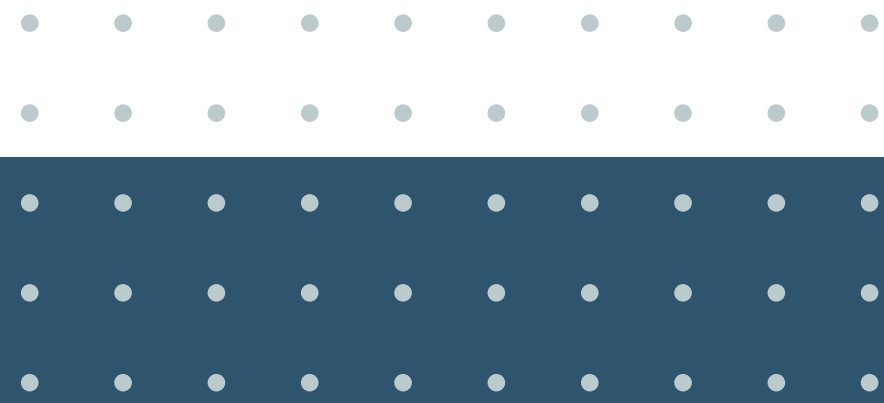




THE CURE FOR WHAT AILS YOU

Walking the Fine Line of Workplace Mental Health Issues and the Duty to Accommodate



Presented by

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Importance of Workplace Mental Health and Wellness

- Mental Health Issues are becoming more prevalent in all aspects of our lives, and your workplaces are no exception.
- This magnifies the importance of workplace elements such as:
 - Culture
 - Workplace Wellness Programs
 - Managing Organizational and Workplace interpersonal relationships



HR “Softer Side” Workplace Strategies

- Work together, play together, stay together
- Workflow monitoring and Management
- Provide meaningful work and regular feedback



Stress Claims

- The frequency and duration of stress claims can be reduced by:
- Employee Assistance Programs;
- Respectful Workplace / Harassment Policies;
- Wellness programs;
- Workplace flexibility



Stress Claims

- The frequency and duration of stress claims can be reduced by:
- Reduced overtime, callbacks, short deadlines, etc.;
- Reorganization/redistribution of work; and
- Enhanced training or upgrading



Alberta Human Rights Act

- No employer shall:
 - (a) refuse to employ or refuse to continue to employ any person, or
 - (b) discriminate against any person with regard to employment or any term or condition of employment, because of the ... physical disability, mental disability ... of that person or of any other person.



Strategies for Suspected, Non-disclosed Mental Illness/Addiction

- Signs / Suspicion of illness not disclosed by an employee
- Potential use of “Two Roads Meeting”:
 - Do you need help? / We are here to help; or
 - If there are no illness / addiction issues, clearly communicate workplace performance or conduct concerns, disciplinary or potential disciplinary consequences
- Employers Duty to Inquire – when there are clear signs that would lead a reasonable observer to conclude there may be disability, illness or addictions issues affecting the Employee’s conduct or performance



A Balancing Act:

- The accommodation process seeks to balance employees' rights to equal opportunity to employment as against employers' rights to run a safe, efficient and effective workplace.



Obligation: Duty to Accommodate

- Employers must take reasonable steps to modify workplace requirements, practices or policies to meet the specific needs of an ill or disabled employee
- The burden of proof of illness or disability rests with the employee



Obligation: Duty to Accommodate

- A few examples of accommodations:
 - Granting leave of absence, with or without pay;
 - Modifying work schedules, environment or duties;
or
 - Purchasing specialized equipment



Limitation: Undue Hardship

- Employers must accommodate ill or disabled employees to the point of undue hardship
- Undue Hardship: The burden upon the employer is substantial and unreasonably onerous when viewed objectively
- Burden of proof of undue hardship rests with employers



Limitation: Undue Hardship

- Few examples of undue hardship:
 - Ridiculous financial cost;
 - Unreasonable disruption of student learning or operations;
 - Interference in normal student learning or operations beyond mere inconvenience;
 - Profound adverse effects on other employees;



Limitation: Undue Hardship

- A few examples of undue hardship:
 - Creation of health or safety risks;
 - Failure to meet bona fide occupational requirements; and
 - No requirement to create a job where none exists



Verifying Medical and Disability Claims

- Employers' right to employees' medical information;
- Dealing with “scratch pad” doctors' notes;
- Obtaining employees' medical information



Return to Work Programs

- Key elements of Return to Work programs:
 - Constant and regular contact;
 - Ongoing evaluation of medical capabilities;
 - Identification of modified work opportunities;
 - Established policies and procedures; and
 - Employee Assistance Programs, counseling and rehabilitation.



