

# *Mental Illness and Substance Use in the Workplace*

*The webinar will begin at 9:00 a.m. EST – September 20, 2023*



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# *Agenda*

- Mental Illness and Substance Use
  - Duty to inquire
  - Investigating suspected impairment
  
- Disability-Related Accommodation
  - Definition of “disability”
  - Requests for medical information

# Agenda

- Employee's duty to cooperate
- Employer's duty to accommodate
- Accommodation Strategies

## ■ WSIB Stress Claims

- Chronic mental stress
- Traumatic mental stress
- Practical Tips

# *Agenda*

- Discipline and Termination
  - Disability-related conduct
  - Last chance agreement
  - Frustration of contract
  - Mitigating risk

# *Mental Illness and Substance Use*



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Sherrard Kuzz LLP, Employment & Labour Lawyers

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# *Mental Illness and Substance Use*

- Accommodation of mental illness and substance use disability can pose unique challenges
  - Employee may not be aware of the disability
  - Stigma may hinder proactive disclosure
- Even if not raised by employee, in certain circumstances, employer has ‘duty to inquire’ about possible disability

# ***Mental Illness and Substance Use***

## ***The Duty to Inquire***

- Employer has a duty to inquire prior to discipline if it has a reasonable basis to believe conduct giving rise to discipline may be caused by a disability
- Failure to do so may be a breach of the duty to accommodate

# *Mental Illness and Substance Use*

## *The Duty to Inquire*

### *Calkins v. Broadview Homes, 2023 AHRC 45*

- Complainant's employment was terminated for hostile and abusive conduct towards customers - 'out of character'
- After second incident, complainant told supervisor he might have chronic traumatic encephalopathy (CTE) resulting from earlier concussion-related trauma



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# *Mental Illness and Substance Use*

## *The Duty to Inquire*

### *Calkins v. Broadview Homes, 2023 AHRC 45*

- Complainant's employment was terminated few weeks after second incident and alleged termination was disability-related discrimination
- Human Rights Tribunal of Alberta agreed
- Employer should have explored if performance-related issues were related to potential CTE

# *Mental Illness and Substance Use*

## *Investigating Suspected Impairment*

- Duty to inquire commonly arises where there is suspected workplace impairment
- Conduct would otherwise be culpable, but duty to inquire may first require a discussion with employee to determine if conduct is related to a substance use disorder
  - If it is, may first require accommodation
  - If not, disciplinary response is appropriate

# ***Mental Illness and Substance Use***

## ***Investigating Suspected Impairment***

- If employee attends work impaired
  - Document the conduct/symptoms and, if possible, have another managerial employee independently verify
  - Conduct drug/alcohol test if permitted under employer policy and circumstances
  - Send employee home in a cab and instruct them to contact the employer the following day

# *Mental Illness and Substance Use*

## *Investigating Suspected Impairment*

- Prior to employee's return to the workplace, speak to them about the conduct observed and the assessment that they were impaired at work (which may include results of drug and alcohol test)
- Allow employee opportunity to respond/explain
- Ask if conduct may be related to a substance use disorder
- If employee says no, treat as culpable

# *Mental Illness and Substance Use*

## *Investigating Suspected Impairment*

- ❑ If employee says conduct may be related to substance use disorder
  - Request medical documentation to confirm diagnosis and treatment plan
  - Focus accommodation on treatment to permit employee to return to work free from impairment
  - Type of accommodation may depend on physician assessment and whether work is safety-sensitive

# *Disability-Related Accommodation*



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# *Disability-Related Accommodation*

## *Definition of “Disability”*

- No list of medical conditions that will, or will not, be considered a disability
- “Normal ailments” and “personality characteristics” not a disability
- General feelings of “stress” or “anxiety” not a disability
  - May be symptoms of a disability

# *Disability-Related Accommodation*

## *Definition of “Disability”*

### *Skytrain v. CUPE Local 7000 (Olsen), [2009] B.C.C.A.A.A. No. 85*

- Medical note stated grievor was “under stress due to assault at work” and was absent “due to anxiety attacks and stress”
- Not sufficient evidence of a mental disability; no duty to accommodate



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# *Disability-Related Accommodation*

