What's New in HR Law

Human Rights Tribunal Reiterates Need for Evidence When Refusing to Accommodate

April 18, 2019

Bottom Line

The Human Rights Tribunal of Ontario (the "Tribunal") found that an employer violated the Ontario *Human Rights Code* (the "Code") when the employer concluded, without evidence, that an employee was unable to perform the essential duties of his position after hip replacement surgery.

Employee sought to return to work gradually after hip replacement

The employee was working as a maintenance technician at the employer's Hamilton steel mill when he underwent hip replacement surgery due to osteoarthritis. Approximately six months after the surgery, the employee's medical practitioners cleared him to return to work, albeit gradually, until he could undergo surgery to his other hip.

The employee's medical practitioners opined that the employee could work his regular eight-hour shift at his own pace and as tolerated. However, they said he should not be "on-call" – that is, available to come in after hours to perform urgent repairs. This restriction would allow the employee to rest at the end of the day and between shifts.

Employer insisted the employee could not perform his job

The employer initially accommodated the employee's restrictions, including the employee's inability to work on-call.

Three weeks into the employee's graduated return to work, however, the employer arranged a follow-up meeting with its medical services nurse. At the meeting, the employee's supervisor indicated that, in fact, the department was *not* able to accommodate the employee's restrictions. The supervisor then scheduled another meeting with the employee to review his medical documentation and to require the employee to first meet with the employer's in-house physician.

At the subsequent meeting, the supervisor reiterated that the employee could not be accommodated in his own position. He began to look across the plant for other positions for the employee. He also gave the employee forms to apply for short-term disability. Because the supervisor was unable to find an alternative position, the employee remained off work on short-term disability until after his second hip replacement surgery.

The Decision: The employee could have been accommodated; there was no reason to look for alternative positions

The key question before the Tribunal was whether the employee could have been accommodated from the time that he was able to return to work on a graduated basis until his second hip replacement surgery.

It is important to note that the employer agreed that it could in fact accommodate the employee's restrictions if the only restrictions were an inability to work at his own pace and to be on-call. But it seemed that the supervisor refused to accommodate the employee to work in his original position because of his own beliefs of the employee's medical condition and restrictions.

Particularly, the employer argued that it had health and safety reasons for not allowing the employee to perform his job. The employee was walking with a limp at the time, which the supervisor felt could cause the employee further injury. The supervisor testified that the uneven ground and potential hazards in the workplace posed unacceptable health and safety risks to the employee while he favoured his hip.

The Tribunal agreed that the employer may be obligated to determine whether an employee continuing to work may constitute a health and safety issue. However, it found that the supervisor's concern in this case was not based on any medical evidence, restriction, or recommendation. It was based solely on the employer's observation that the employee was limping. If the employer was concerned about the employee's health and safety, then it ought to have raised these concerns with the employee directly. And if the employer had done so here, it would have learned that the employee's surgeon had actually turned his mind to this issue and concluded that it was better for the employee's recovery to continue working.

The Tribunal concluded that the employer violated its procedural and substantive duties under the Code. It stated:

> […] I find that the respondent has not met its obligations under […] the Code. It did not properly consider the medical evidence before it, and reached conclusions respecting the applicant's abilities based on casual observations and selective, narrow interpretations of medical documents, without seeking clarification, and without involving the applicant in the process. The respondent has not been able to establish that the applicant could not do the essential duties of his job short of undue hardship.

As a result, the Tribunal ordered the employer to pay the employee over $16,000 in lost wages and an additional $15,000 as monetary compensation for injury to dignity, feelings, and self-respect.

The Tribunal also ordered the employer to review and revise its current policy addressing disability accommodation and to provide training on disability accommodation for all front-line supervisory staff at least once every three years.

Check the Box

We recently wrote an article on the importance of developing an accommodation plan based on objective and accurate medical evidence.

This new case serves as another reminder that employers are well-advised to involve employees in the accommodation process, particularly if the employer has a concern about the employee's ability to perform regular or accommodated duties.

As a refresher, employers should:

- **Involve the employee with the disability in the accommodation process:** If you have a concern about an employee's ability (or inability) to perform a task, then discuss this concern with the employee and allow him or her to address it. This will likely require allowing the employee to consult with his or her treating medical practitioner in order to respond directly to the stated concerns, including with recommendations on how to address them.
- **Do your own research if necessary:** Wherever possible, an employer should base its response or directions on objective and medically supported data, not casual observations and assumptions. If the employee's treating medical practitioner is unwilling or unable to co-operate or address your concerns, then consider seeking a medical or scientific opinion from a third party.
- **Train your front-line supervisors:** Supervisors who are tasked with assessing medical information and determining whether an employee can be accommodated in the workplace should be trained on the employer's procedural and substantive duties under the Code. The training program should include the medical information an employer is entitled to receive, how to properly assess such medical information, and the procedure by which the supervisor ought to determine whether, and how, the restrictions may be accommodated, short of undue hardship.

Citation: *Skedden v. ArcelorMittal Dofasco* 2019 HRTO 627

Need more information?

Should you need more information, please contact Diane Laranja at 416-408-3221, or your regular lawyer at the firm.

Filion Wakely Thorup Angeletti LLP
management labour and employment law

Proud member of L&E GLOBAL
an alliance of employers' counsel worldwide

Toronto
Bay Adelaide Centre
333 Bay Street, Suite 2500,
PO Box 44
Toronto, Ontario M5H 2R2
tel: 416.408.3221
fax: 416.408.4814
toronto@filion.on.ca

London
620A Richmond Street, 2nd Floor
London, Ontario N6A 5J9
tel: 519.433.7270
fax: 519.433.4453
london@filion.on.ca

Hamilton
1 King Street West, Suite 1201
Box 57030
Hamilton, Ontario L8P 4W9
tel: 905.526.8904
fax: 905.577.0805
hamilton@filion.on.ca