I hope you are all doing well and enjoying the change in the weather and looking forward, as I am, to the summer.

This edition of the *Fitzgibbon Workplace Law Newsletter* touches on a number of recent employment law developments that are of interest to employers and HR practitioners. A few relate to the duty to accommodate under the *Human Rights Code* and the importance of the employer managing that process. Accommodation and disability management are, in my nearly 30 years of practice, the most challenging HR issue facing employers. The complexities are varied, and there are no risk-free solutions. Options fall onto a spectrum from "really bad" to "less bad, but still risky". Determining the options starts with managing the process sensitively yet proactively, and engaging with the employee.

I hope you enjoy this edition of the newsletter and that you will find something of interest in these pages. I am always happy to hear your comments and suggestions.

Mike

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Interaction between Frustration of the Contract and the Duty to Accommodate

Terminating an employee who is absent from work due to an illness or disability falls into the "high-risk" end of the employment law spectrum. The issues go beyond traditional HR law considerations and can bleed into exceptional damages (*i.e.* moral and punitive damages) as well as *Human Rights Code* considerations. Caution, sensitivity and patience must be exercised whenever an employer is considering terminating a sick or disabled employee. In my experience, *most* employers exercise

care when considering terminating the employment of an employee who is absent from work as a result of a medical condition. At the same time, some employers either become so frustrated at the process that they rush and terminate without having adequately laid the groundwork or, conversely, are paralyzed into inaction and just sit back and, by doing so, are in as bad a position as the employer that rushes to judgment.

The most recent word comes from the Divisional Court in the as-yet unreported case of *Katz v. Clarke* 2019 ONSC 2188.

The plaintiff commenced employment with the defendant in March 2000, most recently as a front store manager. He commenced a leave of absence in July 2008 due to depression. In December 2008, he had a slip and fall and broke his kneecap and, in January 2011, he had another fall injuring the same leg.

Short and long-term disability insurance benefits were approved by the employers' insurer Great West Life ("GWL"). GWL informed the employer in early 2013 that, based on the medical information available, the plaintiff was unable to perform the essential duties of the position and there was no reasonable expectation that he would be capable of performing them in the foreseeable future.

On July 1, 2013, the employer wrote to the employee advising him of the above and of their position that the contract of employment had become frustrated. As such, the employment relationship would end on December 31, 2013 and he would be paid his entitlement under the *Employment Standards Act, 2000*. His benefits would cease on December 31, 2013.

Plaintiffs counsel wrote to the employer and advised that he was working very hard to get well so that he can return to his former employment and perform the essential duties of his position.

In response, the employer requested updated medical information, the expected date of return to work and his prognosis for recovery. The plaintiff did not respond.

The employer's counsel again wrote to the employee's counsel and reiterated that, unless updated medical information was received, the employer would deem the plaintiff's employment to be frustrated effective December 31, 2013, on the basis that there was no reasonable prospect that he would be able to perform the essential duties of his position in the foreseeable future.

The employer did not receive a response to the letter and the plaintiff's employment was terminated effective December 31, 2013 on the basis of the frustration of his contract of employment and, on January 9, 2014 he was paid his statutory entitlements in accordance with the ESA.

The plaintiff sued claiming damages for wrongful dismissal along with damages under section 46.1 of the *Human Rights Code* for injury to dignity, feelings, and self-respect, and moral damages on the basis of bad faith in the manner of termination.

The chief defence offered by the employer was that the contract of employment had been frustrated as a result of a 5 year absence from work.

According to the decision:

> There is no dispute between the parties that the Respondent's medical and benefit claims documentation available to GWL and the Appellant during 2013 indicated that the Respondent was totally disabled and unable to work in any occupation with no reasonable prospect of returning to work in any capacity in the foreseeable future.

However, the employee argued that the contract was not frustrated because the employer had failed to accommodate the employee to the point of undue hardship under the *Human Rights Code*. The employer brought a motion for summary judgment which was dismissed.

The motion judge found, among other things, that the issue of whether the employer fulfilled its duty to accommodate required a trial. The judge reached this conclusion in part as because the employee had stated a desire to return to work. This, the motion judge found, was all that was required of an employee to trigger the duty to accommodate.

The employer appealed to the Divisional Court.

The Court discussed the concept of frustration of the employment contract and held as follows:

> The doctrine of frustration of contract applies where there is evidence that the employee's disabling condition is permanent. The principle applies in these circumstances because the employee's permanent disability renders performance of the employment contract impossible "such that the obligations of the parties are discharged without penalty": see *Fraser v. UBS*, 2011 ONSC 5448 at paras. 14-15.

