
Workplace Accommodation ~ Mental Health and Substance Use Disorders

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Agenda

- Workplace Accommodation Framework
- Mental Health Accommodation
- Substance Use Disorder and Accommodation

Workplace Accommodation Framework



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Workplace Accommodation Framework

What constitutes discrimination

- To claim discrimination based on a disability, an employee must prove:
 1. They have a disability
 2. They have suffered adverse treatment, and
 3. Their disability was **a factor** in the adverse treatment
- Burden then shifts to employer to show:
 - ☐ *Bona fide* occupational requirement (“BFOR”), and
 - ☐ Accommodation to the point of “undue hardship”

Workplace Accommodation Framework

Definition of “disability”

- Existence of “disability” is a key issue
- **Includes:**
 - ☐ Physical and mental disability
 - ☐ Temporary, permanent, acquired or developmental disability
 - ☐ Actual or *perceived* disability
- **Does not include:**
 - ☐ Personal characteristics or common/temporary ailment
 - ☐ An expected response to a common stressor
(*e.g.*, stress due to a performance review or deadline)

Workplace Accommodation Framework

Definition of “disability”

- Example: Ontario *Human Rights Code* defines disability as:
 - ❑ Any degree of physical disability caused by injury, birth defect, illness, *including* brain injury, paralysis, amputation, speech impediment, epilepsy, reliance on a wheelchair (*and others*)
 - ❑ A condition of mental impairment or developmental disability
 - ❑ Learning disability
 - ❑ Mental disorder
 - ❑ Injury for which benefits were claimed under workers' compensation regime

Workplace Accommodation Framework

Prevalence of “disability”

■ Statistics Canada

- ❑ 27% of Canadians aged 15+ currently have at least one disability
- ❑ 10.4% of Canadians aged 15+ currently have a mental health related disability

■ Canadian Mental Health Association

- ❑ By age 40, roughly half of Canada’s population will have or have had a mental illness
 - 14% will experience major depressive disorder
 - 13.3% will experience general anxiety disorder
 - 3.4% will experience bipolar disorder
 - 21.6% will experience a substance use disorder

Workplace Accommodation Framework

Employer's duty to inquire

- Employer has a duty to inquire if it has a reasonable basis to believe employee conduct may be caused by a disability
 - ❑ Failure to do so may be a breach of the duty to accommodate
- Particularly important in the context of mental health and substance use disorder
 - ❑ Employee may not be aware of disability
 - ❑ Stigma may hinder proactive disclosure

Workplace Accommodation Framework

Employer's duty to inquire

Wall v Lippe Group, 2008 HRTO 50

- Employee experienced traumatic occurrence in workplace
- Doctor's note stated employee unable to work due to "medical illness," for three to six months
- Employer did not seek further information; instead, terminated employment
- Human Rights Tribunal: *"If this was not sufficient to put them on actual notice that Ms. Wall was suffering from a disability, it placed on them the onus to inquire further and precluded any defence based on ignorance of Ms. Wall's condition."*

Workplace Accommodation Framework

Employer's duty to accommodate ...

- Employer has duty to accommodate established medical restrictions and limitations to the point of undue hardship
- Duty is *procedural* and *substantive*
- Accommodation must be reasonable, not perfect or preferred
 - May require flexibility and creativity
- If restrictions cannot be accommodated, a leave of absence may be appropriate

Workplace Accommodation Framework

Employer's duty to accommodate ...

■ Procedural

□ Take appropriate steps to assess employee's needs

- Freedom from discrimination includes having needs “appropriately considered and assessed” regardless whether needs can be accommodated substantively

■ Substantive

□ Show it cannot accommodate to point of undue hardship...

Workplace Accommodation Framework

... to the point of undue hardship

- Undue hardship is contextual
 - ☐ **Financial Cost:** Would the accommodation, if implemented, pose a risk to the financial viability of the organization?
 - ☐ **Health and Safety:** Would accommodation pose an actual and identifiable risk to the employee, other employees, clients or the public?
- Employer is **not required** to:
 - ☐ Displace another employee
 - ☐ Pay employee to perform unnecessary work
 - ☐ Hire additional person to work with them

Workplace Accommodation Framework

Accommodation process

“Bullseye” approach:

1. Accommodate in employee’s own position if possible
(with/without modification)
2. Accommodate in comparable position
(without modification; then with modification)
3. Consider an alternative, not comparable position
(without modification; then with modification)
4. Leave of absence (if no role can be performed)

Workplace Accommodation Framework

Employee's duty to cooperate

- Employee must:
 - ☐ Disclose they require accommodation and basis for request
 - ☐ Co-operate with process in good faith; be honest
 - ☐ Provide sufficient documentation to support needs
 - ☐ Accept **reasonable** offer of accommodation

