

**EMPLOYMENT, LABOUR & EQUALITIES  
LAW WEBINAR SERIES**

# MANAGING DISABILITIES IN THE WORKPLACE

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# SPEAKERS



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# AGENDA

Topic	Speaker
The Legal Framework	Jordan Epstein
The Duty to Accommodate	Melissa Roth
Disability Management & Medical Notes <ul style="list-style-type: none"><li>• General principles</li><li>• Common issues</li><li>• Case studies</li></ul>	Craig Stehr
Frustration of Contract <ul style="list-style-type: none"><li>• General principles</li><li>• Case law</li><li>• Practical application</li></ul>	Jordan Epstein

# STATISTICS

- **One in five (22%) of the Canadian population aged 15 years and over (or about 6.2 million individuals) have one or more disabilities.**  
(2017 study, by Statistics Canada)
- **In Canada, illness or disability account for most absenteeism (as off 2011 about 70%).**  
(Statistics Canada)

# MENTAL HEALTH

- **Mental Illness is the leading cause of disability in Canada.**
- **Every week at least 500,000 Canadians miss work due to mental illness.** (CAMH)
- **An estimated 30% of short-term and long-term disability claims in Canada are attributed to mental health issues.** (Mental Health Commission)
- **The economic burden of mental illness in Canada is estimated to be approximately \$51 billion each year, with \$6.3 billion resulting from lost productivity.** (CAMH, 2020 study)

# LEGAL FRAMEWORK TO MANAGE DISABILITIES

- **Human rights law**
- **Contract**
- **Workplace safety insurance legislation**
- **Employment standards legislation**

# HUMAN RIGHTS LAW – PROTECTED GROUNDS

- Every person has a right to equal treatment with respect to employment without discrimination because of:

1. race;
2. ancestry;
3. place of origin;
4. colour;
5. ethnic origin;
6. citizenship;
7. creed;
8. sex;
9. sexual orientation;

10. gender identity;
11. gender expression;
12. age;
13. record of offences;
14. marital status;
15. family status; or
- 16. disability.**

(Protected grounds under ON *Human Rights Code*)

# HUMAN RIGHTS LAW – DISABILITY

- Definition of disability is extremely broad

*The Code protects people from discrimination and harassment because of past, present and perceived disabilities. “Disability” covers a broad range and degree of conditions, some visible and some not visible. A disability may have been present from birth, caused by an accident, or developed over time. (OHRC)*

*There are physical, mental and learning disabilities, e.g. hearing or vision disabilities, epilepsy, mental health disabilities and addictions, environmental sensitivities, and other conditions.*

- Be careful in adopting overly sceptical view of employee’s disability claim

# DUTY TO ACCOMMODATE: GENERAL

- **All employers have a general duty to accommodate disabilities short of undue hardship**
- **Duty to accommodate has both a substantive and procedural aspect**
- **Three Principles:**
  1. respect for dignity;
  2. individualization;
  3. integration and full participation.

# DUTY TO ACCOMMODATE – WHEN TRIGGERED

- **Employees do not have to use “magic words” to trigger the accommodation process**
- **May be triggered when an employee makes a request or informs their employer of a particular illness or disability**
- **In some cases, the employer may have to be proactive in probing for a potential disability**
- **Employers must be vigilant: some attendance issues are the result of disability or illness**
- **Employers cannot turn a blind eye to an employee’s medical issues**

# DUTY TO ACCOMMODATE – WHEN TRIGGERED

- **Common triggers include:**
  1. self-evident (wheelchair) or self-disclosed disabilities;
  2. observable indicators of workplace problems (performance or attendance issues, visible signs of distress or impairment);
  3. medical notes/requests for leave and/or accommodation.
- **Disciplining an employee prior to making inquiries may contribute to a finding of discrimination**
- **Accommodation is a process. Not a science, Not mechanic – Flexibility is fundamental**