In terms of the interaction between the duty to accommodate and the doctrine of frustration, the Court agreed with the employer stating:

> *… the law is clear that an employer's duty to accommodate is only triggered when an employee informs an employer not only of his wish to return to work but also provides evidence of his or her ability to return to work including any disability-related needs that would allow him or her to do so*: see *Lemasani* at para. 187. As was succinctly put by Fregeau J. in *Nason v. Thunder Bay Orthopaedic Inc.*, 2015 ONSC 8097 at para. 144, "the employee must communicate the ability, not just the desire, to return to work". In this case, the Respondent never provided any such information to the Appellant. [emphasis added]

Of note is that the *Nason* case referred to in the above quotation was appealed to the Court of Appeal and is reported at *Nason v. Thunder Bay Orthopaedic Inc.*, 2017 ONCA 641 (CanLII).

According to *Katz*, the employers' duty to accommodate ends where employees' permanent disability renders performance of the employment contract impossible into the foreseeable future. The employer bears the onus of proving that the contract was frustrated.

Further, the Court in *Katz* rejected the argument that the employer had failed to satisfy the duty to accommodate because it didn't contact the employee while he was off work. Specifically, the Court held that the employer had no obligation to contact the employee "so long as the medical documentation provided to it indicated that the Respondent was unable to return to work."

Some Takeaways

I found this case of interest on a number of levels.

The concept of frustration of the employment contract is not new, but it is challenging in practice. The *Katz* case provides some important guidance, in particular on the interaction between the duty to accommodate and frustration and, specifically, when the duty to accommodate applies and is exhausted. It is important for the employer to manage absences diligently and obtain medical documentation that allows it to both substantiate the continued absence and to determine if the employee can be accommodated short of undue hardship, and whether the contract can be terminated for frustration.

Importantly, the Court in *Katz*, and in other cases, stated that an employees' simple statement of a desire to return to work, without more, is insufficient to trigger the duty to accommodate where the medical documentation provided to the employer indicates that the employee was unable to return to work.

In other words, according to *Katz*, not only must the employee inform the employer that they want to return to work, but they must supply evidence that supports their ability to return to work along with any medically-related accommodation needs.

Should the employer sit by and make no further inquiries once it receives medical evidence to the effect that the employee is unable to return to work, and just let the clock run? Is the burden on the employee to supply updated medical information or risk termination, at some point, for frustration of the contract based on the last medical received?

Best practice would suggest that employers should manage the absence and take control of the process which will include obtaining medical updates including changes in the status of the employee and their medically related limitations and restrictions. There are ways to do this, and every case is unique, but being proactive, within reason having regard to the particular circumstances, still seems to be the courts direction in these tough cases.

Independent Contractors and Reasonable Notice

Should periods during which an employee provides services to the employer as an independent contractor be counted towards the calculation of common law reasonable notice termination?

The Court recently considered this in *Cormier v. 1772887 Ontario Limited c.o.b. as St. Joseph Communications*, 2019 ONSC 587.

Kelly Cormier ("Cormier") began providing services to St. Joseph Communication in 1994. She suggests that she was either an employee or dependent contractor of the company. The employer, on the other hand, argued that Cormier was an independent contractor providing it with Freelance Wardrobe Stylist services. She worked approximately 37 to 40 hours per week between 1994 and 2004.

On June 3, 2004 Cormier became an employee of St. Joseph Communication and worked as a Wardrobe Stylist. On January 16, 2008, Cormier was promoted to the position of Fashion Studio Producer at which time she signed an employment contract. On September 19, 2012, Cormier was promoted to the position of Fashion Studio Manager and signed another employment contract which provided in part as follows:

(a) The Company may terminate your employment at its sole discretion, at any time for any reason, without cause, upon providing you the minimum notice, pay in lieu of notice and/or severance pay required by the Ontario *Employment Standards Act, 2000*, as amended from time to time. You will have no other entitlement to notice of termination, pay in lieu of such notice, and/or severance pay.
(b) In addition to the foregoing and subject to the consent of the Company's insurers, you will be entitled to continue to receive Company benefits (excluding STD and LTD benefits) during the notice period specified above.

Cormier and 80 other employees were given notice of termination on June 1, 2017 effective October 27, 2017. Cormier was 52-years old at the time of her termination. Since June 1, 2017, St. Joseph Communications paid her the total sum of $55,576.92 as a combination of working notice and pay in lieu of notice (35 weeks, approximately 8 months).