Workplace Accommodation Framework

Employee's duty to cooperate ~ Medical information

- Employee has duty to provide sufficient medical information regarding:
 - ☐ Existence of disability
 - ☐ Nature of illness (in *some* cases, a diagnosis)
 - ☐ Whether disability is permanent or temporary
 - ☐ Estimated time for improvement
 - ☐ Functional restrictions and limitations
 - ☐ How medical conclusion was reached (diagnostic or other tests)
 - ☐ Treatment plan (to the extent it impacts restrictions)
 - ☐ Opinion as to whether employee can perform a particular task

Workplace Accommodation Framework

Employee's duty to cooperate ~ Medical information

- Employer not required to accept deficient or unclear medical information
 - Can request clarification or additional information
 - Go through employee (unless they give consent to interact with doctor directly)
 - Put request in writing, ask specific questions, and explain issue with earlier documentation
 - Outline demands of job
 - Identify areas of concern
- If medical remains unclear, consider third-party review or independent medical examination (“IME”)

Workplace Accommodation Framework

Employee's duty to cooperate ~ Medical information

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

Workplace Accommodation Framework

Employee's duty to cooperate ~ Medical information

■ Grievance dismissed

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

Workplace Accommodation Framework

Union's obligations

- A union must cooperate with accommodation process
- If necessary to implement a reasonable accommodation, union may be obligated to accept some modification of another employee's rights under the collective agreement
 - *E.g.*, allow for flexibility in a seniority-based shift-scheduling process to facilitate accommodation

Mental Health



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Mental Health

Determining if there is a disability

Crowley v LCBO, 2011 HRTO 1429

- Employee harassed by customer and requested permanent transfer to another store
- Doctor's note said employee self-reported “stress” and “health problems” but note did not mention “disability”
- Transfer denied
- Employee alleged denial amounted to discrimination
- Human rights tribunal dismissed application; found medical evidence insufficient to establish disability

Mental Health

Accommodation strategies

- **Mental disability accommodation can be challenging**

- Restrictions are often cognitive/psychological/behavioural, so can be more difficult to identify or define
 - May be impacted by work and non-work-related factors
 - Symptoms can be dynamic and unpredictable
 - Can be intertwined with physical restrictions

- **Privacy considerations (stigma)**

Mental Health

Accommodation strategies

■ Modify Job Duties

- ☐ Exchange minor tasks; job sharing

■ Modify Work Environment

- ☐ Equipment, *etc.*

■ Adjust Scheduling

- ☐ Flexible hours; part-time shifts; work from home
- ☐ Frequent or timed breaks
- ☐ Time off for medical appointments/treatment

Mental Health

Accommodation strategies

■ **Training**

- ☐ Extra time, resources, individualized approach

■ **Supervision or Management**

- ☐ Change method of communication
- ☐ Regularly scheduled meetings or job coaching

Mental Health

Accommodation strategies

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

Mental Health

Accommodation strategies ~ Absenteeism

- Apply absence management program (“AMP”)
- Following features are permissible:
 - ❑ Check-in meetings to discuss attendance status and progress under the AMP.
 - ❑ Attendance tracking (so long as *Code* compliant)
 - ❑ Clear warning of possible outcomes for failure to meet AMP standards
 - *E.g.*, Last chance agreement

Mental Health

Discipline and termination

- Discipline is appropriate if conduct is culpable
- Accommodation may be appropriate if conduct is non-culpable; the result of a disability
 - ❑ Question is usually whether conduct is within an employee's ability to control or change
 - ❑ Employee has onus to show conduct caused by medical condition

Mental Health

Discipline and termination

Lane v AGDA, 2008 CanLII 39605 (ON SCDC)

- Employer did not have right to terminate employee who “lied” about bipolar condition during hiring process
- When employer found out, it dismissed employee based on assumption and perception employee could not do the job
- Court found in rushing to terminate, the employer:
 - ❑ Failed to fulfill procedural duty to accommodate
 - ❑ Did not conduct appropriate assessment to reach informed conclusion it could not accommodate without undue hardship

Mental Health

Discipline and termination

Herbert v Parole Board of Canada, 2018 FPSLRB 76

- Grievor had a history of work quality issues
- Transferred to another position at the same pay
- Grievor disclosed he had chronic major depressive disorder one month after transfer, then went off on sick leave
- Returned to work on a time limited special project
- Employer asked grievor to undergo “neuropsychological assessment” but grievor refused, and grieved
- Employer said special project could not be continued indefinitely, and terminated employment

Mental Health

Discipline and termination

- Grievance re transfer dismissed
 - ❑ Transfer was non-disciplinary and not a “demotion”
 - ❑ Pay the same and intended to help grievor raise his work level
- Grievance re failure to accommodate dismissed
 - ❑ Difficult for employer to determine how to accommodate grievor
 - ❑ Contradictory medical
- Grievance re termination upheld
 - ❑ Employer yielded to grievance re IME, despite knowing its medical info was insufficient

