

Emond Harnden Breakfast Seminar

Human Rights and Accommodation Update

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Session Overview

- Recent insights in human rights law and practice
- Human rights remedies update
- Performance issues unrelated to the disability
- Duty to mitigate and HRTD damages
- Establishing a link between employee's medical condition and requested accommodation
- Evidence required to establish *prima facie* discrimination
- Components of the duty to accommodate
- Family status accommodation update
- Other developments

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Recent Insights in Human Rights Law and Practice

HRTO Remedies Update

- Lost income
- General damages – 2014 range of \$1,000 to \$45,000 for:
 - The loss of right to be free from discrimination
 - Injury to dignity, feelings, self-respect
- Reinstatement
- Public interest remedies
 - Develop policies
 - Provide training

HRTO Remedies Update

2014 Decisions	Grounds	General Damages	Other Remedies
C.K. v. H.S.	Sex	\$45,000	Lost income
Wesley v. The Grounds Guys	Disability	\$25,500	Lost income Positive reference letter Online HR training
MacLeod v. Lambton County	Disability	\$25,000	Reinstatement with conditions Lost income (3 yrs)
J.D. v. The Ultimate Cut Unisex	Sex, reprisal	\$105,000 (3 applicants)	Lost income

HRTO Remedies Update

2014 Decisions	Grounds	General Damages	Other Remedies
Garrie v. Janus Joan	Disability	\$25,000	\$161,737.87 lost income (10 years) Cease and desist paying workers with developmental disabilities less than minimum wage and persons without disabilities Retain expert to provide training
Jensen v. Lekkas	Disability	\$15,000	Lost income
Islam v. Big Inc. (2013)	Creed, Colour, Ancestry, Place of Origin, Ethnic Origin	\$71,000 (3 applicants)	Lost income Online HR training Create and post policy Post HRC cards

Fair v. Hamilton-Wentworth District School Board (2014 – ONSC)

- Court upheld HRTO decision
- Employer wrongfully terminated employee when it determined she could not be accommodated
- Decision on remedy
 - Reinstatement after 8.5 years
 - Training period of 6 months
 - 10-years worth of lost wages (\$419,238.89)
 - Employer pension contributions/additional costs to buy back service
 - Out of pocket medical/dental expenses since 2004
 - \$30,000 injury to dignity, feelings and self-respect
 - Employer has filed leave to appeal to ONCA

Wilson v. Solis Mexican Foods Inc. (2013 – ONSC)

- Under 2008 changes to OHRC (s. 46.1) – courts permitted to award damages for violations of Code rights
- Awarded \$20,000 for violation of human rights
- Also awarded 3 months reasonable notice and legal costs
- Judge concluded Wilson’s physical disability (ongoing back ailment) was a significant factor in the termination

Performance Issues Unrelated to Accommodation Needs

Westfair Foods v. UFCW (2014 – Bendel)

- Grievor, full-time grocery clerk, suffered knee injury at work in January 2009
- Pre-injury job not suitable, even with modifications, employer looked for an alternate position
- In August 2009 grievor applied for newly created position of Store Administrator – was interviewed but was not awarded the job
- Union filed a grievance alleging employer's duty to accommodate obliged it to give grievor this job despite concerns about her willingness to work cooperatively with 2 managers

Westfair Foods v. UFCW (2014 – Bendel)

Arbitrator's Findings

- Rejected claim employer required to work around grievor's inter-personal conflict with 2 managers as part of its duty to accommodate – essential requirement of the job
- Employer reasonably concluded grievor was not qualified for the job based on her unwillingness to work with the 2 managers
- “ ... in accommodating an employee with a disability, an employer is obliged to accommodate only the needs of the employee resulting from the disability and not other performance deficits the employee might have.”