# DUTY TO ACCOMMODATE – PROCESS

- **Employer must make a provable, meaningful effort to consider accommodation options, including:**
  1. proving any *bona fide* occupational requirements (BFOR);
  2. providing reasonable accommodation options if feasible;
  3. proving that employer cannot accommodate without reaching the point of undue hardship.
- ***Document, document, document* – the process followed, decisions made, and reasons**
- **Mere failure to follow proper accommodation process can equal a breach even if undue hardship exists**

# DUTY TO ACCOMMODATE – HOW TO

- **Employers do not need to exempt a person from the essential duties of the job**
  1. Essential duties are those which are vital or indispensable to a person's job
  2. Evidence, such as job descriptions, will be required to determine whether a duty is essential
    - How often is the duty performed?
    - How much time is spent on each duty?
    - How does the duty fit with the others performed in the job?
    - How would the job change if the duty were removed?

# DUTY TO ACCOMMODATE – HOW TO

- **Duty to accommodate does not require an employer to:**
  1. fundamentally change working conditions;
  2. assign the essential duties of an employee with a disability to other employees; or
  3. change the essential duties and requirements of a position.
- **Rather, alternative work may need to be found for the employee**

# DUTY TO ACCOMMODATE – ALTERNATIVE WORK

- **Temporary alternative work may be appropriate in return to work context or where disability temporarily renders an employee unable to accomplish a pre-disability job**
- **Permanent alternative work should be considered where an employee cannot perform the pre-disability job, with or without accommodation**
  1. This may include workplace reorganization
  2. Employee does not need to be promoted
  3. Vacant position must be equivalent
  4. The person must be qualified for the alternate position
  5. This does not require the employer to “make work” or to create a job that does not need to be done

# DUTY TO ACCOMMODATE – RETURN TO WORK

- **Employees who return to work after an absence related to a protected ground are protected by the *Human Rights Code***
- **Employees generally have the right to return to their pre-disability job**
- **If a person cannot return to work in pre-disability job, employer has obligation to canvas alternative work possibilities**

# DUTY TO ACCOMMODATE – COOPERATION

- **Employees (and Unions) must cooperate in the accommodation process**
- **Employees must accept reasonable accommodation (not entitled to *preferred* accommodation)**
- **Employees must provide sufficient information to allow the employer to determine:**
  1. if there is a medical condition requiring accommodation;
  2. the expected duration of the medical condition requiring accommodation;
  3. specific needs arising from disability / restrictions & limitations;
  4. whether the employee will require time off from work to seek treatment; and
  5. whether the employee will be required to take any medications that will impair motor or cognitive functions.

# DUTY TO ACCOMMODATE – EMPLOYER DUTIES

- **Employer must:**
  1. determine if employee requires accommodation;
  2. meaningfully consider possible accommodations, including employee suggestions;
  3. respond within reasonable time and discuss options with employee;
  4. maintain confidentiality to the extent feasible;
  5. request necessary medical information/updates;
  6. explain which accommodations are preferred/viable/not feasible, why, and what alternatives are offered;
  7. document the process and prepare a written accommodation plan;
  8. implement and follow up;
  9. modify accommodations and adjust if/as required.

# DUTY TO ACCOMMODATE – UNDUE HARDSHIP

- **Employers must accommodate employees short of undue hardship**
- **Three considerations in assessing undue hardship:**
  1. cost;
  2. outside sources of funding, if any; and
  3. health and safety requirements.
- **The following are not valid considerations:**
  1. business inconvenience;
  2. employee morale; or
  3. third-party preferences.