## *Definition of “Disability”*

### *Crowley v. LCBO, 2011 HRTO 1429*

- Employee sought transfer “on compassionate and medical grounds” to Collingwood from Toronto after ongoing harassment by a customer
- Doctor’s note supported employee’s request for transfer but did not provide medical information to confirm a disability

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# *Disability-Related Accommodation*

## *Definition of “Disability”*

### *Crowley v. LCBO, 2011 HRTO 1429*

- Employer provided temporary transfer but did not characterize it as a workplace accommodation
- When permanent transfer was refused, employee claimed discrimination based on disability and filed an application with the Human Rights Tribunal of Ontario (HRTO)

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# *Disability-Related Accommodation*

## *Definition of “Disability”*

### *Crowley v. LCBO, 2011 HRTO 1429*

- HRTO dismissed application
- Applicant had medical documentation at hearing to support diagnosis of Generalized Anxiety Disorder; however, no medical evidence to support the existence of a disability at the time accommodation was sought

# ***Disability-Related Accommodation***

## ***Definition of “Disability”***

### ***Crowley v. LCBO, 2011 HRTO 1429***

*“...[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.”*

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# *Disability-Related Accommodation*

## *Requests for Medical Information*

- Employer has right to sufficient medical information to support assertion employee has disability and requires accommodation
- If vague or unhelpful doctor's note provided initially, request further information from treating physician
- If unsuccessful, consider a third-party medical review

# *Disability-Related Accommodation*

## *Requests for Medical Information*

- Employer is entitled to
  - ❑ Confirmation of the existence of a disability
  - ❑ Information re nature of the illness (in some cases, also diagnosis)
  - ❑ Information re whether disability is permanent or temporary
  - ❑ Information re estimated time for improvement
  - ❑ Information re functional restrictions and limitations

# *Disability-Related Accommodation*

## *Requests for Medical Information*

- Explanation of how the medical conclusion was reached (diagnostic or other tests)
- Information re treatment plan
- Employer can ask for medical opinion as to whether employee can perform a particular task
  - However, not appropriate for a physician to unilaterally dictate the specific role the employee can perform

# *Disability-Related Accommodation*

## *Employee's Duty to Cooperate*

- Employee has a duty to participate in the accommodation process by providing medical information sufficient to
  - ❑ Substantiate the need for accommodation
  - ❑ Allow employer to determine appropriate accommodation
  - ❑ Provide information on prognosis and improvement of stated limitations



# *Disability-Related Accommodation*

## *Employee's Duty to Cooperate*

- Particularly in cases of mental disability or substance use disorder, employee may be reluctant to disclose medical information
- However, failure to provide sufficient medical information and participate in accommodation process can bring the duty to accommodate to an end

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# *Disability-Related Accommodation*

## *Employee's Duty to Cooperate*

### *Interim Place v. OPSEU, 2020 CarswellOnt 3766*

- Long service employee took leave of absence
- Considerable back and forth to acquire medical evidence to substantiate disability, restrictions and limitations
- Medical documentation focused primarily on physician's perspective about employee's role and schedule

# ***Disability-Related Accommodation***

## ***Employee's Duty to Cooperate***

### ***Interim Place v. OPSEU, 2020 CarswellOnt 3766***

- Employee did not consent to release of medical information and was ultimately deemed to be on unapproved leave
- Was warned that failure to provide necessary information would result in termination
- Terminated and union grieved

# ***Disability Related Accommodation***

## ***Employee's Duty to Cooperate***

***Interim Place v. OPSEU, 2020 CarswellOnt 3766***

- Grievance dismissed
- Incumbent on employee to share information about existence of disability, medical restrictions and limitations
- Employer fulfilled its duty to inquire after it made multiple attempts to obtain relevant medical information
- Termination appropriate; grievor failed to cooperate

# *Disability-Related Accommodation*

## *Employer's Duty to Accommodate*

- Employer has duty to accommodate established medical restrictions and limitations to the point of undue hardship
- May require flexibility and creativity
- If restrictions cannot be accommodated in the workplace, a leave of absence may be appropriate

# *Disability-Related Accommodation*

## *Employer's Duty to Accommodate*

- Mental disability accommodation can be particularly challenging
  - Restrictions are often cognitive/psychological/behavioural, so difficult to specify or define
  - May be impacted by work and non-work related factors
  - Symptoms can be dynamic and unpredictable