Cormier sued and claimed damages based on a 24 month period of reasonable notice.

The case was decided on a summary judgment motion.

The motion judge identified three (3) types of work relationships:

(a) employer - employee;
(b) contractor - independent contractor, and
(c) contractor - dependent contractor

The judge reviewed the tests for determining which of the three (3) categories applied. The court stated:

> … if the first step of the analysis determines that the worker is a contractor, then it is necessary to go further and determine whether the worker is a dependent or independent contractor. In *McKee v. Reid's Heritage Homes Ltd.*, supra, Justice MacPherson identified a variety of factors to differentiate dependent and independent contractors including: (1) the extent to which the worker was economically dependent on the particular working relationship; (2) the permanency of the working relationship; (3) the exclusivity or high level of exclusivity of the worker's relationship with the enterprise. It follows from the factors identified by Justice MacPherson that the more permanent and exclusive the contractor relationship, then the less it resembles an independent contractor status and the more it resembles an employee relationship and, therefore, the relationship should be classified as a dependent contractor relationship.

The judge found that Cormier was a *dependent contractor* between 1996 and 2004.

The court then held that the termination clause in the employment contract was unenforceable and that the common law reasonable notice applied.

Mr. Justice Perell reiterated the following principles which I think are helpful and I will set them out at some length:

- An employee or a dependent contractor who is dismissed without reasonable advance notice of termination is entitled to damages for breach of

contract based on the employment income the employee would have earned during the reasonable notice period, less any amounts received in mitigation of the loss;

- An employee who is wrongfully dismissed is entitled to recover the value of all losses arising from the failure to have been given reasonable notice of the termination of his or her employment;
- The damage award should place the plaintiff in the same financial position he or she would have been at the end of the reasonable notice period had he or she actually been given the appropriate notice of pending termination, and, thus, the employee is entitled to the salary, benefit, and bonuses he or she would have received during the period of reasonable notice;
- A wrongfully dismissed employee is entitled to be compensated for the value of the employment-related benefits that the employee had available when employed or the cost of replacement coverage for the reasonable notice period;
- A terminated employee is entitled to claim damages for the loss of pension benefits that would have accrued had the employee worked until the end of the notice period, unless some contractual right limits that right;
- As a general rule, additional damages are not awarded to compensate the employee for the disappointment, embarrassment, or other psychological effects flowing from the loss of employment. However, if an employee can prove bad faith conduct by the employer in the manner of the dismissal that caused mental distress that was in the contemplation of the parties, then the employee may be entitled to aggravated or punitive damages.

I always find it useful to lay out damages principles for the simple reason that they come up in every without cause termination case where the common law presumption of reasonable notice has not been successfully displaced by a written contract of employment. They are considerations that ought to be kept in mind where constructing the initial severance offer, during the negotiations and in litigation (if it gets to that point).

In determining the common law period of reasonable notice we look at the factors in *Bardal v. Globe & Mail Ltd.*, 1960 CanLII 294 (ON SC) including length of service. Mr. Justice Perell held that the total time Cormier worked for the company was to be taken into account in determining her years of service. That is, the court looked at the period from 1994 through to her termination in October 2017 in calculating her length of service.

The Court goes on (and this is where the controversy is) to state:

> *However, in my opinion, even if I had concluded that Ms. Cormier was an independent contractor from 1994 to 2004, it would have been wrong in principle to ignore these years of their relationship in determining the reasonable notice period.* The court should take all of the circumstances into account and in the immediate case even if I had found Ms. Cormier to be an independent contractor, I would not have ignored those years of their relationship. In either case, considering all of the relevant factors and the particular facts of this case, I conclude that the reasonable notice period for Ms. Cormier at the time of her dismissal is twenty-one months. [emphasis added]

It has generally been believed or maybe assumed is the better way of phrasing it, that where an individual provided services as a true independent contractor the time during which they provided those services as an independent contractor should not be taken into account when calculating their length of service should for purposes of determining the period of reasonable notice at common law.

The *Cormier* case may suggest otherwise.

But we should not get too ahead of ourselves. Mr. Justice Perell's comment as quote above was made in what we call in the business *obiter* (from the Latin meaning an incidental remark not essential to the decision or establishing a precedent). The reason it's a passing comment is because the judge already found Cormier to have been a dependent contractor during the relevant time.

