October 2010 EA Blog

EMPLOYEES WITH ILLNESS: WALKING THE LINE BETWEEN ACCOMMODATION AND DISCRIMINATION

Dealing with chronically ill employees is always a challenge for H.R. managers. They are often faced with the conflicting requirements of fairness to the employee while maintaining the employer's ability to get work done. While it would seem obvious that an employer would be entitled to terminate an employee who, as a result of a physical disability, is unable to perform the duties of her job, the *Ontario Human Rights Code* provides that:

> "Every person has a right to equal treatment with respect to employment without discrimination because of…disability."

When faced with an employee with a disability, the Code mandates that the employer must do a two-step analysis in determining how to deal with that employee. The employer must first determine whether or not the employee is, in fact, disabled in light of the job requirements of his position. If, in fact, the employee is disabled, can the employer terminate his employment or, rather, must the employer take steps to accommodate the employee's disability to enable him to continue to work. The Code mandates that an employer must take steps to accommodate an employee's disability to the point of undue hardship. Determining whether the employee is disabled, and then assessing the limitation of undue hardship has led to a significant amount of litigation before the Human Rights Tribunal in Ontario and before the courts. Two recent decisions of the Human Rights Tribunal have given guidance to employers as to what they must do in dealing with disabled employees.

Both cases arose as a result of complaints filed with the Human Rights Commission and its successor, the Human Rights Tribunal. In each case, the employee lodged a complaint alleging that he had been discriminated against on the basis of disability, contrary to s. 5 and s. 17(2) of the *Human Rights Code*.

In the first of these cases, the employee complained that he had been terminated as a result of his need to take a four-week medical leave. The employer responded that, in fact, the decision to terminate the employee had been taken prior to the request for a leave but had not been implemented. The employer further took the position that the termination had been for cause.

In rejecting the employer's position, the Tribunal held that regardless of when the initial decision was made to terminate the employee, the actual termination took place at the time when the employee was, in fact, a person with a disability. The employer was therefore under an obligation to make inquiries as to his condition. The Tribunal held that the employer had an obligation to make further inquiries when it was presented with medical evidence supporting the employee's disability. The employer also had an obligation to investigate whether accommodation was possible in light of the disability. The Tribunal based its finding in part on facts which it felt supported a conclusion that the employer had taken the opportunity of the disability to terminate an employee it no longer wished to employ. The Tribunal held that the employer failed in its obligation to make reasonable inquiries to the employee's medical condition prior to terminating his employment. It therefore ordered compensation to be paid to the employee.

In a decision released on October 14, 2010, the Human Rights Tribunal elaborated on the obligations of employers when dealing with disabled employees, and imposing a remedy short of termination. In this case, the employee had complained of back pain which he said was affecting his ability to work. When he advised his supervisor of this condition, the supervisor directed the employee to go home and refused to allow the employee to return to work until he was satisfied that continued work would not adversely affect the employee's health.

The evidence showed that the employer had attempted to access medical information from the employee's insurer obtained following a motor vehicle accident. The employer sought to have the insurer confirm when the employee was able to return to work. That assessment indicated that the employee "could work while on medication. Modified duties only." Based on this assessment, the employer refused to allow the employee to return to work until the suitability of that work was assessed. However, the Tribunal felt that, in attempting to have the work assessment completed by the auto insurer, the employer breached its obligation to take steps on its own to ascertain the suitability of the employee's duties.

As a preliminary issue, the employer took the position that, in fact, the employee had not been terminated but had merely been told to stay home pending receipt of the assessment of his ability to work. However, the Tribunal pointed out that, as of the date of the hearing, that assessment had still not taken place and therefore the employee was still prohibited from working.

The Tribunal concluded that, in fact, the applicant had not been terminated. It found that before he was sent home, the applicant was given the letter by his employer in which the employer

sought to ensure that the work the applicant would be doing would be suitable given his disability. The Tribunal felt that such a letter was inconsistent with the intent of the employer to terminate the applicant's employment. In fact, when the H.R. Manager was advised by both the Worker's Safety and Insurance Board and the insurer, that the applicant had told each body that his employment had been terminated, he contacted the applicant to stress that he had not been fired.

Although the employee had not been fired, this did not conclude the investigation. The Tribunal still had to consider whether the employer's actions in sending the employee home and prohibiting him from working pending the results of the assessment constituted a breach of the employer's duty to accommodate to the point of undue hardship. The Tribunal found that, as a reason for denying the applicant the right to work was his disability, and that the applicant suffered as a result, discrimination contrary to the Code had been proven.

The Tribunal then went on to consider whether or not the accommodation would have imposed undue hardship contrary to s. 17(2) of the Act. It described the duty to accommodate as:

> "…removing those obstacles to participation in the workplace which employees may face because of disability. Once the employer becomes or is made aware that an employee is facing obstacles in the full participation of the workplace because of a disability, the employer has a positive obligation to accommodate the employee up to the point of undue hardship with a view to removing such

obstacles and allowing the employee to participate in the workplace as fully as possible."

The Tribunal found that as soon as an obligation to accommodate is triggered, the failure by the employer to do so will open it to damages under the Code. The Tribunal found that the employer also had a duty to consider whether there was work the applicant could safely do while the employer investigated the applicant's conditions and resulting limitations. The failure to do so constituted a breach of the employer's obligations under the Code.

Having found a breach of the Code, the Tribunal went on to consider the appropriate remedies. Pursuant to s. 45.2 of the Code, the Tribunal has wide remedial powers, including ordering monetary compensation or directing any party to do whatever the Tribunal feels is required for it to comply with the provisions of the Code. In this case, the Tribunal ordered the applicant to provide medical information describing the extent of his disabilities to his employer so that the employer could assess the necessary accommodation. The Tribunal ordered the employer to pay the applicant the wages he would have earned during the period he was improperly kept out of work, less any income he received from other sources in that period. The period of replacement income ended when it was determined that the applicant was totally disabled, and would not have been able to work in any event.

Finally, the Tribunal ordered the maximum damage award of $10,000 for loss of self-esteem, embarrassment, loss of dignity, and emotional distress pursuant to s. 45.2(1) of the Code. The Tribunal found that the employer's actions caused serious consequences to the applicant. In fact,

the applicant gave evidence that his wife and children ended up in a homeless shelter at one point because he did not have the means to support them. The Tribunal considered the duration of the violation of the applicant's rights under the Code, which continued for many months.

It is obvious that the issues of disability and accommodation are fraught with risks for unwary employers. Detailed legal advice must be obtained prior to dealing with the entitlement of disabled employees, and their dismissal.