# *Disability-Related Accommodation*

## *Accommodation Strategies*

- Modify Job Duties
  - Exchange minor tasks; job sharing arrangements
- Adjust Scheduling
  - Flexible hours; part-time shifts
  - Frequent or timed breaks
  - Short or long-term leaves of absence
  - Time off for medical appointments/treatment

# *Disability-Related Accommodation*

## *Accommodation Strategies*

- Adjust Training
  - Extra time, resources, individualized approach
- Adjust Supervision or Management
  - Change method of communication
  - Regularly scheduled meetings or job coaching
- Alter Work Environment



# *Disability-Related Accommodation*

## *Accommodation Strategies*

- Plan for relapses, setbacks and intermittent absences
- Consider in advance how you will handle
  - Changes to employee's restrictions or prognosis
  - Conflict that may arise in relation to disability
  - Decline in employee performance
  - Communication to managers/co-workers

# *Disability-Related Accommodation*

## *Employer's Duty to Accommodate*

- Employer is obligated to provide reasonable, not perfect, accommodation
- Employee has a corresponding duty to accept reasonable accommodation, even if it is not preferred
  - Failure to do so may end employer's duty to accommodate

# *WSIB Stress Claims*



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# *WSIB Stress Claims*

- In most cases, employee unable to work due to mental illness is entitled to an unpaid leave of absence
  - May apply for EI Sickness Benefits or any available disability benefits (paid sick leave, STD, LTD)
- In some situations, employee may be eligible for WSIB benefits for work-related mental injury

# *WSIB Stress Claims*

## *Chronic Mental Stress*

- Worker may be entitled to benefits for **chronic mental stress** if
  - ❑ Worker has an appropriately diagnosed mental stress injury
  - ❑ A substantial work-related stressor is the predominant cause of the injury
  - ❑ Injury arose out of and in the course of employment

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# *WSIB Stress Claims*

## *Chronic Mental Stress*

- Commonly related to workplace harassment or jobs with a high level of routine stress
- Worker not entitled to benefits for stress caused by decision or action of employer related to employment
  - Discipline, termination, change to work performed, *etc.*

# *WSIB Stress Claims*

## *Traumatic Mental Stress*

- Worker may be entitled to benefits for **traumatic mental stress** if
  - ❑ Worker has appropriately diagnosed mental stress injury
  - ❑ One or more traumatic events caused, or significantly contributed to, injury
  - ❑ Injury arose out of and in the course of employment

# *WSIB Stress Claims*

## *Traumatic Mental Stress*

- May arise where worker is subject to physical violence or the threat of violence, witnesses a violent crime or accident, or is the object of a death threat, *etc.*
- Worker must have suffered or witnessed the work-related traumatic event or heard about the event first-hand through direct contact with the traumatized individual



# *WSIB Stress Claims*

## *Practical Tips*

- Workplace investigation is particularly important in the context of a chronic mental stress claim
  - May even be requested by the WSIB and findings will be given weight if done properly
- Employer should challenge a WSIB stress claim if there is any question about causation
  - Reach out to Sherrard Kuzz for assistance!

# *Discipline and Termination*

**You're**



**Fired!**

# *Discipline and Termination*

## *Disability-Related Conduct*

- Discipline is an appropriate response if conduct is culpable
- However, if conduct is the result of an employee's disability, it may be viewed as non-culpable
- Question to consider is whether the conduct is within an employee's ability to control or change

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# *Discipline and Termination*

## *Disability-Related Conduct*

- If conduct is non-culpable, first consider accommodation
- Remember, in some cases, it may not be clear that misconduct is attributable to disability
  - Employee has the onus to demonstrate the conduct was caused by a medical condition

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# *Discipline and Termination*

## *Disability-Related Conduct*

### *Cambridge Memorial Hospital v ONA, 2017 CanLII 2305*

- Nurse stole painkillers prescribed for patients and falsified medical records
- Dismissed for cause
- Evidence nurse was addicted, but no evidence the addiction was sufficient to cause theft and falsify records

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# *Discipline and Termination*

## *Disability-Related Conduct*

### *Cambridge Memorial Hospital v ONA, 2017 CanLII 2305*

- Post-dismissal, nurse demonstrated a commitment to rehabilitation and was unlikely to relapse
- Dismissal upheld – addiction not so strong as to cause misconduct
  - Nurse made conscious decisions and should be held accountable

