Hot Topic Update: Accommodation in the Workplace

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Session Overview

- Changing an employee's status from full to part-time
- Family and childcare responsibilities
- The interplay between the WSIB and Human Rights
- When the duty to accommodate ends
- The responsibility to change accommodation over time
- Update on recent damage awards

Ottawa Hospital and CUPE, 4000 (O'Neil - 2011)

- Facts:
  - Grievor placed on employer's AMP
  - Reduced to part-time hours for 6 months
  - Employer argued valid exercise of management rights:
    - 3 years of excessive absenteeism
    - No hope of improved attendance
    - Absences were increasing in frequency

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Ottawa Hospital and CUPE, 4000 (O'Neil - 2011)

- Findings:
  - Layoff provisions not triggered by reduced hours
  - Grievor warned of administrative action if no improvement
  - The AMP was a form of accommodation
  - Reduction to part-time, versus termination, not unreasonable in these circumstances

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Practical Implications

- Excessive absenteeism does not have to be tolerated indefinitely
- Reducing hours not inherently discriminatory
- The reduction may be more defensible than termination

Custom and Immigration Union and the Alliance and Employees Union (Allen - 2011)

- Facts:
  - Grievor sought a blanket exemption from travel outside Ottawa for childcare reasons:
    - Grievor had a special needs child
    - Grievor's wife experiencing a high risk pregnancy
  - Employer agreed to incur travel costs so grievor could be home each night
  - Evidence revealed no attempts to arrange for childcare assistance

Custom and Immigration Union and the Alliance and Employees Union (Allen - 2011)

- Findings:
  - Arbitrator adopted the "substantial interference test" to determine a *prima facie* case
  - The most the grievor would work outside of his regular hours was 1 to 2 ½ hours, and only 3 times in the months of his wife's pregnancy
  - No back-up childcare plan was ever arranged
  - The alleged interference was speculative and *de minimus*
  - Evidence is required to prove a *prima facie* case

Practical Implications

- The "serious interference with a substantial parental obligation" test is being used in Ontario
- Must be a substantial parental obligation
- Analyze steps taken by the employee to balance their family and work-life responsibilities
- Provide flexible scheduling/absences for special care situations
- Document accommodation programs

Boyce v. Toronto Community Housing (2010 - HRTO)

- Facts:
  - Applicant suffered a knee injury when chair collapsed
  - WSIB accepted the Applicant could not perform any work
  - Alternative work offered; Applicant declined:
    - Applicant claimed too disabled to perform 1position
    - Location of the other position was too difficult to get to
  - Employer terminated the Applicant when he refused to show up for permanent modified work

Boyce v. Toronto Community Housing (2010 - HRTO)

- Findings:
  - The HRTO cannot dismiss an application on the grounds it could be more appropriately dealt with under another act
  - WSIB did not intervene in accommodation discussions
  - WSIB asked if parking problem meant the jobs were not suitable
  - HRTO asked if parking problem required accommodation

Practical Implications

- An employee may pursue a claim through the WSIB and the HRTO concurrently
- Employers must keep accommodation obligations in mind during a return to work
- Providing suitable work may not meet the obligation to accommodate
- Prudent to document accommodation discussions when faced with a return to work

Duliunas v. York-Med Systems (2010 - HRTO)

- Facts:
  - Applicant went off work for depression and anxiety on 2 separate occasions
  - Employer advised that the Applicant would return to a new, part-time position with reduced pay
  - Applicant wanted full-time work - supported by physician
  - A new contract of employment was offered and refused
  - Applicant terminated for refusing to sign contract

Duliunas v. York-Med Systems (2010 - HRTO)

- Findings:
  - Employer breached the duty to accommodate when it determined without meaningful consultation
  - The episodic nature of the Applicant's disability was a source of concern for the Employer
  - Employer seemed intent on securing "assurances" about the Applicant's future good health
  - A worker's needs may change over time as do the responsibilities of employers

Practical Implications

- Consult with employee upon a return to work
- Be aware that disabilities may change over time
- Ask questions and seek more information if needed
- Managing future uncertainties is no justification for imposing discriminatory conditions on a return to work
- As a disability changes, the response of the employer must change accordingly

McKee v. Imperial Irrigation (2010 - HRTO)

- Facts:
  - The Applicant returned to work on modified duties
  - His employment then "discontinued on a permanent layoff for health and safety reasons"
  - By the Applicant's own estimation, he could perform 40% of his pre-injury job
  - Employer argued these duties would only represent 10% to 15% of the Applicant's regular duties

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McKee v. Imperial Irrigation (2010 - HRTO)

- Findings:
  - No evidence that list of duties prepared by the Applicant had been medically approved
  - The Applicant was only able to perform less than 40% of regular job duties
  - No prognosis for when this would change
  - Employer made efforts to accommodate, but employee not able to work for the foreseeable future

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Practical Implications

- Take steps to inquire into the extent of the duty to accommodate
- Engage in an active inquiry about accommodation
- Document efforts to accommodate an employee
- Accommodate WSIB non-compensable injuries
- If possible, seek medical information to determine if situation will change

HRTO – Failure to Accommodate

- Significant 2010 decisions
  - Employees requested accommodation
  - 3 cases - employment was terminated
  - 1 case - employee sent home
  - 1 case - employee did not return to work

Damages awarded by HRTO

- Lost wages
- Range of $10,000 to $20,000 for the loss of right to be free from discrimination, injury to dignity, feelings, self-respect
- $15,000 for discriminatory treatment

Damages awarded by HRTO Case Law

- ***Loutrianakis v. Claire de Lune*** **(2010 - HRTO)**
  - Applicant seriously injured in car accident
  - Employer believed it had the right to terminate employment once 10 day *ESA* emergency leave exhausted
  - General damages - $17,000
- ***Black v. Etobicoke Ironworks (*****2010 - HRTO)**
  - Applicant reinjured back at work
  - Employer sent him home as he could not give “100%”
  - General damages - $10,000

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Damages awarded by HRTO Case Law

- ***McLean v. DY 4 Systems* (2010 - HRTO)**
  - Applicant mistakenly told employer she had tuberculosis contracted from a co-worker who was "Asian"
  - Terminated for falsely reporting TB and making discriminatory comments
  - General damages - $20,000
- ***Simpson v. JB & M Walker* (2010 - HRTO)**
  - Applicant sustained a workplace injury
  - Applicant left her employment after alleged employer harassment involving constant questions about her recovery
  - General damages - $15,000

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Damages awarded by HRTO Case Law

- ***Duliunas v. York-Med Systems* (2010 - HRTO)**
  - Applicant placed in lower paying position upon return to work
  - Terminated for refusing to sign a new employment contract
  - General damages - $15,000
- ***LeBlanc v. Syncreon* (2010 - HRTO)**
  - Applicant subject to inappropriate comments while on sick leave and upon return
  - Terminated for her numerous absences
  - General damages - $10,000

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Practical Implications

- Implement a human rights policy
- Determine accommodation case-by-case
- Provide human rights training
- Take complaints seriously

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Questions?