What's New in HR Law

Employer Must Have Evidence to Support Accommodation Plan

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Bottom Line

An arbitrator found that an employer violated the Ontario *Human Rights Code* by requiring a diabetic employee to leave his workstation to test his blood glucose and to inject insulin because this stigmatized the employee and created a negative perception about his disability. There was no evidence to support the employer's claim that the employee's self care posed a hazard to other employees.

Facts: Diabetic employee directed to inject insulin in private office

An employee working at a 24/7 call centre was diagnosed with diabetes. As a result, he had to test his blood glucose level and inject insulin at his workstation 15 minutes before his break.

The call centre employees worked at workstations/cubicles in an open space. They did not have assigned cubicles and would simply work in whatever cubicle was available on their shift. The employer did not have these cubicles cleaned between shifts but instead provided employees with disinfectant wipes so they could clean the cubicles themselves.

At first, the employer was supportive of the diabetic employee's self-care. However, within a few months, a union steward working in the area reported that the employee testing his blood and injecting insulin at his cubicle might be a health and safety issue.

After receiving this report (and a request from the employee to provide his supervisors with a diabetes information sheet), the employer told the employee that he should stop monitoring his blood glucose or injecting insulin at his workstation. Relying on the workplace health and safety policy, the employer directed the employee to instead use one of the nearby offices that was often empty. The employer was also willing to change the employee's break schedule to coincide with the employee's testing schedule.

The Claims: Employee claimed discrimination; employer relied on its health and safety obligations

The employee claimed that the employer's new direction was discriminatory. He testified that being told to use the offices for his care made him feel alienated and that his disability was unwelcome and inconvenient for his co-workers. He also stated that it was disruptive to his work to leave his workstation to administer his care.

The employer defended its action by stating that the employee's self care posed a health and safety risk to other employees. The employer alleged that the kits used by the employee were biohazardous, and there was a risk that blood-borne pathogens could be transmitted to other employees. Therefore, the employee should test his blood levels and inject insulin privately and away from other employees. Notably, however, the employer provided no medical or scientific evidence in support of its position.

The Decision: No medical or scientific evidence to support the employer's health and safety concerns

It was clear that the employee had a disability that was recognized under the Ontario *Human Rights Code* ("the *Code*"). And in order to manage that disability, the employee needed to monitor his blood glucose level and administer insulin.

The arbitrator found that requiring the employee to use a private office was discriminatory because it was based on the assumption that the employee's diabetic care posed a risk to his co-workers. But such an assumption was not supported by objective evidence. And to the extent that there was any risk, the arbitrator found that it was no more severe than any other health and safety risk associated with sharing workstations. Therefore, the employer's direction had an adverse impact on the employee with a connection or nexus to the disability.

It was then up to the employer to justify the discriminatory requirement. The arbitrator found that the employer was unable to do so. After reviewing the process by which the employee actually administered his diabetic care, the arbitrator found that the employer failed to demonstrate that the employee's care was in fact a health and safety risk to other employees.

The employer produced no medical or scientific evidence to support that allowing the employee to do his care at his cubicle posed a hazard to his co-workers. It was also insufficient to rely on a few lines in the medical equipment booklets that say that used equipment was biohazardous. The employer needed to explain that hazard and the extent to which it placed other co-workers at jeopardy (if at all).

The only accommodation the employee required was a few minutes a few times each shift to test his blood glucose and administer insulin if needed. The arbitrator accepted that he could do this quickly and safely in his cubicle.

On the other hand, requiring the employee to go to a private office meant that he would be taking more time away from his work. Moreover, it sent a message to his co-workers that there was something dangerous about his condition. The arbitrator noted:

> [The employee] can do that at his desk with minimal disruption to his work. However, the Employer insists that he do it in a private office which is a greater disruption to his work and which sends the message that what he is doing is a health and safety risk to his colleagues i.e. that he could pass on some kind of infectious disease to them through ordinary diabetic care. That is not the case and, therefore, forcing the [employee] to use the office is a violation of the collective agreement and the Code.

As a result, the arbitrator ordered that the employer to stop requiring the employee to leave his cubicle to monitor his blood glucose and administer insulin. The arbitrator also awarded the employee $1,000 as damages for injury to the employee's dignity.

Check the Box

Although employers may have good intentions when responding to employees' reported concerns about health and safety, they must nonetheless comply with the *Code* when accommodating an employee with a disability.

If an employer's concerns are related to the health and safety of other employees, it must rely on scientific and medical evidence to support its directions – and not just unsupported assumptions of an employee's disability. A failure to do so runs the risk of isolating and stigmatizing the employee and creating an incorrect and negative perception among the other employees that the disabled employee presents a health and safety risk.

To avoid this pitfall while still appropriately accommodating those with disabilities, employers should consider the following:

- **Involve the employee with the disability in the accommodation process:** Although employees are not entitled to solely dictate their own accommodation, involving them in the process can encourage an open dialogue about the employee's needs and perceptions. It may also increase the likelihood of identifying a successful accommodative measure.

- **Consult with the employee's treating medical practitioner:** If an employer has concerns about an employee's disability, including how it may manifest in the workplace or whether it presents any health and safety issues, then the employer should consult with the employee's treating medical practitioner. Ask the practitioner for more information or clarification, particularly about any concerns that you may have about the preferred or suggested accommodation.

- **Do your own research if necessary:** If the employee's treating medical practitioner is unwilling or unable to co-operate or address your concerns, then consider seeking a third party's medical or scientific opinion. Wherever possible, an employer's response or directions should be based on such objective and medically supported data.

- **Train your employees:** Employees should be trained and encouraged to immediately bring forward any health and safety concerns to their manager. However, the training program should also include the employer's duty to accommodate those with disabilities. Employers should also invite employees to appropriately challenge incorrect assumptions regarding physical and mental disabilities.

Citation: International Brotherhood of Electrical Workers, Local 636 v. Tyco Integrated Fire and Security Canada Inc. 2018 CanLII 80194

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Should you need more information about pay transparency or pay equity obligations, please contact Diane Laranja at 416-408-5565, or your regular lawyer at the firm.

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