Some Takeaways

One point here is that work relationships can be difficult to pin down where the parties set it up (or try to) as an independent contractor arrangement. These arrangements, while certainly possible, need to be entered into with caution and with eyes open. Work relationships can evolve over time. Nothing is static in

employment and what started as an independent contractor relationship can morph into something else and it's important to be alive to this and responsive as things look like they're changing or solidifying into something that the parties might not have originally intended. Getting things wrong can be costly.

But on the controversial point in the *Cormier* case, we will have to see if other judges pick up the baton that Mr. Justice Perell seems to be holding out. Sometimes *obiter* comments get traction while other times they are treated as a "one off" and are largely ignored.

Confidentiality in Settlement Agreements

Most cases settle without litigation or, if litigation is commenced, prior to a formal hearing on the merits (*i.e.* trial). The terms of settlement are invariably memorialized in Minutes of Settlement or other written settlement documents.

One important term of settlement will be confidentiality, in particular for the employer. In short, the employer doesn't want the employee discussing the terms of settlement with anyone, save a limited circle or as required by law. The employer is settling one case, it's not setting a precedent, or pattern in other cases and, so, it wants to protect itself as much as is possible.

But are confidentiality provisions worth the paper they're written on?

There have been a few cases that suggest that confidentiality provisions in settlement documents are more than just words on a page.

A leading case is *Jan Wong v. The Globe and Mail Inc.*, 2014 ONSC 6372 (CanLII). An arbitrator concluded that the grievor had breached a Memorandum of Agreement ("MOA") that had settled grievances filed regarding the grievor's employment with The Globe and Mail. The Minutes contained the following:

> The Grievor agrees that until August 1, 2009, she will not disparage The Globe and Mail or any of its current or former employees relating to any issues surrounding her employment and termination from The Globe and Mail. The Globe and Mail agrees that until August 1, 2009, to not disparage the Grievor.

The Minutes contained a provision regarding confidentiality that provided that the parties agreed "not to disclose the terms of this settlement" with certain specific exceptions.

In terms of the consequences of breaching the confidentiality obligation, the Minutes provided:

> Should the Grievor breach the obligations set out in paragraphs 5 and 6 above, Arbitrator Davie shall remain seized to determine if there is a breach and, if she so finds, the Grievor will have an obligation to pay back to the Employer all payments paid to the Grievor under paragraph 3.

The employee wrote a book. There was an advance article in a magazine in which she commented on The Globe and Mail's reasons for firing her. The Globe objected to her characterization of the reasons why it had fired her and contacted the publisher of the book about this. The publisher refused to publish the book and the grievor self-published the book in May 2012.

The Globe applied to the arbitrator arguing that 23 phrases in the book breached the confidentiality provision in the Minutes. The Arbitrator concluded that at least four of the twenty-three impugned phrases in the book did breach the Minutes.

In the result, the arbitrator required the grievor "to pay back the payments received under paragraph 3 of the MOA if she breached the nondisclosure obligations set out in paragraph 6 of the MOA."

The grievor sought judicial review of the arbitrator's award. The Divisional Court found that she did not have standing to bring the application, but went on to consider the other issues raised and found that the arbitrator's conclusion was correct.

More recently, another arbitrator considered the consequences of a breach of a confidentiality provision in Minutes of Settlement. The case is *Acadia University v Acadia University Faculty Association*, 2019 CanLII 47957.

Minutes were voluntarily executed by Acadia, the Faculty Association, and the grievor. According to the award:

> … the parties agreed "to keep the terms of these Minutes strictly confidential except as required by law or to receive legal or financial advice."
>
> The Minutes contained the following undertaking: "If asked, the parties will indicate that the matters in dispute proceeded to mediation and were resolved, and they will confine their remarks to this statement. Stated somewhat differently, it is an absolute condition of these Minutes that no term of these Minutes will be publicly disclosed."
>
> One of the terms of the Minutes provided for the payment of a specified amount.

The arbitrator found that the grievor had breached the confidentiality provision in the Minutes of Settlement as a result of certain posts to his Twitter account. In the result, according to the arbitrator:

> Settlements in labour law are sacrosanct and given the repeated and continuing breaches, together with the absence of any mitigating circumstance or explanation, I find that the University is no longer required to honour the payment provision.

In an earlier case called *Tremblay v. 1168531 Ontario Inc.*, 2012 HRTO 1939, the Human Rights Tribunal of Ontario found that the applicant had breached the confidentiality provision in the Minutes of Settlement. The employer refused to pay the balance of the monies under the settlement. The employee alleged that this was a breach of the terms of settlement.

