

Mental Health and the Workplace

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Mental Illness – General Principles

- Emphasis is on the illness, not its psychological nature
- But challenges exist in identification –proof of a fractured leg vs. proof of a bipolar disorder
- Nevertheless, medical evidence can be determinative

Equal Treatment

Saadati v Moorhead, (Supreme Court of Canada, 2017)

- Personal injury case – motor vehicle accident caused psychological injuries, including personality change and cognitive difficulties
- Sick is sick – Law treats mental and physical injuries the same
- But differentiation is needed from the ordinary annoyances, anxieties and fears that come with living in civil society

Equal Treatment

Saadati v Moorhead, (Supreme Court of Canada, 2017)

- LESSON:
 - Attitudes to mental illness that differ from those to physical illness can cause problems
 - Employer requirements for medical notes, functional abilities assessments, etc., should be consistent for illnesses of any nature

The Ontario Human Rights Code – Disability

- Sec 5: Every person has a right to equal treatment with respect to employment without discrimination because of ... disability.
- Sec 10 (1) among other things, “disability” means a condition of mental impairment or a developmental disability, and a mental disorder.

The Ontario Human Rights Code – Accommodation as a Defence

- 17 (1) A right of a person under this Act is not infringed for the reason only that the person is incapable of performing or fulfilling the essential duties or requirements attending the exercise of the right because of disability.
- (2) No tribunal or court shall find a person incapable unless it is satisfied that the needs of the person cannot be accommodated without undue hardship on the person responsible for accommodating those needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any.

Identification of a Mental Illness: A problem of poor performance or of illness?

- If behaviour changes - ASK
- Absent obvious mental disturbance, employees who deny a problem will find it difficult to claim discrimination
- If a problem is acknowledged, questions on how to deal with the situation are appropriate
- But employers are not entitled to detailed medical reports, diagnosis, etc.
- If available to your employees, a referral to your EAP – Employee Assistance Program, if there is one, may be wise

Elements of Accommodation:

ADGA Group Consultants Inc. v. Lane (2008, Ontario Divisional Court)

- Procedural Duty – steps to be taken
 - Seek and obtain all available relevant evidence about:
 - the condition
 - prognosis for recovery
 - ability to perform work duties
 - capabilities for alternate work
 - Employers must give active thought to the issue of accommodation and the steps that could be taken to permit continued viable employment

Elements of Accommodation:

ADGA Group Consultants Inc. v. Lane (2008, Ontario Divisional Court)

- Substantive Duty
 - Undue hardship is a defence
 - Show that the employer could not have accommodated the disability without suffering undue hardship
 - Undue hardship is case specific – can be cost or safety based
 - Not mere hardship, but “undue” – of a serious degree – Must show evidence of a significant safety risk or expense, not speculative or unsubstantiated concerns

Accommodation - What's Required?

Hydro Quebec (2008, Supreme Court of Canada)

- Not a question of whether it was impossible to adjust for the employee
- Does not require a fundamental change in working conditions
- Duty is to arrange the employee's workplace or duties to enable the employee to do his or her work, if possible without undue hardship
- Employee should be able to provide some services – make work projects are not required

Accommodation - What's Required?

Hydro Quebec (2008, Supreme Court of Canada)

- It's a contextual approach – no rigid rules, and - may take into account factors like:
 - Length of service
 - Nature of employment
 - Resultant harm to the employer, including cost, disruption
 - Potential interference with rights of other employees
 - Nature of the illness (in a non-judgemental way)
 - Prognosis for return to work
 - Inability to work in the “reasonably” foreseeable future

Workers' Compensation

- Fundamental changes regarding psychological injury, effective January 1, 2018
- Previous Basic Rule
 - No entitlement for mental stress, except “mental stress that is an acute reaction to a sudden and unexpected traumatic event arising out of and in the course of ... employment.”
 - But even then, no entitlement if the mental stress is caused by the employer’s conduct relating to the employment, such as decisions to change the work performed or the working conditions, to discipline, or to terminate

Workers' Compensation

- New Rule (2018)
 - “A worker is entitled to benefits under the insurance plan for chronic or traumatic mental stress arising out of and in the course of the worker’s employment.”
 - But still, no entitlement if the mental stress is caused by the employer’s conduct relating to the employment, such as decisions to change the work performed or the working conditions, to discipline, or to terminate
 - There are more generous provisions for workers like police, firefighters, correctional officers and nurses that would require an entirely separate presentation

Two Types of Mental Stress Claims: Chronic Mental Stress and Traumatic Mental Stress

- Common to both types of claim:
 - It must arise out of and in the course of employment – i.e. it must be employment related
 - Employer actions referred to above are excluded
 - It can arise from workplace harassment - a course of vexatious comment or conduct against a worker, including bullying, that is known or ought reasonably to be known to be unwelcome

Two Types of Mental Stress Claims: Chronic Mental Stress and Traumatic Mental Stress

- Common to both types of claim:
 - There must be a diagnosis by a regulated health professional – a physician, nurse practitioner, psychologist or psychiatrist
 - The diagnosis must be based on the American Psychiatric Association Diagnostic and Statistical Manual (DSM) - e.g. acute stress disorder, posttraumatic stress disorder, adjustment disorder, or an anxiety or depressive disorder
 - The worker must have experienced a substantial work-related stressor(s), such as workplace bullying or harassment and that stressor must be the predominant cause of the injury

What's Distinct?

- Chronic Mental Stress:
 - Requires a substantial work-related stressor
 - Substantial = excessive in intensity / duration as compared to the normal pressures and tensions experienced by workers in similar circumstances
 - Includes workplace harassment

What's Distinct?

- Traumatic Mental Stress:
 - Requires one or more traumatic events
 - May be a result of a criminal act or a horrific accident
 - May involve actual or threatened death or serious harm against the worker, a co-worker, a worker's family member or others
 - Event(s) must be clearly and precisely identifiable, and objectively traumatic

What's Distinct?

- Traumatic Mental Stress:
 - Examples of a traumatic stress incident include: witnessing or being involved in a horrific accident, an armed robbery or a hostage-taking, or being the object of credible serious threats of violence, or workplace harassment that includes real or threatened physical violence or being placed into a high risk situation (such as the harassor tampering with a worker's fall arrest harness)

What's distinct?

- Chronic Mental Stress:
 - The events claimed to have caused the chronic mental stress must be identifiable by the WSIB, through information or knowledge provided by co-workers, supervisory staff, or others
- Traumatic Mental Stress:
 - The traumatic event(s) or the cumulative effect of a series of such events must have arisen out of and in the course of the worker's employment, and caused, or significantly contributed to, an appropriately diagnosed mental stress injury

QUESTIONS?