Practical Implications

- Confirms need to understand disability-related restrictions in order to understand scope of obligation to accommodate
- Performance-related issues that are not disability-related need not be accommodated
- Reasonable accommodation not preferred or perfect accommodation

Reduced Damages for Failure to Mitigate

Li v. University Health Network (2014 – HRTO)

- Applicant, a steamfitter, sought accommodation for his disability, back pain
- Met with supervisors and HR to discuss his restrictions and 4 MWP's were developed. Continued to perform all functions of his regular work despite MWP's
- Medical condition was exacerbated and he went on another medical leave
- Employer hired 3rd party investigator to conduct video surveillance
- Terminated for abuse of sick leave

Li v. University Health Network (2014 – HRTO)

HRTO Findings

- Employer’s approach to procedural component of duty to accommodate was inadequate
- Employer breached the substantive component, no evidence any accommodation actually provided
- Awarded \$15,000 in general damages for employer’s failure to accommodate
- Denied claim for 8 months of lost wages
 - Applicant’s own evidence, no efforts to find alternate employment for more than 6 months
 - No evidence medical restrictions prevented applicant from seeking alternate employment

Practical Implications

- As in wrongful dismissal litigation, human rights applicants have a duty to mitigate
- Where applicants fail to make reasonable efforts to seek suitable alternative employment following termination, damages for lost income may be significantly reduced, if not eliminated altogether
- Onus on respondent

Establishing a Link Between Medical Conditions and Accommodation Requests

***Yue v. Bank of Montreal* (2014 – s. 240 CLC)**

- Mr. Yue lived in Barrie and worked at BMO branch in downtown Toronto
- To accommodate client project, BMO allowed Mr. Yue to work 2 days/week in Barrie until project was complete
- Later provided doctor's note stating "... illness is aggravated by inadequate rest and travelling between Barrie and Toronto. It is advisable for him to work in Barrie 5 days a week." BMO requested further medical information
- Accommodation request and STD claim were denied due to inadequate medical evidence to support claims
- Mr. Yue claimed he had been unjustly dismissed (constructively dismissed) under s. 240 of the CLC

***Yue v. Bank of Montreal* (2014 – s. 240 CLC)**

Adjudicator's Findings

- No constructive dismissal
- Medical documentation did not support requirement to accommodate Mr. Yue by relieving him of his commute from Barrie to Toronto
 - This was a preference, not a medical necessity
 - No other restrictions were imposed regarding travel or hours of work by his doctor
 - No link between medical condition (eczema and hypertension) and inability to travel for long periods
- Even if BMO was required to provide some form of accommodation, Mr. Yue was inflexible and uncooperative in refusing to consider other options
- Application for JR filed with Federal Court

Practical Implications

- Need to consider requests for accommodation carefully
- May be appropriate to follow up on recommendations or opinions from medical professionals where link between medical condition and workplace restrictions is unclear
- Must be prepared to consider range of options in order to establish reasonable efforts to accommodate
- Failure by employee to be reasonable may result in dismissal of claim/frustration of duty to accommodate

ONCA Clarifies Test to Establish a *Prima Facie* Case of Discrimination

***Pieters v. Peel Law Association* (2013 – ONCA)**

- Applicant must prove:
 - Membership in a group protected by the Code;
 - That he or she was subjected to adverse treatment; and
 - A **connection** between the adverse treatment and a prohibited ground; that is, prohibited ground must be a **“factor”** in adverse treatment

Burden of Proof v. Evidentiary Burden

- Respondent faced with a *prima facie* case must call evidence to avoid an adverse finding
- Respondent can avoid an adverse finding by calling evidence:
 - To show its action is not discriminatory
 - Only evidentiary burden shifts
 - Burden of proof (balance of probabilities) remains on the applicant to show evidence is false or a pretext
- OR
 - Establishing a statutory defense that justifies the discrimination
 - Burden of proof shifts to the respondent

Impact of *Pieters v. Peel Law Association*

- Subsequent decisions confirm that some evidence linking alleged adverse treatment to a ground protected under the *Code* is required
- If the applicant (or their union) can establish this link, then the respondent has to “explain or risk losing”
- Court of Appeal’s clarification of the *prima facie* test in *Pieters* may operate to the benefit of respondents