# DUTY TO ACCOMMODATE – UNDUE HARDSHIP

- **The onus of proof rests with the employer to demonstrate that accommodation cannot be accomplished without undue or excessive hardship**
- **Evidence must be objective, real, direct and quantifiable if related to cost**
- **Objective evidence includes:**
  1. financial statements and budgets;
  2. scientific data, information and data resulting from empirical studies;
  3. expert opinion;
  4. detailed information about the activity and the requested accommodation;
  5. information about the conditions surrounding the activity and their effects on the person or group with a disability

# ***HAMILTON-WENTWORTH DISTRICT SCHOOL BOARD V FAIR, 2016 ONCA 421***

- **Ontario Human Rights Tribunal found that the employer discriminated against the employee by failing to accommodate her disability**
- **Tribunal ordered employee's reinstatement (2012)**
- **Divisional Court dismissed School Board's application for judicial review (2014)**
- **Divisional Court's decision upheld by Ontario Court of Appeal (2016)**

# HAMILTON-WENTWORTH DISTRICT SCHOOL BOARD V FAIR, 2016 ONCA 421

- **The Tribunal ordered the following remedies:**
  1. **reinstatement** to a suitable position with seniority;
  2. **lost wages** from June 26, 2003 (the date an alternate position was posted) to 2012 (the date of reinstatement), for a total of **\$419,283.89**;
  3. cover **tax expenses** due to back pay;
  4. pre and post-judgment interest at 2.3% and 3% per year;
  5. reinstate the applicant's years of service with **OMERS** and pay the employer pension contributions and additional costs associated with the buy-back of service;
  6. **CPP** back pay;
  7. out of pocket **medical and dental expenses**;
  8. **\$30,000 General Damages** for injury to dignity, feels and self-respect.

# **HAMILTON-WENTWORTH DISTRICT SCHOOL BOARD V FAIR, 2016 ONCA 421**

- **Employee held position of Supervisor, Regulated Substances, Asbestos**
- **Employee developed a generalized anxiety disorder for which she was hospitalized**
- **Disability developed in response to stressful nature of her job and her fear that she could cause personal injury to others, be held personally liable for breach of *Occupational Health and Safety Act***
- **Employee took approved medical leave of absence and received long-term disability benefits**
- **Employee requested return to work**
- **School Board did not identify a suitable position for employee and terminated her employment**

# HAMILTON-WENTWORTH DISTRICT SCHOOL BOARD V FAIR, 2016 ONCA 421

- **HRTO: School Board “failed to actively, promptly, and diligently canvas possible solutions to [Ms. Fair’s] need for accommodation”:**
  1. School Board’s Disability Management Co-ordinator:
    - failed to take on an active role in canvassing possible accommodation solutions
    - failed to meet with the long-term disability insurer’s vocational rehabilitation consultant
    - attempted to influence the School Board’s medical expert to conclude that the employee was not worthy of accommodation.
  2. School Board refused to accommodate the employee in available positions either temporarily or permanently;
  3. School Board neglected to consider alternate employment opportunities and instead terminated employment.

# DISABILITY MANAGEMENT

- **No hard and fast rules**
- **Case-by-case basis/approach**
- **Requires patience**
- **Document, document, document → diligence**
- **WHY?**
  - Is the right thing to do
  - Is the legally required thing to do
  - Significant exposure if you get it wrong \$\$\$\$\$\$\$

# DISABILITY MANAGEMENT STRATEGY

## STOP!

- D. *Don't* play doctor/jury, *do* play defence
- R. Request up to date medical (or other) information/clarification
- O. Options – canvas, identify, consider, assess, prioritize, test
- P. Participation – this is a co-operative, collaborative TEAM SPORT!

and

- R. Rinse and repeat
- O. Observe and adjust
- L. Log and document at every step

**Reflex and rigidity are the main enemies of accommodation!**

# MEDICAL NOTES

- **What to do when presented with a vague medical note?**
  - Consider objectives and develop a flexible strategy
  - Avoid knee-jerk reactions / emotional response
  - Inform yourself (e.g. facts, operational issues, etc.)
  - Be patient; one step at a time
  - Consider possible outcomes / prepare for next step

# MEDICAL NOTES

- **What is the issue you are dealing with?**
  - Accommodation request
  - Request for payment during medical leave
  - Employee ready to return to work following an absence
  - Medical produced to excuse or justify misconduct
- **Why are you receiving a medical note?**

