

Accommodating Workplace Issues Related to Mental Health

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Session Overview

- Violence and Mental Health
 - Balancing OHS and Human Rights obligations
 - Specific case examples and practical implications
- Traumatic Mental Stress (TMS) Claims before the WSIAT

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Violence and Mental Health Balancing Human Rights and OHS

Obligations under the *Occupational Health and Safety Act* (OHS):

- Employers must take all reasonable precautions to protect employees' health and safety
- Bill 168 obligations regarding workplace violence

Obligations under the *Human Rights Code*:

- Employers have a legal duty to accommodate mental health disabilities
- Duty to accommodate is not displaced by duty to provide safe workplace

Balancing Employer's Obligations

- To avoid discrimination in relation to employees with mental health disabilities, both duties must co-exist
- Concern – what to do where there is a link between violent behaviour in the workplace and an employee's mental health disability?
- To be entitled to accommodation, employee required to show a link or nexus between workplace misconduct and mental health issue

Limits on Employer's Obligation to Accommodate

- Duty to accommodate to the point of “undue hardship”
- Section 24(2) of the Code specifies factors to be considered in making undue hardship assessment:
 - Cost;
 - Outside sources of funding; and
 - Health and safety requirements.

Agropur Division Natrel and Teamsters (2012 – Kaplan)

Facts:

- Employee with 10 years service was diagnosed with “severe mental health conditions”
- Went on STD and spent 2 months at a Centre for traumatic stress recovery. Released in June with expectation could return to work in August
- Employer discussed accommodation with Union
- Employee's behaviour became erratic and threatening
- Employer felt employee's behaviour posed a real risk to the health and safety of employees
- Employer terminated employee and encouraged him to apply for LTD

Agropur Division Natrel and Teamsters (2012 – Kaplan)

Findings:

- Individual who suffers from “occasional brief psychotic outbreaks” cannot be reinstated
- Risks to workplace and co-workers far outweighed benefits to the employee
- Employer had established undue hardship
- Ordered reinstatement of employee solely to provide opportunity to apply for LTD
 - Employer directed to ensure insurer treated application as though grievor were continuously employed

Bell Canada and Unifor (2015 – M. Picher)

Facts:

- 30-year employee with clean disciplinary record
- Discharged for theft from payphone coin boxes
- Union asserted defence of PTSD and depression – grievor had witnessed a suicide

Findings:

- Arbitrator did not accept evidence that pre-meditated scheme of systematic theft spanning more than 24 months was directly and fully prompted by grievor’s PTSD and depression
- Grievor’s condition did mitigate to some extent his culpability
- Company had legitimate interest to be protected – trustworthiness of any employee entrusted to handle money
- Followed Arbitrator Kaplan’s approach in *Agropur*
- Reinstated grievor for sole purpose of applying for LTD

Practical Implications

- Positive duty to inquire
- You are NOT a doctor!
- Address the performance issues
- Be honest, upfront, professional, caring
- Job at risk? Be clear
- Document the accommodation process

Ontario (Ministry of Community Safety and Correctional Services) and OPSEU (2013 – Petryshen)

Facts:

- Mr. G had been accommodated for 5 years in relation to mental health issues (major depression and PTSD) triggered by the suicide of his mother
- Worked an accommodated schedule with limited inmate contact – Monday through Thursday, 10-hour days at reception
- Having Fridays off allowed him to attend counselling sessions when needed
- In 2008, he was notified that a new schedule was being implemented and the nature of his job would change (on same day he submitted medical note confirming need for ongoing accommodation)

Ontario (Ministry of Community Safety and Correctional Services) and OPSEU (2013 – Petryshen)

Findings:

- The employer engaged in conduct which amounts to discrimination on the basis of disability
- Certain comments made at the meeting were discriminatory and harassing in the circumstances
- Employer failed to accommodate the grievor by failing to take into account his mental health issues when communicating to him about proposed schedule changes impacting on his existing accommodation

Practical Implications

- Ensure that people making decisions have required information about disabilities and accommodations
- Need for consistency in dealing with employees with disabilities
- Process is important
- How you communicate with employees with mental health disabilities may be as important as what you communicate!

Davis v. Sandringham Care Centre (2015 – BCHRT)

Facts:

- Complainant worked as a Registered Care Aide (RCA) at psychogeriatric care facility for 1 year with no performance issues
- A co-worker expressed concern about her well-being to the Executive Director
- Executive Director called her into a meeting and interrogated her about her mental well-being; she admitted to suffering from PTSD
- Complainant became quite agitated and meeting ended with employer requiring her to leave work to attend at the Hospital for medical care
- 6 week delay in complainant being permitted to return to work

Davis v. Sandringham Care Centre (2015 – BCHRT)

Findings:

- Employee had no performance issues but reacted based on ED's mistaken and stereotypical assumptions about the nature and extent of her illness
- Employer had no basis for sending her to the Hospital or putting her off (and keeping her off) work on medical leave for 6 weeks
- No evidence to suggest that the complainant posed a safety risk to herself, her co-workers or the residents of the Centre

Practical Implications

- You are NOT a doctor!
- If there are performance concerns that might be related to a disability, ask for medical evidence
- Do not act on the basis of assumptions or stereotypes
- Protect employee's confidentiality – only share information with those who need to know