Mental Health

Frustration of contract / Innocent absenteeism

- Employment may be terminated for non-disciplinary/non-culpable reasons
- Medical evidence must support position there is no reasonable prospect employee will be able to return to work in reasonably foreseeable future
 - Request medical information to confirm if any reasonable prospect of return to work in foreseeable future
 - Easier to establish the longer employee is out of workplace
 - If employee on disability benefits, consider making request when employee moves to “any occupation” coverage

Mental Health

Frustration of contract ~ Post-termination payments

- If there is *frustration*, no obligation to provide reasonable notice of termination (or pay in *lieu*)
- May be an obligation to provide statutory termination entitlements – depends on jurisdiction. For example:
 - ❑ In Ontario, must provide termination entitlements
 - ❑ In British Columbia, may not be required to provide

Substance Use Disorder



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Substance Use Disorder

Determining if there is a disability

- An *addiction* to drugs or alcohol – referred to as “substance use disorder” – is a disability under the *Code*
- The *use* of drugs or alcohol in the workplace may not necessarily be a disability
- Employer has duty to inquire
- Employee has duty to disclose
- Ultimately, employee has onus to establish with medical evidence that they have a disability

Substance Use Disorder

Employer's duty to inquire

Sunnyside Home, 2019 CanLII 433 (ON LA)

- Grievor was nurse in long-term care home
- Dismissed for stealing narcotics over two years
 - ❑ Union and employer agreed conduct highest level of misconduct justifying just cause for termination
- Grievor did not disclose addiction until after misconduct was brought to attention of employer
 - ❑ Employer received reports of troubling appearance and behaviour
- Reinstated at arbitration
 - ❑ Employer failed to meet procedural duty to inquire; no inquiries
 - ❑ Employer did not establish undue hardship

Substance Use Disorder

Investigating suspected impairment

- Duty to inquire commonly arises where there is suspected workplace impairment
 - May first require a discussion with employee to determine if conduct is related to substance use disorder
 - If there is substance use disorder → consider accommodation
 - If no substance use disorder → consider discipline

Substance Use Disorder

Investigating suspected impairment

- If employee attends work impaired
 - ☐ Document the conduct/symptoms (two managers, if possible)
 - ☐ Conduct drug/alcohol test if permissible under a reasonable employer policy
 - ☐ Send employee home in a cab and follow up next day
 - ☐ Speak to employee about conduct observed (and results of testing, if applicable)
 - ☐ Allow employee opportunity to respond/explain
 - ☐ Inquire if conduct may be related to a substance use disorder

Substance Use Disorder

Investigating suspected impairment

- If employee says conduct may be related to substance use disorder
 - ❑ Request medical documentation to confirm disability 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 (*e.g.*, operate heavy machinery)

Substance Use Disorder

Investigating suspected impairment

Vancouver Shipyards v Marine and Shipbuilders, 2022 CanLII 100825 (BC LA)

- Grievor worked in safety sensitive position (spotter)
- Following a workplace accident, employer required grievor to take drug and alcohol test (pursuant to policy)
- Grievor's urine tested positive for cannabis metabolite
- Grievor admitted he smoked cannabis night before shift
- Employer policy did not prohibit the off hours use of cannabis

Substance Use Disorder

Investigating suspected impairment

- Employer required grievor to participate in IME and 12-month monitoring program
- IME reported grievor did not have substance use disorder
- Grievor stopped smoking cannabis, returned to work, and successfully completed monitoring program
- Union grieved testing, requirement for IME, and random testing as condition for return to work

Substance Use Disorder

Investigating suspected impairment

■ Arbitrator held:

☐ Testing was justified

- Impairment was a “reasonable line of inquiry”

☐ IME was not justified

- Positive test didn’t establish impairment or unfitness for duty

☐ Monitoring program not justified

- Policy did not prohibit cannabis use prior to work and grievor did not have substance use disorder

☐ Grievor entitled to damages for violation of privacy - \$15,000

Substance Use Disorder

Accommodation strategies

- Accommodation can be a challenge because relapse is recognized as a symptom of addiction
 - Potential for relapse should be considered in accommodation process
 - May require multiple attempts to return employee to work before undue hardship is established
- Can consider last chance agreement as a “last resort”

Substance Use Disorder

Last chance agreement (LCA)

- Used if accommodation unsuccessful and employer wants to give employee final opportunity to remain employed
- Sets out conditions on which employment will continue
 - *e.g.*, Abstain from drug and alcohol use, participate in treatment, undergo testing, *etc.*
 - Parties cannot “contract out” of human rights obligations
- Parties agree any breach of LCA will constitute just cause for dismissal and undue hardship for employer
- Can be an effective tool to demonstrate employer has fulfilled its duty to accommodate