# MEDICAL NOTES – ISSUES

- **Consider your objectives**
  - Part ways with the employee at all costs
  - Ensure safe and/or timely return to work
  - Ensure proper documentation obtained during leave
  - Adjudicate claim for disability benefits
  - Prevent abuse/malingering
- **Don't ask for the sake of asking – have a purpose and be strategic!**

# MEDICAL NOTES – ISSUES

- **What information do you need to proceed?**
  - Confirmation of fitness to RTW
  - Confirmation of disability / justification for absence
  - Basic understanding of the condition?
  - Functional limitations and/or restrictions
  - Information re potential accommodations
  - Duration (i.e. temporary or permanent)
  - Prognosis
  - Treatment
- **Information required is directly tied to objectives**

# DOS

- **What can you ask for?**
  - Nature of the illness (do you really need to know?)
  - Expected duration
  - Restrictions and/or limitations
  - Possible accommodations
  - Basis for medical conclusions (e.g. testing)
  - Treatment plans (?) and employee compliance
  - Extent/scope of patient/doctor relationship
  - Dates of visits and next scheduled appointment

# DON'TS

- **What can't you ask for?**
  - Diagnosis
  - Mental/physical health history
  - Medical records (depends)
  - IME (without a reasonable basis)

# MEDICAL NOTES – ISSUES

- **Can your objectives be met without this information? If yes, consider:**
  - not pursuing the information
  - a more focused or targeted inquiry

# MEDICAL NOTES – ISSUES

- **Are you legally entitled to the information?**
  - Written consent (may be implicit)
  - Contractual
  - Statutory (e.g. ESA, WSIA)
- **Best approach: letter to the employee, letter to the treating physician and signed authorization form**

# MEDICAL NOTES – ISSUES

- **Have you fully informed the employee and doctor?**
  - Vague medical note due to:
    - Employer not specifying what information it requires
    - Employer not fully advising the doctor of the context
    - Employer not clearly describing job functions

# MEDICAL NOTES – ISSUES

- **Do you have reason to doubt what the employee or doctor is telling you?**
  - The less reason you have, the less reason to push for more detail and vice versa
  - A vague medical note from a long term good employee, whose attendance record is good, should suffice for a short absence

# EPISODIC DISABILITIES

- **What is an “episodic disability”?**

An episodic disability is a long-term condition that is characterized by periods of good health interrupted by periods of illness or disability. These periods may vary in severity, length and predictability from one person to another.

Unlike permanent disabilities, episodic disabilities are periodic — the episodes of illness come and go, and may vary in length and degree — but because they are also unpredictable, they can often be more difficult to manage with regard to employment.

# EPISODIC DISABILITIES

- **Arthritis**
- **Asthma**
- **Chronic Obstructive Pulmonary Disease**
- **Chronic Pain**
- **Crohns & Colitis**
- **Diabetes**
- **Epilepsy**
- **HIV / AIDS**
- **Mental Health Conditions – Depression, Anxiety**

# MANAGING EPISODIC DISABILITIES

- **Requires an ongoing approach**
- **Management – and tolerance – of periodic absences from work**
- **Communication is key**
- **Requires a flexible approach**
- **Do not require unnecessary medical notes**

# FRUSTRATION OF CONTRACT



# COMMON LAW DOCTRINE

- **Frustration occurs when a contractual agreement becomes legally or physically impossible to perform without fault of either party.**
- **When a contract is frustrated, both parties are excused from their obligations under the contract.**
- **The Supreme Court of Canada has described frustration as occurring “when a situation has arisen for which the parties made no provision in the contract and performance of the contract becomes ‘a thing radically different from that which was undertaken by the contract’.”**

(Naylor Group Inc. v Ellis-Don Construction Ltd., 2001 SCC 58 at para 53.)