The Tribunal found that the employee had breached the confidentiality provision in the Minutes of Settlement, but ordered the respondent to comply with the terms of settlement, less $1,000 as a result of the breach of confidentiality.

Some Takeaways

There are different types of confidentiality provisions that can be included in settlement documents. Some are softer while others have more express bite. In the end, where one of the parties breaches those obligations and this can be proven through the evidence, there can be consequences, though the exact consequences aren't always clear. As Arbitrator Kaplan noted in the *Acadia University* case, "settlements in labour law are sacrosanct" and clear and unambiguous terms, voluntarily entered into, must be given effect.

Mitigation and Damages in Wrongful Dismissal

The Ontario Court of Appeal recently looked at and discussed the issue of mitigation and damages in wrongful dismissal cases in *Dussault v. Imperial Oil Limited*, 2019 ONCA 448 (CanLII). The employer dismissed Dussault and Pugliese (the "Plaintiffs") without just cause following the sale of part of the business of Mac's Convenience Stores Inc.. The Plaintiffs were very long service employees (Dussault had 39 years service and Pugliese had 36 years of service).

They sued alleging that they had been wrongfully dismissed and argued that the employer had failed to provide them with reasonable notice of termination or pay in lieu at common law. The employer defended largely on the basis that each of the Plaintiffs had failed to mitigate their alleged damages by accepting offers of employment with the purchaser.

The offers were conditional on the sale from Imperial to Mac's taking place and made clear that the plaintiffs would be expected to sign releases in Imperial's favour in order to receive a gratuitous lump sum payment.

Without getting into all of the details of the pre-sale and post-sale compensation as reflected in the offers, the offers provided that the Plaintiffs' base salaries would remain the same as their base salaries with Imperial for a period of eighteen months. According to the judge, "while they were not told what their salaries would be after eighteen months, they were given the salary range for comparable employment at Mac's. In Ms. Pugliese's case she was told that the salary range for similar employment at Mac's was from a midpoint of $56,500 to a highpoint of $69,952, and in Mr. Dussault's case he was told that it ranged from a midpoint of $85,000 to a highpoint of $102,000." This was a significant reduction in their pre-sale base salaries (Dussault's pre-sale base salary was $190,200 and Puglese's pre-sale base salary was $156,700).

In addition, both offers of employment included an explicit term that Mac's would not recognize their years of service with Imperial.

Although it was noted that, if they accepted Mac's offers of employment, Imperial would provide the plaintiffs with "lump-sum payments" to make up for the reduction in value of the benefit plans, it would seem that the employer "did not disclose to the plaintiffs the amount of the lump-sum payment and advised that it would only be disclosed after the plaintiffs accepted Mac's employment offer, resigned from Imperial and signed a release in favour of Imperial".

Both Plaintiffs rejected the purchasers' offer of employment.

On August 12, 2016, the employer notified Pugliese that it was terminating her employment effective on October 7, 2016. She was provided with a severance payment of $78,100, which represented her statutory entitlement under the *Employment Standards Act, 2000*.

On September 2, 2016, the employer gave Dussault notice of termination of his employment effective October 31, 2016. He was provided with a severance payment of $94,800 which represented his entitlement pursuant to the *Employment Standards Act, 2000*.

The Plaintiffs chose to retire following the end of their working notice period and they began receiving monthly unreduced pension benefits, monthly Registered Pension Plan Bridge payments payable to age 65, and health, dental, life insurance and other benefits. In addition, Mr. Dussault received a lump sum payment from Imperial's Supplemental Pension Arrangement.

Neither Dusault or Pugliece had found new employment at the time the summary judgment motion was heard.

Madame Justice Favreau awarded 26 months reasonable notice or pay in lieu to each of the Plaintiffs having regard to the *Bardal* factors and other circumstances which were somewhat unique.

On the issue of mitigation, the motions judge considered the employer's argument that the Plaintiffs had failed to mitigate because they did not accept the purchaser's offers of employment. The judge rejected this argument for a variety of reasons:

- The offer from Mac's was made before the plaintiffs' employment was terminated (see *Farwell v. Citair, Inc. (General Coach Canada)*, 2014 ONCA 177 (CanLII)).
- Given the employer's requirement that the plaintiffs sign a release in order to get their lump sum payment, it was reasonable for the plaintiffs not to accept the Mac's offers. (see *Filmore v. Hercules SLR Inc.*, 2017 ONCA 280 (CanLII))
- It was not reasonable to require the plaintiffs to accept an offer that did not recognize their years of service with Imperial.
- The plaintiffs' would be required to "hide their higher pay from other employees at Mac's" which the judge said "would make for a potentially difficult working environment" and appeared to say that this would create an "atmosphere of hostility or embarrassment" which they were not required to accept as part of their mitigation obligation.
- There were significant difference between the post-sale offer and the pre-sale terms of employment. The judge also considered the fact that "Imperial's failure to disclose the amount of the lump sum payment did not allow the plaintiffs to assess whether the Mac's offer in combination with the lump sum made for comparable employment."

