

Employee Disability and the Employer's Duty to Accommodate

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PART I

Disability in the Workplace

Disability in the Workplace

The Ontario *Human Rights Code* (the “**Code**”) prohibits discrimination in employment:

5. (1) Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences, marital status, family status or disability.

Disability in the Workplace

“**Constructive**” discrimination is also prohibited by the Code unless the requirement or qualification is reasonable and *bona fide* in the circumstances:

11. (1) A right of a person under Part I is infringed where a requirement, qualification or factor exists that is not discrimination on a prohibited ground but that results in the exclusion, restriction or preference of a group of persons who are identified by a prohibited ground of discrimination and of whom the person is a member, except where,

Disability in the Workplace

- (a) the requirement, qualification or factor is reasonable and *bona fide* in the circumstances; or
- (b) it is declared in this Act, other than in section 17, that to discriminate because of such ground is not an infringement of a right.

Disability in the Workplace

(2) The Tribunal or a court shall not find that a requirement, qualification or factor is reasonable and *bona fide* in the circumstances unless it is satisfied that the needs of the group of which the person is a member cannot be accommodated without undue hardship on the person responsible for accommodating those needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any.

What is a Bona Fide Occupations Requirement?

The Test:

- i. employer adopted standard for a purpose rationally connected to the performance of the job;
- ii. employer adopted standard in an honest and good faith belief that it was necessary to fulfilment of the legitimate work-related purpose; and,
- iii. the standard is reasonably necessary – i.e. is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship on the employer



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PART II

The Duty to Accommodate

The Duty to Accommodate

An employer's duty to accommodate arises once a "*prima facie*" case of discrimination has been made out

Determining whether a requirement or qualification is "discriminatory" is not always straightforward. For example, an employer's failure to accommodate an employee's "preference" may not be discriminatory

The Employee's Duty

Employees have a duty to inform their employer of a need for accommodation

Employee is required to provide the employer with sufficient information to substantiate any limitations/restrictions and how the limitations/restrictions interact with workplace duties

The amount of information necessary depends on the surrounding circumstances. Sometimes, a very general doctor's note or even an employee complaint is sufficient to trigger the employer's duty to accommodate

The Employer's Duty

Procedural Obligation: Determine what modifications are required

Substantive Obligation: Make the necessary modifications up to the point of undue hardship

What is Accommodation?

No definition – determined on a case by case basis and may include:

- modified duties and work expectations
- modified hours, breaks, schedules
- physical changes to work environment
- shared work arrangements
- bundling of duties, etc.

What is “Undue Hardship”?

Very high threshold – difficult test to meet

“Undue” means that some hardship to the employer is clearly acceptable

Can only be established by “objective” evidence



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PART III

Frustration of the Employment Contract

Chronic Absenteeism

Most employers reasonably expect their employees to attend for work on a regular and reliable basis – this is usually found to be a BFOR

Termination or disciplinary action due to chronic absenteeism that is related to a disability is *prima facie* discrimination – so employer has a duty to accommodate

Tribunals and courts have found that an employer may not be required to tolerate chronic absenteeism over a significant period of time



Lengthy Leaves of Absence Due to Disability

Very rarely “cause” for termination

In general, employer can only allege cause if there is medical evidence that demonstrates that it is extremely unlikely that employee will be able to return to work for the foreseeable future



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PART IV

When the Employer Gets it Wrong!

Range of Remedies Available

Human Rights Tribunal has broad powers to remedy discrimination – general damages, damages for loss of income, re-employment, public policy remedies, etc.

Courts also have broad powers – but usually just impose monetary awards. Where court concludes discrimination and failure to accommodate, employers can be subject to significant damages for wrongful dismissal, mental distress/moral damages and punitive damages in rare circumstances

Keays v. Honda Canada Inc.

The Facts

Keays suffered from Chronic Fatigue Syndrome

Keays was initially exempted from Honda's attendance-related progressive discipline policy but was required to provide a medical note for any absence

Honda ultimately hired its own medical doctor to assess Keays. Keays, through counsel, requested clarification of the purpose of the meeting with Honda's doctor

In response, Honda took the position that Keays was insubordinate and terminated him for cause



Keays: **The Trial Decision**

Honda did not have cause to terminate Keays and Honda failed to accommodate Keays

Court awarded Keays 15 months' notice plus 9 additional months for "bad faith"

Court further awarded Keays punitive damages of \$500,000

Court of Appeal upheld trial decision (but reduced punitive damages to \$100,000)

Keays:

The Supreme Court's Decision

Upheld lower court's award of 15 months' notice but held that the lower court's erred in awarding an extension of the notice period for bad-faith damages (i.e. the Wallace "bump-up"). In order to obtain damages for mental distress, employee will have to demonstrate he/she has suffered actual, compensable damages due to the manner of the dismissal

Set aside award of punitive damages – such damages only available in “exceptional circumstances . . . where employer's . . . wrongful acts . . . are so malicious and outrageous that they are deserving of punishment on their own.



*Fair v. Hamilton-Wentworth District
School Board, 2013 HRTO 440*
The Facts

Fair suffered from post-traumatic stress disorder and anxiety

Away from work on LTD – but later assessed as capable to return to work but not in her original position

Board concluded that there was no suitable position available given her limitations and terminated her employment



Fair: **The Tribunal Decision**

Tribunal held that the Board breached its duty to accommodate by failing to “actively, promptly and diligently” consider possible solutions

Tribunal ordered that Fair be reinstated (with seniority), payment of lost wages, reimbursement with respect to medical benefits that would have been covered but for termination of benefits, and \$30,000 for injury to dignity



ADGA Group Consultants Inc. v. Lane et al,
2008 CanLII 39605 (Ont. Div. Ct.)

The Facts

Lane suffered from bi-polar disorder.

Lane was terminated ten days after his employment commenced, shortly after he advised the employer of his condition. Employer alleged that termination was reasonable as employee had misrepresented his ability to perform the essential duties of his position. Employer also relied on 90 day probationary provision in the employment agreement

ADGA: **The Decision**

The Tribunal found that the employer discriminated against Lane when it concluded that his condition made him unsuitable for the job and further failed to accommodate Lane

Tribunal awarded Lane damages for wrongful dismissal, general damages and damages for mental distress (\$45,000), damages for lost wages (\$34,000) and public interest remedies



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PART V

The Role of In-House Counsel



The Role of In-House Counsel

Role of in-house counsel is determinative of question of privilege

Many in-house counsel wear multiple “hats”

Assisting the employer in “investigating” the duty to accommodate may require in-house counsel to “walk the line” between lawyer and HR Manager