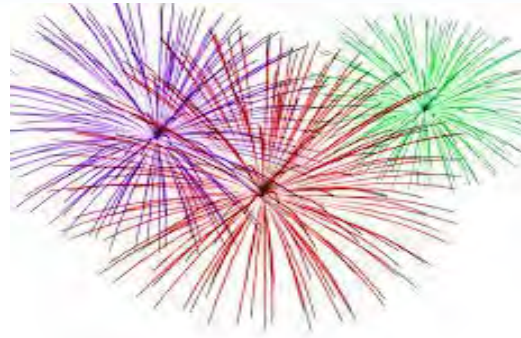


WELCOME
HUMAN RESOURCE SEMINAR

May 29, 2014





TIS' THE SEASON
**Public Holidays, Seasonal Employees
and Complying with the ESA**

By: L. Viet Nguyen

PUBLIC HOLIDAYS

- New Year's Day, Good Friday, Victoria Day, Canada Day, Labour Day, Thanksgiving, Christmas, December 26 and any day prescribed as a public holiday (Family Day)
- S. 24(1) – Public holiday pay – equal to:
 - (a) Total amount of regular wages and vacation pay in the previous four weeks divided by 20; or,
 - (b) Any other manner of calculation prescribed.

PUBLIC HOLIDAYS

- Not eligible for public holiday pay if fails to work day before and day after without reasonable cause
- Employee and employer may agree for employee to work a public holiday
 - (a) Regular pay plus premium pay (at least 1.5x)
 - (b) Regular pay and a day off 3-12 months after

PUBLIC HOLIDAYS

- S. 28(1) – Requirement to work – hospitals, continuous operation, hotel, motel, tourist resort, restaurant, tavern
- Special cases:
 - (a) Not ordinarily a working day;
 - (b) Leave or lay-off;
 - (c) Premium pay hours not counted as overtime

SEASONAL EMPLOYEES

- Ontario Regulation 285/01 – Seasonal employee – an employee who works not more than 16 weeks in a calendar year
- S. 9(1)(j) – Public Holidays Part does not apply to a seasonal employee in a hotel, motel, tourist resort, restaurant or tavern and provided with room and board
- S. 15 – Fresh fruit and vegetable processing overtime pay

SEASONAL EMPLOYEES

- Not entitled to notice of termination at end of the season
- No obligation to rehire the following season
- Permanent employee hired to do seasonal work
 - (a) length of the seasonal relationship;
 - (b) pattern of recall/return to work;
 - (c) nature of the industry.

SEASONAL EMPLOYEES

- Severance pay calculated as:

Total hours of work in severance year

52 weeks

multiplied by employee hourly rate of pay

= average weekly rate

*Service Employees International Union Local 2 v.
Fort Erie Live Racing Consortium*

HELPFUL TIPS

- Confirm industry and exceptions under ESA
- Consider specific nature of employment
- Consider Employment contracts and setting terms for Seasonal Employees
- Consider future recall and next season at end of current season



Employee v. Self-Employed Tax Considerations and Consequences

**Presenter:
Eldad Gerb**



Employee v. Self-Employed Overview

The central question is whether the person who has been engaged to perform the services is performing them as a person in business on his/her own account.

(Sagaz)

No exhaustive list has been compiled and perhaps no exhaustive list can be compiled of considerations which are relevant in determining that question, nor can strict rules be laid down as to the relative weight which the various considerations should carry in particular cases. *(Wiebe Doors)*

Employee v. Self-Employed Preliminary Considerations

- Tax withheld at pay source s. 153(1)(a)
- Permitted expenses s. 8(2)
- Filing deadline s. 150(1)(d)
- Collection / remittance of GST or HST
- Eligibility for Employment Insurance
- Timing of tax: on receipt v. when earned s. 5(1)
- Stock option benefits s. 7(1) and s. 110(1)(d)
- According to TCC, same relationship may be viewed differently for:
 - Tax purposes
 - EI / CPP deductibility purposes
 - Wrongful Dismissal purposes
 - Vicarious liability / tort purposes
- Compliance costs
- Bargaining power

Employee v. Self-Employed Legal Framework

- In *Connor Homes*, the Federal Court of Appeal outlined the two-stage framework:
 1. What was the **subjective intent of the parties**, as evidenced by the form of contract and actions such as GST registration, provision of invoices for past services rendered and any previous income tax filings?
 2. Does the **objective reality** sustain the subjective intent of the parties? At this stage, the Court will assess a number of objective factors.