In the circumstances, the Plaintiffs were not required to accept the purchasers offers in mitigation of their damages.

The Court issued a follow up decision dealing with damages which you can read at *Dussault v. Imperial Oil Limited*, 2018 ONSC 4345 (CanLII). The decision sets out a good review of damages principles and whether damages ought to be reduced by pension income.

In the end, the Court awarded Dussault $328,505.00 in damages plus pre-judgment interest and Pugliese $290,640.06 in damages plus pre-judgment interest, along with costs in the amount of $75,000.

The Court of Appeal

The employer appealed and the employee cross-appealed. I will just deal with the issue of mitigation here.

The Court of Appeal summarized the law as follows:

> We start with the following well-established principles: to mitigate any damages arising from dismissal, an employee must make reasonable efforts to seek comparable employment; and it remains the employer's burden to prove the

> employee's failure to do so: see: *Red Deer College v. Michaels*, [1976] 2 S.C.R. 324. "Comparable employment" does not mean "any employment" but comprehends employment comparable to the dismissed employee's employment with his or her former employer in status, hours and remuneration: *Carter v. 1657593 Ontario Inc.*, 2015 ONCA 823, at para. 6.

The Court of Appeal agreed with the motions judge that the plaintiffs were not required to accept the purchasers offer of employment as it would have resulted in "an immediate, substantial decrease in benefits and, after 18 months, a material drop in base salary." Further, waiving years of service as part of the offer was also problematic as was the fact that the employer did not disclose the amount of the lump-sum payment they would make to offset the losses.

Some Takeaways

An employee who is terminated without just cause and is entitled to be provided with common law reasonable notice or pay in lieu of termination is required to mitigate their damages by making reasonable efforts to secure replacement employment. The employer bears the onus of proving that the employee failed to satisfy this onus.

Of note is that the employee is required to make reasonable efforts and, as the *Dussault* case makes clear, the employee is not required to accept any employment. The employee is required to accept comparable employment. As was said by Levitt in *Law of Dismissal in Canada* (3rd edition):

> An employee can reject an offer of alternative employment if it is reasonable to do so under the circumstances from the standpoint of the plaintiff's interests.

The issue of mitigation is one factor that should be considered in deciding how to structure severance offers. It is also a defence raised by employers in most wrongful dismissal cases. That said, it is not a silver bullet and the onus on the employer is significant.

The case also provides some helpful guidance about offers and the reasonableness of those offers in the context of a sale of a business. The case may also inform what conditions should be negotiated between the vendor and purchaser as relates to the parameters of the offers of employment and which should be memorialized in the purchase documents.

Gathering Evidence Key to Success in Accommodation Cases

The duty to accommodate under the *Human Rights Code* is complicated. The duty has a procedural and substantive component and is an individualized exercise.

According to the leading Canadian case of *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees' Union*, 1999 CanLII 652 (S.C.C.) the procedural component of the duty to accommodate requires that the employer take steps to understand the employee's disability-related needs and undertake an individualized investigation of potential accommodation measures to address those needs.

The Ontario Divisional Court explained the procedural aspect of the duty to accommodate in *ADGA Group Consultants Inc. v. Lane* 2008 CanLII 39605 (ON SCDC), [2008] O.J. NO. 3076:

> The procedural duty to accommodate involves obtaining all relevant information about the employee's disability, at least where it is readily available. It could include information about the employee's current medical condition, prognosis for recovery, ability to perform job duties, and capabilities for alternate work. The term undue hardship requires respondents in human rights cases to seriously consider how complainants could be accommodated. A failure to give any thought or consideration to issue of accommodation including what, if any, steps could be taken constitutes a failure to satisfy the "procedural" duty to accommodate.

The substantive component of the analysis considers the reasonableness of the accommodation offered or the employer's reasons for not providing accommodation.

The employer bears the onus of demonstrating what considerations, assessments, and steps were undertaken to accommodate the employee to the point of undue hardship.