# EMPLOYMENT CONTEXT

- **Employee cannot perform job anymore due to no fault of employee or employer.**
- **The employment relationship has become untenable due to a change of circumstances beyond the control of the parties.**
- **Employee Disability: If employee has become totally disabled and there is no reasonable prospect of returning to work in the foreseeable future.**

# WHAT HAPPENS?

- **When an employment contract is deemed frustrated, the employment relationship is considered to be terminated.**
- **Typically, the employer does not need to provide the employee with notice or severance when an employment contract is frustrated.**
- **However – in cases where frustration of contract occurs due to employee injury or illness, Ontario employers remain obligated to pay out minimum statutory termination pay and/or severance pay to an employee.**

(In Ontario, Regulation 288/01 *Employment Standards Act*, 2000)

- **Employee is entitled to only ESA termination entitlements.**

# FRASER V. UBS, 2011 ONSC 5448

- **Facts:**

- Ms. Fraser was diagnosed with major depression and anxiety phobia.
- Initial attempts at returning to work with modified duties after STD leaves were unsuccessful.
- Ms. Fraser commenced an LTD leave that ultimately spanned 3.5 years.
- Employer terminated employment and paid out ESA minimums.
- Ms. Fraser commenced a lawsuit claiming that she had been wrongfully dismissed.

# FRASER V. UBS, 2011 ONSC 5448

- **Decision:**
  - Court deemed that Ms. Fraser was permanently disabled and that her employment contract had been frustrated.
  - Legal Test: “No reasonable likelihood of the employee being able to return to work within a reasonable time.”
  - Must take into account all facts known at the time of termination:
    - The employee did not provide employer with updated medical notes, did not attempt to return to work or provide any indication that she would be able to in the future. There was no evidence that she was even receiving ongoing medical treatment.

# HOEKSTRA V REHABILITY OCCUPATIONAL THERAPY INC., 2019 ONSC 562

- **Facts:**

- Medical absence of more than 3 years due to severe throat and stomach issues.
- Recent doctor's note stated that the employee "will not return to work".
- The Plaintiff brought a lawsuit claiming frustration of contract and seeking his ESA termination entitlements.
- The employer argued that there was insufficient medical evidence to support a finding of frustration and that frustration requires an "act of the employer."

# HOEKSTRA V REHABILITY OCCUPATIONAL THERAPY INC.

- **Decision:**
  - Frustration of contract occurs as a matter of law.
  - Once circumstances exist that have the effect of frustrating the terms of a contract, the contract is deemed terminated.
  - “A contract of employment is frustrated when “there is no reasonable likelihood of the employee being able to return to work within a reasonable time.” The fact that a party to the employment contract takes the position that the contract has been frustrated, whether in support or defence of a claim, does not have the effect of deeming a contract frustrated.”

# LENGTH OF LEAVE

- ***Naccarato v. Costco Wholesale Canada Ltd., 2010 ONSC 2651***
  - Five year disability leave – no frustration.
  - The employee was absent from work for five years due to depression. However, there was no medical evidence that the employee was permanently disabled and so no evidence that he would not be returning to work.
- ***Parks v. Atlantic Provinces Special Education Authority, 1992 CanLII 2564***
  - Employment contract deemed frustrated after a medical leave of 18 months.
  - Employee worked as a counsellor for children with physical handicaps. Duties required him to physically lift the children to move them from a bed to a wheelchair. The employee underwent surgery for arthritis and was unable to lift heavy things thereafter. Employment contract deemed frustrated as he could not longer fulfill the job requirements.

# LENGTH OF LEAVE

- The question for employers is not: “How long is the leave?”
- The question should be: “What is the medical prognosis?”

# PRACTICAL APPLICATION

- **Seek updates and clarification of medical diagnosis at reasonable intervals.**
- **Be proactive – the longer employers wait for updated medical evidence, the longer it might take for frustration of contract to take place.**
- **Keep track of medical changes:**
  - Is there improvement over time?
  - Are doctors pessimistic or optimistic about return to work?
- **Ask the question – “will this employee be able to return to work, even with modified duties”?**
- **Duty to accommodate.**

**QUESTIONS?**

# SPEAKERS



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