The Objective Framework

- Control Test
 - What is the degree of control the business have over the worker and the manner in which the work is performed?
- Ownership Test
 - Who owns/covers the expenses related to the tools used?
- Integration Test
 - To what degree is the work performed integral to the business?

The Objective Framework

- Specified Result Test
 - Was the worker hired to achieve a certain result?
- Economic Reality Test
 - What are the economic practices of the worker?
- Form of Contract
 - What was the discernible intent of the parties?

Mischaracterization Consequences Income Tax Issues

- Mischaracterization can lead to penalties and interest for employers
 - A failure to withhold T4 taxes results in:
 - Penalty of 10% of CPP, EI and income tax
 - Penalty of 20% for second or later failures if grossly negligent
 - Interest
 - EI premiums owed by employee
 - outstanding WSIB premiums, plus interest and fines
 - Subject to wrongful dismissal claims under the *ESA*

Mischaracterization Consequences HST Issues

- Services rendered by employees are not a taxable supply
- Services rendered by independent contractors to employers are a taxable supply
- Significantly, for non-compliance under the ETA, employers who mistakenly treat independent contractors as employees may be subject to:
 - administrative fines
 - penalties

Personal Services Business s. 125(7)

- But for the existence of a corporation, employer/employee relationship exists
- Also known as an “incorporated employee”
- Deductions limited to that of an employee i.e. salary s. 18(1)(p)
 - Management fees also limited by s. 67
- Income from PSB does not qualify for CCPC tax rate reduction
- Disposition of shares of PSBs not eligible for Lifetime Capital Gains Exemption

Employee v. Self-Employed \$100,000 Example

	Employee	Self-Employed
	\$100k - T4 Income	\$100k - Net Business Profit
Tax Rate:	Federal: 15% to 26%: Provincial: 5.05% to 11.16%	Federal: 15% (11% for CPCC) Provincial: 11.5% (4.5% for CPCC)
Inclusions/Deductions:	All taxable benefits/Nothing unless allowed by Act	Gross profit/Every reasonable expense unless disallowed by Act
Taxes Owing	Federal: \$17,066.38 Provincial: \$9,189.66 Total Tax: \$26, 256.04	Federal: \$11,000 Provincial: \$4,500 Dividend: \$1,1513.18 x2 Total Tax: \$18, 526.36
Net Income:	<u>\$73, 743.96</u>	<u>\$81, 473.64</u>

Recent Case: *1392644 Ontario Inc. (Connor Homes)*

- Connor Homes operated a number of group homes and retained persons to perform childcare, therapeutic, and supervisory functions. Despite signing contracts that stated that the affected persons were working as independent contractors, CRA took the position that the persons were, in fact, employed by the appellant.
- At the Tax Court, the Court held that the appellant exercised considerable control over the manner and timing of work, there was little financial risk on the part of the persons, and the majority of the tools were supplied by the appellant. Thus, the Court concluded that, despite the contract, the persons were employees of the appellant.
- On appeal to the Federal Court of Appeal, the Court upheld the CRA and TCC's decision. Applying the factors from *Wiebe Door* and *Sagaz*, the court found that, despite the workers' intention to create an independent contractual relationship, the nature of their work was akin to that of any other employee of the appellant.