Many accommodation cases are lost because the employer failed to *reasonably* engage with the employee in gathering information, including medical information, necessary to meet the procedural element of the duty to accommodate. It failed, in other words, to implement a proactive disability management process. It did not seek to understand the disability related needs of the employee that required accommodation and, as such, the accommodation attempts (or refusal to accommodate) was flawed.

Employers will sometimes act on the basis of assumptions about the needs that require accommodation, rather than on the basis of objective medical evidence. Basing decisions on assumptions (or a Google search) is problematic and will generally backfire when accommodating under the *Human Rights Code*.

Employers have a legitimate business interest in managing disability related absences. The majority of the Supreme Court of Canada in *Honda Canada Inc. v. Keays*, [2008] 2 SCR 362 put it this way:

> … I accept that the need to monitor the absences of employees who are regularly absent from work is a *bona fide* work requirement in light of the very nature of the employment contract and responsibility of the employer for the management of its workforce.

This does not provide the employee with a green light to make unreasonable requests of the employee. It does, however, provide some support for making reasonable requests of the employee, including for certain medical information, to ensure that the multi-party duty to accommodate obligations are met.

Prima Facie Discrimination and Addiction

The Ontario Divisional Court released a decision dated June 10, 2019 in which it reviewed the test of *prima facie* discrimination under the *Human Rights Code* (and the collective agreement, in that case). The case is *Ontario Nurses' Association v. Royal Victoria Regional Health Centre*, 2019 ONSC 1268.

In brief, a nurse ("P.S.") was caught stealing narcotics from her employer (a hospital). She made a variety of admissions during the initial interview with the employer, including that she had injected herself with morphine and fentanyl in the washroom, that it was hospital property and that, after taking the drugs she returned to work. She was suspended pending further investigation.

She attended at the drop in clinic of her family physician. The physician completed a form noting that the nurse suffered from a "substance abuse disorder", among other things. The nurse said that she gave this form to the hospital.

A second interview was scheduled. According to the Divisional Court:

> P.S. confirmed that she had taken drugs from the Hospital and had injected them. P.S. admitted at this interview that she had taken the drugs by associating the various withdrawals from the ADU to various patients. She also admitted to stealing non-narcotic medication and paraphernalia related to drug use.

Her employment was terminated and a grievance was immediately filed alleging that she had been "unlawfully discriminated against her on the basis of a disability contrary to the Collective Agreement and the *Human Rights Code*, R.S.O. 1990, c. H.19 (the "OHRC") by failing to accommodate her disability."

She was charged with theft under the *Criminal Code* and pleaded guilty on August 7, 2014.

The matter proceeded to arbitration. The arbitrator reviewed two (2) lines of decisions:

- Those relied on by the employer as authority for the proposition that, in the absence of overt discriminatory conduct by the employer, there is no human rights analysis to undertake.
- Those relied on by the union as authority for the proposition that, once a prima facie case of discrimination is established by the employee/union, that focus is "on a contextual analysis to determine whether there is a duty to accommodate. In these cases, careful attention is paid to the relevant facts to determine the extent of the linkage between the illness and the conduct that led to the termination."

The Divisional Court summarized the arbitrator's reasoning as follows:

> The Arbitrator held that the grievance should be dismissed, regardless of which line of decisions he applied as the law. He stated that it would be "easy" to find that there was no discrimination if he accepted the reasoning in [the employer decisions]. He went on to say that if he accepted the reasoning of the [union's decisions], he would reach the same conclusion on the basis of three factors that distinguished this case from the [union's decisions]:
>
> 1. P.S. pleaded guilty to the criminal offence of theft and therefore the thefts were voluntary;
> 2. Her own treating physician has stated that the recovery of P.S. from her addiction would not be assisted by returning to the Hospital; and
> 3. Of particular importance to the Arbitrator, P.S. was gainfully employed in two other health care settings, including at a hospital, by the time the arbitration was held.

The Divisional Court discussed the state of the law and referred to the Supreme Court of Canada decision in *Stewart v. Elk Valley Coal Corp*, 2017 SCC 30 (CanLII) which was released after the decision of the arbitrator and was not, of course, considered by him or the parties:

> *Elk Valley* confirms that a complainant must demonstrate the following matters to make out a case of *prima facie* discrimination:
>
> 1. That he or she has a characteristic that is protected from discrimination under the relevant Code;
> 2. That he or she has experienced an adverse impact with respect to the event; and
> 3. That the protected characteristic was a factor in the adverse impact.

The employee/complainant bears the onus of establishing a *prima facie* case of discrimination. If this burden is met, the onus shifts to the employer to demonstrate that it has accommodated the employee/complainant up to the point of undue hardship.