02.

So you've reached the point of undue hardship/frustration – now what?

- Frustration of contract
- Undue hardship
- If established, can conclude employment with no notice or severance



02.

Key practical strategies and procedures

- Make sure you are there and ensure you have an updated and clear medical prognosis



02.

Key practical strategies and procedures

IF ENTITLEMENT TO CONCLUDE EMPLOYMENT IS
RELATIVELY CLEAR

- Just do it
- Do not delay
- Just cause contract is frustrated now does not guarantee it will still be so next month or next year
- Generally do not let these circumstances sit without your attention and action. The one exception would be a valuable employee that you are hoping will return despite the prognosis.



02.

Key practical strategies and procedures

IF LEGAL ENTITLEMENT TO TERMINATE IS UNCLEAR

- Obtain updated medical prognosis
- Potential negotiated conclusion of employment for severance payment
- Potential non-negotiated conclusion of employment with some risk



02.

Primary Risks

HUMAN RIGHTS COMPLAINT

- Prohibits termination by reason of illness or disability unless continued employment constitutes undue hardship
- Termination breaching the Human Rights legislation has a wide range of potential repercussions
 - Pure breach of Human Rights damages typically capped at \$30,000 (extreme case \$75,000)
 - Loss of wages
 - Reinstatement with back pay
 - Risk of loss of wages and back pay practically less if employee unable to work



02.

Primary Risks

WRONGFUL DISMISSAL LEGAL ACTION

- Employee would allege contract not frustrated and sue for wrongful dismissal
- Claim to severance on normal principles with potentially unique twists if medically unable to work during the applicable severance period



02.

Primary Risks

WRONGFUL DISMISSAL LEGAL ACTION

- Potential for additional damage claim for bad faith or punitive damages
 - Note the change to bad faith law from 2008 Supreme Court of Canada case (Keyes v. Honda)
 - Employee must show actual damage from bad faith conduct beyond normal dismissal damages



02.

Defence Strategies for Human Rights Complaints

- If risk is present, the conciliation step can yield excellent and early settlement results if handled pro-actively
- If the employer has a strong case, we recommend:
 - Early and thorough written response to the complaint
 - Treat the Director's review like a trial and invest necessary time and effort to respond thoroughly and convincingly to the Director
 - Our experience is, very often in cases where employer's case is strong and necessary time and effort is put into responding to Director, the Director will often dismiss the complaint ,which is often affirmed by Commissioner, bringing an end to Human Rights Complaint.



02.

Disability Benefit Implications

- Often employees are on LTD when being terminated for frustration or undue hardship.
- Normally as long as employee's condition arose while employed, subsequent termination will not, alone, disqualify employee from continued LTD payments.
- However, in most cases you should check to be sure.
- If employee is terminated and subsequently it is found that contract was not frustrated and severance is owed, severance compensation could include any loss of LTD benefits if loss of such benefits was the result of the termination



02.

Critical Role of Timing and Strategy

- Strongly recommend system that follows up with employees for updated prognosis at reasonable intervals
- Often best times to proceed to conclude employment:
 - Long term disability commenced and medical prognosis of no anticipated return for reasonably foreseeable future or at all.
 - WCB letter advising providing employee with retraining and alternate job search assistance
- Often best times to negotiate conclusion of employment:
 - Employee appears to be claiming sick as a result of not wanting to continue in the workplace but needing income
 - WCB or LTD pushing employee back to work but employees not wanting to return



02.

Concluding Comments

- Timing, strategy and an understanding of employer rights is critical.
- A system of seeking reasonable updates on medical prognoses for absent employees is a must to properly manage your risk in this area.
- While this outlined list of issues and strategies will hopefully work as a valuable check list for you, please seek legal advice when dealing with these issues as each circumstance is unique and this area of the law a virtual mine field.





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