Employee v. Self-Employed Closing Remarks

- Intention of the parties only forms part of the analysis
- Think about the thousands of taxpayers in the same circumstances
- Think about the other individuals in the workplace
- Non-tax considerations

FOREIGN WORKER UPDATE





SCOPE OF PRESENTATION

- Recent issues with foreign workers
- A refresher: recent foreign worker program changes
- Best practices and compliance
- What the future may hold

Recent Issues with Foreign Workers

- Over the past 12 months the TFWP has become a hot topic with regular coverage in the media. Two major stories involved ‘whistle-blower’ employees.
- April 2013
 - One of Canada’s largest banks:
- April 2014
 - One of Canada’s largest fast food franchises:



Government Response

- Re-emphasis of “Canadians First” recruitment policy
- Need to balance the genuine business needs of Canadian employers and the overall need to protect the Canadian labour market
- Reforms to the TFWP reflect the government’s changing policy toward the appropriate use of the program
- Progression of stricter controls over employers using the TFWP

Timeline of Reforms to the TFWP

April 2013 – suspension of accelerated LMO process, removal of wage flexibility



July 2013 – more regulation of recruitment process and introduction of user fees



December 2013 – on-site inspections, enforcement of penalties, increase of compliance history to 6 years



April 2014 – moratorium imposed on all Labour Market Opinions in Food Services Sector



Summer 2014 and Beyond – Tightening of Intracompany Company Transferee Provisions, other stricter enforcement

A Refresher: Summary of Recent Foreign Worker Program Changes

- Application Processing
 - New processing fee of \$275 for each LMO requested
 - New recruitment requirements
 - increase from 1 to 3 media
 - increase duration from 2 to 4 weeks
 - some recruitment must remain posted until LMO issued
 - No foreign language requirement permissible other than in exceptional circumstances, e.g. translators, tour guides

A Refresher: Summary of Recent Foreign Worker Program Changes (cont'd)

- Requirement for employer to develop a plan to transition to a Canadian work force – forward-looking commitment
- Compliance and Enforcement
 - New era of “integrity officers” and “employer compliance reviews”
 - Employer must demonstrate compliance with terms of LMO for 6 years:
 - has provided employment that is “substantially the same” concerning: occupation, wages and working conditions

A Refresher: Summary of Recent Foreign Worker Program Changes (cont'd)

- Government has power to conduct warrantless inspections, to interview employees and to compel production of documents
- Non-compliant employers are subject to a 2-year ban from using the TFWP and will have their names published on a public “blacklist”



Employment and Social Development Canada

[Home](#) > [Jobs and Training](#) > [Temporary Foreign Workers](#)

Employers who have broken the rules or been suspended from the Temporary Foreign Worker Program

Employers, whose name and address appear on this list have had a labour market opinion (LMO) revoked or suspended:

Date	Business Name	Legal Name	Address	*Rationale	Penalty
May 1, 2014	Eassons Transport Ltd.	Eassons Transport Ltd.	151 Foster St., Berwick, NS B0P 1E0	D	LMO suspended
April 6, 2014	The Boathouse Restaurant	218812	16 Oriole Rd, Fenelon Falls, ON K0M 1N0	B	LMO revoked
April 6, 2014	Jungle Jim's Restaurant/ Greco Pizza/ Captain Sub	59077 Newfoundland and Labrador Limited	500 Vanier Ave., Labrador, NL A2V 2W7	D	LMO suspended
April 6, 2014	McDonald's Restaurant	Nasib Services Inc	980 Pandora Ave., Victoria, BC V8V 3P3 1200 Douglas St., Victoria, BC V8W 2E5 1644 Hillside Ave., Victoria, BC V8T 2C5	D, E	LMO suspended

Risks of Non-Compliance

LEGAL	Risk of prosecution resulting in fine and/or imprisonment
REPUTATIONAL	Compromise of brand and image resulting from posting of company name on government website
OPERATIONAL	Preclusion from accessing the TFWP in the future, revocation of existing LMO's and/or WP's
FINANCIAL	Loss of revenue from interrupted business operations resulting from inability to bring in new foreign workers and/or loss of existing foreign workers

Best Practices

- Employers must develop a compliance program that is evolving to capture new regulatory and policy changes

Designate a clear allocation of responsibility within your organization for immigration compliance

Monitor job title, duties, wages and report to the government any promotions or changes

Implement a document retention and tracking strategy to permit delivery of proof of compliance