Components of the Duty to Accommodate

▫ **Procedural Duty**

- Employer obligation to take necessary steps to determine what kinds of modifications or accommodations might be required to allow employee to participate in the workplace
 - i.e. obtaining all relevant information about employee's medical condition, prognosis for recovery, ability to perform job duties and capability for alternate work

▫ **Substantive Duty**

- Make modifications, provide necessary accommodation, to the point of undue hardship, i.e.
 - Duties and tasks
 - Hours of work
 - Location of work
 - Amount of work a person performs

Lee v. Kawartha Pine Ridge District School Board (2014 – HRTO)

- Applicant, a school custodian, alleged discriminated against and terminated on the ground of disability
- Suffered from an adjustment disorder/depression/severe anxiety stemming from a meeting with supervisor in 2006
- He was subsequently transferred to 2 other schools
- Employer proposed to return him to his original school in February 2009; he refused and provided medical notes recommending that he could only work at one particular school
- He refused to budge from this position and School Board notified him in April 2010 that it considered him to have abandoned his position
- Terminated after failed to return to work

Lee v. Kawartha Pine Ridge District School Board (2014 – HRTO)

Tribunal's Findings

- Medical evidence did not support claim unable to work at any other school – no substantive discrimination
- Confirmed it is a breach of the Code for an employer to fail to take appropriate steps to assess an employee's disability-related needs (procedural duty)
- Employer breached its procedural duty when it failed to follow up on the recommendation of a mental health professional (psychiatrist) who recommended in December 2009 that the applicant be returned to work at a particular school
- Applicant awarded \$3,000 for injury to dignity, feelings and self-respect

Practical Implications

- The decision re-affirms that a breach of an employer's procedural duty to accommodate can result in a finding of discrimination and an award of damages
- May be greater need to follow-up on and ensure you understand restrictions or medical recommendations in cases involving mental illness or disability

Family Status Update

- ***Attorney General and Johnstone – 2014 – FCA***
 - Johnstone and husband worked for Canadian Border Service Agency (CBSA)
 - Requirement to be available for 24-hour rotating shifts made it impossible to secure regular child care
- ***Canadian National Railway and Seeley – 2014 – FCA***
 - Seeley required to relocate from Jasper to Vancouver to cover a labour shortage
 - Relocation would cause hardship due to parental obligation to her young children
- Both Johnstone and Seeley sought accommodation
- Refused accommodation by their employers

Family Status – Johnstone and Seeley

- Federal Court of Appeal confirmed prohibited ground of family status includes an individual's childcare obligations
- Court made significant efforts to define scope of protection
 - Those which a parent cannot neglect without engaging his or her legal liability
- Parental obligation vs. personal family choices
- Employee's reasonable efforts to self-accommodate

Family Status – Johnstone and Seeley

Individual advancing claim must establish:

1. Child is under individual's care and supervision
2. Childcare obligation at issue engages the individual's legal responsibility for that child, as opposed to a personal choice
3. Individual has made reasonable efforts to meet those childcare obligations through reasonable alternative solutions, and that no such alternative solution is reasonably accessible
4. Impugned workplace rule interferes in a manner that is more than trivial or insubstantial with the fulfillment of the childcare obligation

Practical Implications

- Must demonstrate facing a *bona fide* childcare problem
- Protection is not extended to trivial obligations arising from personal family choices
- Employer entitled to information surrounding reasons for the request
- Review employee's efforts to self-accommodate
- Highly fact specific, individualized assessment
- Document the accommodation process

Other Developments

- OHRC new/updated policies for 2014:
 - Policy on preventing discrimination based on mental health disabilities and addictions
 - Policy on preventing discrimination because of gender identity and gender expression
 - Updated policy on preventing discrimination because of pregnancy and breastfeeding

http://www.ohrc.on.ca/en/our_work/policies_guide_lines

Questions?