CAUT LegalUpdate

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Duty to Inquire

Haghir v. University Appeal Board, 2019 SKCA 13

The Saskatchewan Court of Appeal held that the University of Saskatchewan Appeal Board erred in failing to consider the law of discrimination and accommodation in upholding the termination of a physician's membership in a College of Medicine program. The termination followed findings that the physician had attempted to take textbooks from the University bookstore. The physician had a criminal record for shoplifting and a history of psychiatric treatment related to that conduct.

Facts and Argument

The Appellant was a physician who had been accepted for admission to the College of Medicine Neurology Program at the University of Saskatchewan. He had a criminal record for shoplifting and, in order to obtain admission to the Program, agreed to continue care and treatment with a psychiatrist and seek assistance from the Physician Support Program of the Saskatchewan Medical Association. He also made an agreement with the Regional Health Authority not to commit any further criminal violations, and with the College of Medicine to observe his agreements with both the Saskatchewan Medical Association and the Regional Health Authority.

Four years later, the Appellant was suspended from the Neurology Program as a result of a Senate Hearing decision that found he had attempted to take textbooks from the University bookstore. After an investigation by the College of Medicine, it was recommended he be removed from the Program. The dismissal was upheld in the two-stage appeal process of the University, concluding with a decision of the University of Saskatchewan Appeal Board. The Saskatchewan Court of Queen's Bench upheld the Appeal Board's decision on the basis that the College of Medicine had appropriately accommodated the Appellant's mental health disability, which was related to the theft history.

The Appellant maintained that the College of Medicine knew of his mental health issues prior to his admission to the Neurology Program and that any failure to follow his prescribed treatment was directly related to his mental health disability. The College argued that a specific mental health disorder had never been diagnosed and that the Appellant failed to make his accommodation needs known at the time of dismissal.

Decision

The Court allowed the appeal in finding that the College had failed to meet its duty to inquire into an accommodation for the Appellant given the evidence of a mental health disorder. The Appeal Board's decision was not reasonable in that it had overlooked or disregarded that evidence. The College of Medicine decision should have been reviewed on the basis of

whether it was aware or ought to have been aware of the Appellant's disorder.

The Union of Northern Workers v. The Government of the Northwest Territories (Grievance of Luzviminda Richardson), 2019 CanLII 18391 (NT LA)

Discrimination was established where an employer dismissed a probationary employee without inquiring further when it became aware of a possible alcohol dependency that could have been a factor in the alcohol-related offence that led to the dismissal. In failing to inquire, the employer had breached its duty to inquire under human rights caselaw.

Facts and Argument

The grievor was a probationary employee with the Yellowknife Health and Social Services Authority where she held a position as a supervisor. The grievor was a resident of a "dry" region in the Northwest Territories where the possession of alcohol is prohibited. The grievor was rejected on probation after it was found she had sent a parcel containing alcohol as air freight into the alcohol abstention community.

Prior to her termination, the grievor admitted to shipping the alcohol and said she used alcohol to cope with the stress of her job. She drank daily and admitted to bringing alcohol to the community on other occasions.

The employer maintained that the grievor was the "face" of the agency in her community and a role model for the employees who reported to her. The rejection on probation was justified given the grievor had used employer resources to carry out her illegal activities on more than one occasion. The onus, the employer argued, was on an employee to inform the employer of any need for accommodation and the grievor made no such request in respect to alcohol addiction.

The union argued that the case is about the failure of the employer to inquire if there was a disability. Once aware that the grievor stated she used alcohol to cope, it should have sought further information as to whether there could be a dependency, particularly given the grievor worked in an alcohol abstention community and risked breaking the law to bring in alcohol. The union maintained that the employer's claim that it was up to the grievor to provide information to trigger consideration of an accommodation conflicts with the accepted literature in dealing with a person with a potential alcohol dependency where lack of self-awareness and denial affect any ability to come forward or disclose.

Decision

The arbitrator agreed that the main issue is whether the employer breached its duty to inquire when it chose to terminate the grievor. He held that the law is "clear" in that the duty to accommodate has both a s*ubstantive* and *procedural* component. The duty to inquire and assess is a procedural requirement and failure to meet this duty is a form of discrimination given the affected person is not properly assessed for possible accommodation.

The arbitrator held that while there is an obligation on the employee to disclose their disability, there is also an obligation on the employer that, before taking disciplinary action, it make inquiries "if it suspects that the employee may have a disabling condition which impacts on their workplace behaviour". It was found in this case that the employer had enough information to trigger the duty to inquire as not every employee with an addiction is aware of their disability and indeed may be in denial. The information the employer had should have been a "red flag" and led to an attempt to get a medical prognosis.