# *Discipline and Termination*

## *Disability-Related Conduct*

### *Regional Municipality of Waterloo (Sunnyside Home) v ONA, 2019 CanLII 433*

- Nurse stole painkillers prescribed for patients and falsified medical records
- Strong medical evidence nurse was addicted such that she had diminished capacity to resist engaging in misconduct

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# *Discipline and Termination*

## *Disability-Related Conduct*

### *Regional Municipality of Waterloo (Sunnyside Home) v ONA, 2019 CanLII 433*

- Nurse attended rehab and made excellent progress
- Reinstated – addiction was strong enough to cause misconduct and nurse could be accommodated without employer facing undue hardship



# *Discipline and Termination*

## *Disability-Related Conduct – Mitigating Risk*

- If reasonable basis to suspect employee misconduct is due to disability, remember the duty to inquire
- If employee alleges misconduct is related to disability, ask for medical documentation to support
  - Should confirm existence of disability and provide sufficient evidence to support nexus to conduct at issue

# *Disability-Related Accommodation*

## *Last Chance Agreement*

- Accommodation of substance use disorder can be a challenge because relapse is recognized as a symptom of addiction
- Potential for relapse should be considered in the accommodation process
- May require multiple attempts to return employee to work before undue hardship is established

# *Disability-Related Accommodation*

## *Last Chance Agreement*

- A “last chance agreement” (LCA) can be used if accommodation has been unsuccessful and employer wants to give employee one final opportunity, post-treatment, to remain employed
- Sets out conditions on which employment will continue
  - Abstain from drug and alcohol use, participate in treatment, undergo testing, *etc.*

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# *Disability-Related Accommodation*

## *Last Chance Agreement*

- Parties agree that any breach of LCA will constitute just cause for dismissal and undue hardship for the employer
- Parties cannot “contract out” of human rights obligations
- However, appropriately used, LCA can be an effective tool to demonstrate employer has fulfilled its duty to accommodate

# *Disability-Related Accommodation*

## *Last Chance Agreement*

### *Toronto District School Board v CUPE, 2018 CanLII 39769*

- Grievor terminated after she failed to provide proof of treatment completion and refused to submit to drug test, in violation of LCA
- Union grieved and submitted post-discharge evidence that grievor was now engaging in treatment plan
  - Alleged termination was a breach of duty to accommodate

# *Disability-Related Accommodation*

## *Last Chance Agreement*

### *Toronto District School Board v CUPE, 2018 CanLII 39769*

- Arbitrator affirmed that, absent compelling evidence of post-discharge rehabilitative potential, adjudicators are reluctant to second guess an LCA
- In this case, not satisfied evidence supported overriding LCA agreed to by the parties
- Grievance dismissed

# *Discipline and Termination*

## *Last Chance Agreement – Mitigating Risk*

- LCA is the “last resort” and may not be appropriate on the first accommodation attempt
- However, properly drafted and implemented, an LCA can be an effective tool to demonstrate employer has accommodated
- Reach out to any member of Sherrard Kuzz team

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# *Disability-Related Accommodation*

## *Frustration of Contract*

- In some situations, even if no culpable conduct, employment may be terminated for reasons related to disability
- Most commonly due to circumstances outside parties' control (*i.e.*, disability)



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# *Disability-Related Accommodation*

## *Frustration of Contract*

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

# *Disability-Related Accommodation*

## *Frustration of Contract*

- If frustration established, there is no obligation to provide reasonable notice of termination (or pay in *lieu*)
- In unionized environment, termination will be for “innocent absenteeism”
- However, must provide termination pay and severance pay (if applicable) in accordance with employment standards legislation

# *Discipline and Termination*

## *Frustration of Contract – Mitigating Risk*

- Important to ensure medical position supports frustration of contract
  - Easier to establish the longer employee is out of workplace
- Request medical information/documents from employee's physician to confirm if any reasonable prospect of return to work in foreseeable future

# *Discipline and Termination*

## *Frustration of Contract – Mitigating Risk*

- If medical information/documentation do not support frustration, request additional medical information re when employee will return to work
- If employee on disability benefits, consider making request when employee moves to “any occupation” coverage
  - More likely to align with medical information/documents being provided to insurer

# Questions?



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