Discrimination can be direct or indirect. The Divisional Court agreed that there was no direct discrimination in this case. However, the real issue before the arbitrator was whether there was indirect discrimination. The Court relied on *Wright v College and Assn of Registered Nurses of Alberta (Appeals Committee)*, [2012] A.J. No. 943 as the statement of the law on indirect discrimination:

> As a result of the Appellants' disability, the standard or rule being equally applied, imposes "penalties or restrictive conditions not imposed on other members": *O'Malley* at para. 18. The standard or rule discriminates because it affects Ms. Wright and Ms. Helmer, persons with a disability of addiction "differently from others to whom it may apply": *O'Malley* at para. 18. Treating all nurses the same creates serious inequality, and certain persons such as Ms. Wright and Ms. Helmer are likely "made to feel that ... they are less capable, or less worthy of recognition or value as human beings or as members of Canadian society, equally deserving of concern, respect and consideration" because of their disability: *Egan v. Canada*, 1995 CanLII 98 (SCC), [1995] 2 S.C.R. 513 at para. 39.

The question in the *ONA* case was whether the termination of P.S. on the grounds of theft and breach of trust "was discriminatory because it affected her differently as a person with an addiction than all other nurses who might be terminated on such grounds."

The issue turned, in part, on "whether the complainant has established that her addiction was the cause of her actions in stealing drugs from the Hospital." In other words "the connection between an addiction and adverse treatment cannot be assumed and must be based on evidence".

The Divisional Court concluded that the arbitrator failed to consider the test for indirect discrimination and therefore failed to consider whether P.S. had demonstrated that indirect discrimination had occurred in the particular circumstances of her termination.

The arbitrator appeared to conclude or assume that there was no causal connection between the disability and the adverse consequence (termination) and the Court found that this was based on an unreasonable determination that her actions were voluntary.

The Court remitted the grievance back to the arbitrator and directed him to "address whether the Hospital engaged in indirect discrimination in the termination of P.S.'s employment, based on the evidence in the record of the arbitration."

Some Takeaways

This case highlights that human rights cases are complex, but confirms that there is a two (2) step process - specifically, the employee/complainant must prove a *prima face* of discrimination and, once that is done, the onus shifts to the employer to demonstrate that it has accommodated the employee/complainant up to the point of undue hardship.

There must be some connection or causal relationship between the disability and the adverse treatment. This must be considered. It can't be assumed that there is no causal relationship, this must be looked at and considered based on the evidence and the surrounding circumstances.

I am struck by yet another reminder that is worth repeating - there is no one size fits all solution to any employment issue. Templates, precedents, and checklists might be helpful to a point, but they are no substitute for *thinking* through individual situations and making tailored and personal decisions that fit the unique circumstances and documenting these efforts.

Age Bias in Hiring

The *New York Times* has an interesting article in the June 7, 2019 issue entitled New Evidence of Age Bias in Hiring, and a Push to Fight It. As you would expect, the focus is on the United States.

There is a perceived shortage of workers as the unemployment rate continues to remain low. Corporations complain that there is a shortage of workers yet, "the shadow of age bias in hiring, though, is long".

Although the article is U.S. focussed, it is certainly worth reading and links to some interesting supplemental reading.

From a Canadian perspective comes the recent CBC article *Why mid-life could be the best time to change careers* which is worth a read. With respect to ageism, the article provides:

> One barrier workers may experience in their quest to land a job in a different field is ageism. …. But recruiters would be wise to leverage that value … especially given that careers are lengthening, along with average life span.

Thousands of Ontario Employers Violating Anti-Harassment Law

According to the Globe and Mail article *New data show thousands of Ontario companies violating country's toughest anti-harassment law*:

> More than 3,500 employers were cited for labour violations by provincial inspectors over an 18-month period ending in January, 2017, according to Ministry of Labour data obtained through a Freedom of Information request. Up to now, however, no prosecutions have been initiated under harassment-related laws, ministry spokeswoman Janet Deline said. Instead, employers have been given deadlines to comply with the law.
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> * * *
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> Of the total violations, 16 per cent were for failing to have a written policy, which legal experts consider key to preventing harassment, and 22 per cent were for failing to have a written program laying out how workers can report harassment. These were the two most-violated sections of the law, followed by the requirement to investigate all harassment complaints.

Restaurants far outpaced "all other types of workplaces. Full-service restaurants accumulated 704 violations, while fast-food restaurants racked up 628."

The article which followed a Freedom of Information request is an interesting read.

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