The employer's actions were discriminatory in failing to inquire as to whether there was any need for accommodation.

Pratt v. University of Alberta, 2019 AHRC 24 (Alberta Human Rights Tribunal)

The University of Alberta discriminated against a probationary employee when it failed to inquire as to whether she was suffering a disability in the context of work performance issues once the employee raised related issues in a pre-termination meeting with her supervisor.

Facts and Argument

In a Human Rights complaint filed against the University of Alberta, the terminated probationary employee alleged she was discriminated on basis of mental disability. The Complainant was hired as an assistant to work in University collections and

archives. Concerns were raised over her job performance, including her seeming inability to work creatively, focus and maintain sustained concentration, as well as engaging in text and phone call distractions. The Complainant was issued a letter of counselling about halfway through her probation in respect to improving her work performance.

In a meeting she later requested with her supervisor, the Complainant stated she was trying to cope with the death of her brother who had taken his own life and that she was suffering a grief reaction. She testified that she told the supervisor this was affecting her concentration and cohesive thought pattern. She asked if she could just be assigned core duties while she was undergoing counselling. The supervisor testified that he did not think she was referring to psychological counselling.

The Complainant argued that she thought she was going to be accommodated as a result of her meeting with her supervisor. The University contested her evidence of the meeting and claimed the Complainant had not raised her brother's death and that the supervisor had assumed from his interactions with the Complainant that she just did not like her job.

Decision

Credibility was an important factor in this decision, as the Tribunal preferred the Complainant's evidence that she had advised her supervisor of the personal difficulties in her life that were affecting her work performance. The Tribunal found *prima facia* discrimination on the grounds of mental disability and that her condition was connected to her work performance issues. As such, the duty to accommodate would be applicable if the employer knew or ought to have known of her condition.

The complaint was upheld on the basis of the employer's failure to inquire after the Complainant had advised of her limitations. The Tribunal stated that based on the evidence, the University "could have and should have asked the complainant to provide evidence from a health professional with respect to her limitations."

The Tribunal awarded $20,000 in damages for injury to the Complainant's dignity and self-respect, just under $35,000 for lost wages, and reinstatement to her employment with the University in a comparable position and pay grade.

Significance

The significance of these cases is the recognition and application of the duty to inquire where it would be reasonable for an employer to believe there may be a disabling condition underlying an employee's behaviour. Recognizing a condition and a connection to workplace issues means that the duty to accommodate is triggered, but does not determine the outcome of applying accommodation principles. That is, the duty to accommodate requires the employee to cooperate in a reasonable accommodation up to the point of undue hardship for the employer. The union is also required to participate in an accommodation subject to establishing undue hardship with respect to its members and/or the provisions of a collective agreement.

The duty to inquire is the starting, not ending, point in dealing with an affected employee. Discipline is not an appropriate response without first determining if there is any connection to a disability or other human rights protected ground. The duty to inquire only arises where the evidence is that the employer knew *or ought to have known* that there might be a connection to a human rights condition. But the issue may not be discipline, but any behaviour affected the ability of the employee to fully engage in the employment relationship. Human Rights, after all, is concerned with non-culpable conduct.

CAUT is aware of at least one recent case where a university chose to ignore all the signs pointing to a disabling condition and treated the behaviour concerned as culpable conduct that justified dismissal without further medical inquiry. The matter settled before the arbitration hearing and the issue of the scope of the duty to inquire in that case was thus not addressed.

In discrimination law, the *University of Saskatchewan*, *Northern Workers* and *University of Alberta* cases illustrate the importance of the duty to inquire as a precursor to considering the duty to accommodate. The duty to accommodate cannot be met where there is a failure to inquire in circumstances where it is known or ought to have been known that an underlying condition that could be connected to the behaviour. Where a disabling condition is later established, the result is discrimination because accommodation was not even considered.

CAUT encourages member associations to be vigilant when faced with situations where a disabling

condition may have an impact on an individual's behaviour, and to insist that where the duty to inquire is triggered, an inquiry is actually carried out before other actions are followed, including disciplinary or other corrective action.

What happens when a disability is subsequently established is another matter. Culpable conduct justifies disciplinary penalties; nonculpable conduct requires considering non-disciplinary approaches such as that of accommodation and/or treatment while protecting the interests of the grievor, other employees, and the employer. Sometimes a hybrid approach may be applied where there is a mix of both culpable and nonculpable behaviour and an arbitrator will have to *parse* the behaviour into one category or the other before considering a response.