Kaiser Aluminum Canada Ltd. and USW (2015 – Barton)

Facts:

- W worked as a Production Technician from 1994 to 2013 in a plant with 3 areas: Press, Mill Room (Fabrication) and Packaging
- Following a back injury in 2007, she experienced depression and anxiety and went on stress leave due to conflict with a supervisor – led to her not wanting to work at the Press
- W had high rate of absenteeism; following a 5-day suspension in 2011, she was required to support all absences with medical notes; signed a last chance agreement in July 2011
- Claimed that employer's handling of her difficult personal events and conflict with co-workers/supervisor exacerbated her mental health issues and led to increased absences

Kaiser Aluminum Canada Ltd. and USW (2015 – Barton)

Findings:

- Accommodation and termination grievances upheld; harassment grievance dismissed
- Based on Dr.'s report, arbitrator found that ***he should exercise caution in the area of safety***; W's disability needed to be accommodated by allowing her to not work in the Press area
- No undue hardship as others already being accommodated in a similar manner based on medical restrictions
- No harassment found – employer quite properly enforced its attendance policy and medical reporting requirements

Practical Implications

- Need to be careful in distinguishing employee's preferences from medically-supported accommodation requests
- Value in seeking IME where medical evidence unclear
- Need to ensure consistency in treatment of accommodation requests based on mental disabilities and physical disabilities

Update on Traumatic Mental Stress Claims Before the WSIAT Since Decision No. 2157/09

The Main Rules of Entitlement to TMS



The WSIA and WSIB Policy 15-03-02 treat physical injuries differently from mental stress injuries

Mental stress entitlement criteria are more restrictive in terms of :

- Proof of injuring process
- Proof of compensable injury



The Main Rules of Entitlement to TMS

WSIB Policy 15-03-02 on TMS

“Sudden and Traumatic Event”

- * Clearly and precisely identifiable * Objectively traumatic
- * Unexpected in the normal or daily course of the worker’s employment or work environment
- * Exclusion of employment-related decisions

“Acute Reaction”

- * “Immediate” significant or severe reaction by the worker to the work-related traumatic event
- * Results in an identifiable psychiatric/psychological response

WSIAT Decision No. 2157/09

Claim for TMS due to chronic stress from harassment



Charter challenge to “acute reaction” criteria

WSIAT Decision No. 2157/09

What was the Actual Experience?

- 28 WSIAT decisions identified involving TMS claims between Decision No. 2157/09 and present
- 10 (36%) have granted entitlement for mental stress
- 18 (64%) have denied entitlement for mental stress

Examples of TMS Claims Allowed and Denied since WSIAT Decision No. 2157/09



3 claims denied – Decisions No. **2320/13**, No. 833/14, No. 79/14

1 claim allowed – Decision No. **926/14**

The facts and medical evidence are key to outcomes

WSIAT Decision No. 2320/13

- 1996 finds double-murder/suicide ; 2003 attends accident in which friend died; May 2009 attends scene of murder-suicide
- 2008 separates from wife; increased alcohol consumption
- July 24, 2009 contemplates suicide at work
- July 25, 2009 attends murder/suicide scene drunk, is charged with impaired driving and goes off work
- August 2009 applies for sick benefits and seeks treatment
- September 2009 - February 2010 working, then goes on sick leave until benefits run out in July 2010
- August 2010 files WSIB claim on advice of police association

WSIAT Decision No. 2320/13

- TMS entitlement denied
- There was no reaction to the traumatic events prior to being arrested for impaired driving in July 2009
- A psychiatric report of July 2010 relayed the worker's report of workplace events and workload pressure but not the contemplated suicide
- The report also linked alcohol consumption mainly to the 2008 breakup and not the traumatic events, especially those of 1996 and 2003

WSIAT Decision No. 926/14

- Police officer responsible for 40 civilian staff, with a reputation for high standards, who has met resistance from staff and police association in the past
- 2000 harassment complaint against her. Is prescribed anti-depressants and counselling, but continues to work. Mood stable in fall 2001.
- September 2001, out of concern for employee who had been missing for some time, attended at and entered employee's apartment with help from building superintendent. The employee's brother was upset by this and called 911 to report break and enter.
- After being assured by her duty inspector that she had done nothing wrong, the brother or the employee got the police association involved and she was advised that a criminal investigation had started. She left work crying and sought medical care, absent until retirement 3 years later.

WSIAT Decision No. 926/14

- TMS entitlement granted
- There was an acute reaction to a sudden and unexpected traumatic event. Being personally at risk of injury or violence not required.
- There was no evidence of significant emotional stressors or pre-existing psychological condition prior to the 2000 harassment complaint
- However she did not miss work from that until the "break and enter" incident, following which there was evidence of significant psychological impairment
- There was no employment decision by her superior and the fact that the criminal investigation was ordered by someone superior in rank did not make it an employer decision or action

2 claims of corrections officers allowed (1945/10, 1710/14) and 1 denied (2123/14)

1710/14 useful on notion of traumatic event & sorting out multiple causes

2123/14 by contrast shows limit of what is a traumatic event, especially when medical is questionable

1945/10 is an example of a Charter challenge and chronic stress entitlement



Questions?