



Evans, Philp LLP
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Mental Illness and Addiction: *Workplace Challenges*

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Points To Be Covered Include:

- The duty to inquire
- Discipline and last chance agreements
- The duty to accommodate under the *Code*.

Defining Disability Under the Code

- Section 10 (1) definition of “disability” includes:
 - b) a condition of mental impairment or a developmental disability,*
 - c) a learning disability, or a dysfunction in one or more of the processes involved in understanding or using symbols or spoken language,*
 - d) a mental disorder*

Perceived Disability

- Section 10 (3) of the *Code*:

(3) The right to equal treatment without discrimination because of disability includes the right to equal treatment without discrimination because a person has or has had a disability or is believed to have or to have had a disability.

Employer's Duty to Inquire

- Is triggered when an employer becomes aware of a possible link between an employee's behaviour/performance and his/her disability or possible disability.
- Before taking disciplinary action, employer must investigate whether such inappropriate behaviour or poor job performance is disability-related

Employee Denial of Disability

- If an employer prevents an employee from working based on suspected mental health issues, the employer must have a reasonable basis for this suspicion
- Whether the employee works in a safety-sensitive position is a relevant consideration
- *United Steelworkers of America, Local 8918 v. Gerdau Ameristeel*, (2009) 99 C.L.A.S. 207 (Barton)

OHSA Duties Since Bill 168

- S. 32.0.5(3): new requirements re sharing information about safety risks within the workplace
- Potential for harassment or discrimination claims under the *Code* if mentally ill workers are identified as safety risks
- Part I duties under the *Code* appear to supersede these *OHSA* provisions, while the duty to accommodate under Part II of the *Code* does not

Discipline and Last Chance Agreements

- Application of human rights standards if a link between the mental illness and the misconduct has been established
- “Hybrid” approach from *British Columbia (Public Service Agency) v. British Columbia Government and Services Employees Union (“Gooding”)*

Gooding case

- BC Labour Board adopts a “hybrid analysis” which requires an employer to separate that part of the employee’s conduct that resulted from an addiction (thereby triggering a duty to accommodate) from the part that was within the employee’s control and therefore subject to discipline
- Approach rejected by BC Court of Appeal
- Employer may discipline regardless of an employee’s addiction or mental illness when that employee engages in criminal conduct

Last Chance Agreements

Enforceability of a Last Chance Agreement (LCA):

1. Has the employee breached a term of the LCA?
2. If so, was the breached standard more stringent than standards imposed on other employees?
3. Was the breached requirement or standard imposed on the employee because of his/her disability?
4. Was the breached standard or requirement a *bona fide* occupational requirement or was the point of undue hardship met in accommodating the employee?

Duty to Accommodate

Two recent cases addressing this duty in the context of mental illness and addiction:

- *Hydro-Quebec v. Syndicat des employées de techniques professionnelles et de bureau d'Hydro-Quebec, Section locale 2000 (SCFP-FTQ)*, [2008] 2 S.C.R. 561
- *Lane v. ADGA Group Consultants Inc.*(2008), 91 O.R. (3d) 649 (Div. Ct.)

Hydro-Quebec

- An employer is not required to prove that it is impossible to accommodate the employee's disability, or that the employee will be totally unable to perform his/ her work in the foreseeable future
- A measure that would require the employer to modify working conditions in a fundamental way constitutes undue hardship

Hydro-Quebec (Continued)

- A measure that would completely alter the essence of the employment contract constitutes undue hardship
- When, despite the measures taken by the employer, the employee remains unable to resume his or her work for the reasonably foreseeable future, the employer will be justified in terminating the employment contract.

Lane v. ADGA (OHRT Decision)

The OHRT found that:

- Lane was a victim of disability-based discrimination
- Decision to terminate was based upon false stereotypes of people with bipolar disorder
- Employer failed to satisfy procedural as well as substantive aspects of the duty to accommodate

Lane v. ADGA (Div. Ct.)

- Divisional Court dismissed the appeal and held that the Tribunal had correctly stated and applied the law to the circumstances as it had reasonably found them to be
- Affirmed the OHRT's review of the two dimensions of the duty to accommodate

Undue Hardship Considerations

- *Hydro-Quebec* and *Lane* are at two ends of the spectrum:
- *Hydro-Quebec*: Employer entitled to expect the employee to fulfill the basic obligations of the position
- *Lane*: Employer must take care not to act upon misconceptions or pre-conceived notions



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Thank you for coming