Substance Use Disorder

Last chance agreement (LCA)

Toronto District School Board v CUPE, 2018 CanLII 39769

- Grievor's employment terminated for violating LCA
 - ☐ Failed to provide proof completed treatment
 - ☐ Refused to submit to drug test
- Union alleged breach of duty to accommodate
 - ☐ Submitted post-discharge evidence grievor was engaging in treatment plan
- Grievance dismissed
 - ☐ Arbitrator reluctant to second guess LCA without compelling evidence of post-discharge rehabilitative potential

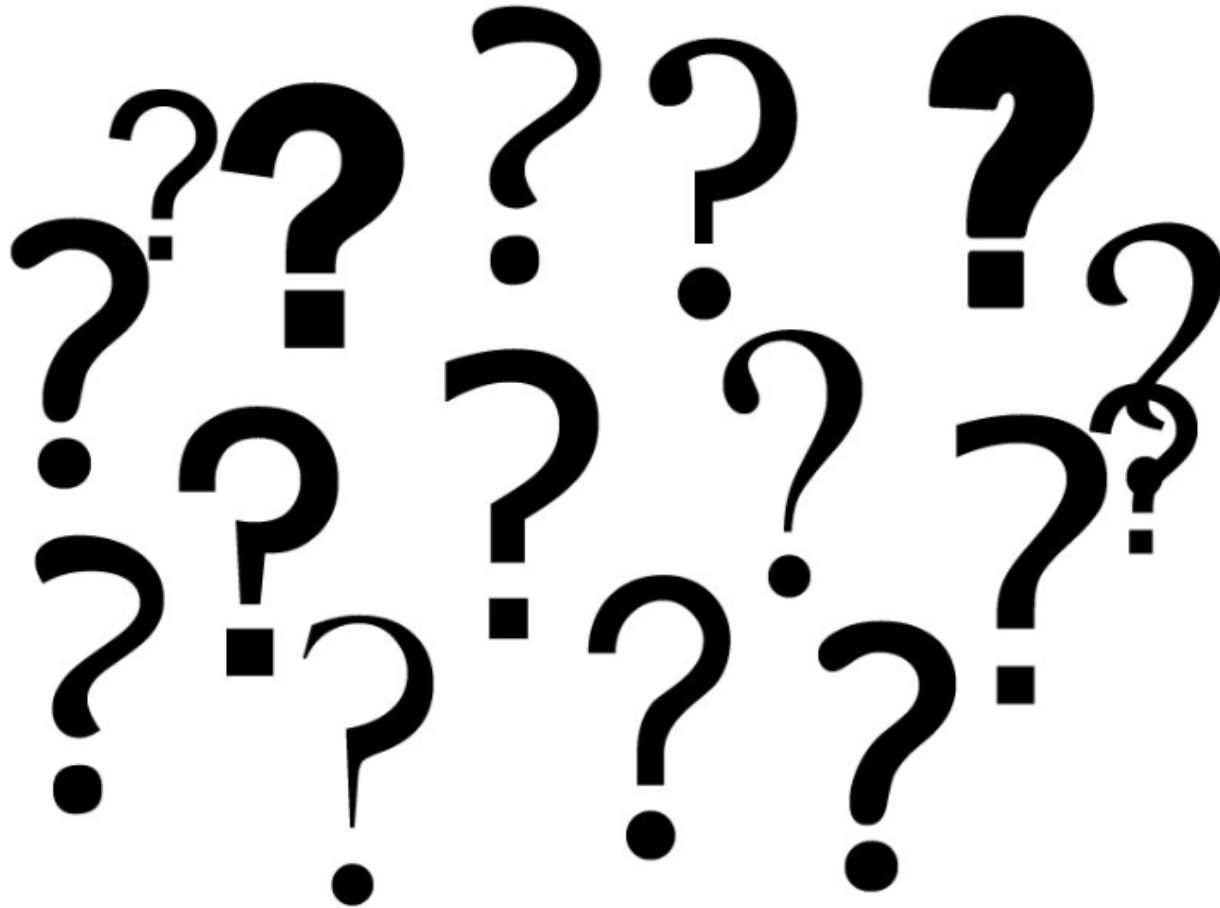
Substance Use Disorder

Discipline and termination

Cambridge Memorial Hospital v ONA, 2017 CanLII 2305

- Nurse stole painkillers prescribed for patients and falsified medical records
- Dismissed for cause
- No evidence nurse's substance use disorder was sufficient to cause her to commit theft and falsify records
- Post-dismissal, nurse demonstrated commitment to rehabilitation and unlikely to relapse
- Dismissal upheld – addiction did not cause misconduct
 - Nurse made conscious decisions and should be held accountable

Questions?





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