *R. v. Rassaun Steel & Mfg. Co.*, 2012 CarswellOnt 14418 (Ont. C.J.).

JUST CAUSE: Air Canada flight attendant grounded after false medical notes

AIR CANADA had just cause to dismiss an employee for false medical notes and had the right to investigate the legitimacy of those notes, an arbitrator has ruled.

The employee, a long-service flight attendant based in Toronto, took three days off from Oct. 1 to 3, 2011, for illness. Air Canada requested a medical certificate to substantiate the absence and the flight attendance eventually provided a note. The note didn't provide any information about the doctor's name or the clinic and only had an illegible signature. The note also appeared to be photocopied.

Air Canada advised the flight attendant that the note wasn't acceptable and he said he would get another one. Air Canada reviewed his file and found he had provided two similar notes for absences earlier in 2011 — no information on the doctor or clinic and an illegible signature.

The flight attendant admitted the notes in question were not from the medical centre from which he had provided notes in the past, though the format was similar. He claimed the notes were from a homeopathic and holistic medicine centre that wasn't used to giving out sick notes, so he showed them one of his older notes as a template.

However, the homeopath wasn't a regulated medical professional and didn't recall being asked for medical notes. The notes were issued by his office but he had no knowledge of them.

Air Canada felt the notes the flight attendant had provided were fraudulent, as the attendant knew what kind of medical documentation was required to support absences and notes from a homeopath were not acceptable. It believed he was attempting to secure sick pay with fraudulent notes and, on March 9, 2012, the airline terminated the flight attendant's employment. The union grieved, arguing the notes were legitimate and the flight attendant's good employment record should be taken into account. It also said the notes were from a "practitioner appropriate to his culture" that should be sufficient prove of his illness on the days he was absent.

The arbitrator found the flight attendant's explanation for the notes was believable. The homeopath didn't remember being asked for notes and had no knowledge of them. The lack of any notes corresponding to the flight attendant's visits to the homeopath and the failure of a reasonable explanation supported the finding that the notes weren't legitimate, said the arbitrator.

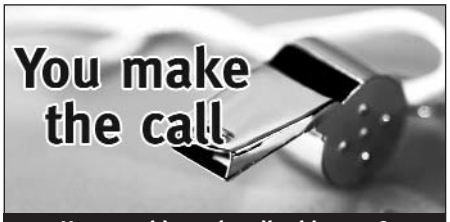
The arbitrator also found Air Canada's checking up on the origin of the notes wasn't a breach of the flight attendant's privacy. The airline was entitled to confirm the legitimacy of the notes if it was suspicious, and it was entitled to investigate the source of the notes, said the arbitrator. The termination was upheld and the grievance was dismissed. See *Air Canada and CUPE — Air Canada Component (K. (R.)), Re*, 2012 CarswellNat 4278 (Can. Arb. Bd.).

Worker can't shoulder regular duties after injury

THIS instalment of You Make the Call features an injured employee who claimed discrimination based on a disability.

Basant Brar was a dock worker for Damco Distribution Canada, an international warehouse and distribution company in Delta, B.C. Brar's job involved offloading, sorting and redistributing boxes of merchandise for shipment.

On Sept. 4, 2009, Brar injured his left shoulder while loading boxes in the warehouse. He filed a claim with WorkSafeBC and had his physician complete a Damco form that outlined his level of fitness for work and functional limitations. Damco modified his duties and he didn't have to miss any work.



How would you handle this case? Read the facts and see if the judge agrees

Brar had regular assessments on his fitness for work and his duties had to be further modified. On March 2, 2010, WorkSafeBC informed Damco Brar would be put into an occupational rehabilitation program for six weeks, which would be followed by a graduated return-to-work plan.

The rehabilitation ended on April 23, 2010, but Brar complained he still had significant pain in his shoulder and said he could still only perform light duties. The medical information Damco had indicated Brar had recovered enough to perform his full duties and the company also received a letter from WorkSafeBC that said Brar was fit to return to work without limitations. Damco recommended to Brar that he should take small breaks to ice his shoulder and use lifting techniques he had been taught.

On April 27, Brar didn't show up for work and didn't contact his supervisor. Brar later explained he was trying to get an appointment with his doctor. Damco requested him to have his doctor complete a fitness for work form but Brar said his doctor refused and didn't provide the doctor's name.

Damco later received a level of fitness form that stated Brar could perform most of his regular duties. However, Brar insisted he was in too much pain to do anything beyond labeling boxes. Damco told Brar it expected him to perform the full duties he was medically cleared to perform and if he could not, he should provide additional medical evidence.

Feeling stressed, Brar went to see his doctor and then a psychiatrist, who diagnosed him with depression. He didn't show up for work over the next four days and made no contact with Damco.

On May 3, Damco sent Brar a letter telling him that he must respond immediately with information supporting his continued absence or he would be disciplined, including possible termination, but it received no response.

On May 6, Damco terminated Brar's employment for not reporting for duties or explaining his absence from work, essentially abandoning his job. Brar filed a human rights complaint claiming discrimination on the ground of physical disability.

You make the call

- ☑ Did Damco have grounds for dismissal?
  OR
- ☑ Did Damco have to do more to accommodate the injury?

IF YOU SAID Damco had grounds for dismissal, you're right. The tribunal found the company adequately accommodated his injury with modified duties for several months. It also acted reasonably given the medical information it had clearing Brar to perform most of his regular duties. If Brar's shoulder was still preventing him from performing those duties, he should have met the request for new medical information supporting that claim, particularly since he was taking time off work, said the tribunal.

The tribunal found Damco provided a "credible non-discriminatory explanation" for the decision to consider Brar to have abandoned his position. He was absent for from work for at least three straight days without proper notification or acceptable reasons — outlined in the collective agreement as a deemed termination of employment.

The tribunal also found Brar should have been aware of the proper process to report his absences. Although he was diagnosed with depression, there was no evidence it prevented him from notifying his employer or that it affected his knowledge of the proper notification procedure. See *Brar v. Maersk Distribution Canada Inc.*, 2012 CarswellBC 1966 (B.C. Human Rights Trib.). CELT

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