Implement quarterly or semi-annual internal immigration reviews

What the Future May Hold

- Implementation of possible additional policies to discourage use of the TFWP especially for low-skilled workers
 - establishing a ‘wage floor’ requiring employers to pay foreign workers higher wages than Canadians
 - increasing application fees from the current \$275 to amounts in excess of \$2,000
- Expanding enforcement policies beyond the LMO stream of the TFWP to intracompany transferees and other LMO exempt categories

**Thank you for listening
and enjoy your break!**



The background features a collage of various mental health terms written on sticky notes. The words are scattered and partially overlapping, including 'HELLO', 'Stress', 'Grief', 'Anxiety', 'Depression', 'Frustrated', and 'Shame'. The text is in a casual, handwritten style.

MENTAL ILLNESS IN THE WORKPLACE: A Healthy Discussion on Accommodation

Presenters:

**Tara Dubrow (Psychotherapist),
Marty Rabinovitch (DSF) &
Meghan Ferguson (*Kellogg's*)**

OVERVIEW

- Statistics Canada: 500,000 Canadians are unable to work due to mental health problems each week
- 1 in 4 (25%) Canadians suffer a mental disability
- Mental illness costs the Canadian economy an estimated \$51 billion each year. This number is estimated to go up year after year

OHRC MINDS THAT MATTER

- “***Minds That Matter: Report on the consultation on human rights mental health and addictions***”
– prepared by the Ontario Human Rights Commission in 2012

OHRC MINDS THAT MATTER

- “***Minds That Matter***: many employees do not ask for help with a mental health issue or an addiction because they fear being discriminated at work including loss of job opportunities, increase scrutiny or dismissal.

OHRC MINDS THAT MATTER

- *People with mental health issues suffer from higher unemployment than the general population and are underemployed in part-time, low income jobs according to studies reviewed by the Commission.*

OHRC MINDS THAT MATTER

- *The Commission also reported that persons with mental disabilities report being subjected to added performance reviews, discipline and/or dismissal from their jobs due to their mental disability.*

LEGAL DUTY TO ACCOMMODATE

Ontario Human Rights Code

- **5. (1)** Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, record of offences, marital status, family status or *disability*.

LEGAL DUTY TO ACCOMMODATE

5. (2) Every person who is an employee has a right to ***freedom from harassment in the workplace*** by the employer or agent of the employer or by another employee because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sexual orientation, gender identity, gender expression, age, record of offences, marital status, family status or **disability**.

LEGAL DUTIES

“**disability**” means,

- a) any degree of physical disability, ...
- b) a condition of mental impairment or a developmental disability,
- c) a learning disability, or a dysfunction in one or more of the processes involved in understanding or using symbols or spoken language,
- d) a mental disorder, or
- e) an injury or disability for which benefits were claimed or received under the insurance plan established under the *Workplace Safety and Insurance Act, 1997*;

LEGAL DUTIES

- *Ontario's Occupational Health and Safety Act*
 - Ontario's workplace violence provision only address *physical* injury
 - “workplace harassment” engaging in a course of vexatious comment or conduct against a worker in a workplace that is known or ought reasonably to be known to be unwelcome.”

LEGAL DUTIES

- **British Columbia** = bullying in the workplace legislation
- **Manitoba** = workplace harassment provisions address psychological harm
- **Quebec** = 1st province to have legislation addressing psychological harm
- **Federal** = broad definition includes “harm” or “injury”

LEGAL DUTIES

- OHSA s.25(2)(h)

An employer shall....take every precaution reasonable in the circumstances for the protection of a worker

CSA STANDARD

- *CSA Standard: Psychological Health and Safety in the Workplace*
- *Voluntary* standard to develop and continuously improve psychologically safe and healthy work environments for their employees.
- NOT law

WORKPLACE SAFETY & INSURANCE ACT

- Section 13 limits entitlement to mental stress that “arises from an acute reaction to a sudden and unexpected event”

WORKPLACE SAFETY & INSURANCE ACT

- April 29, 2014
 - Ontario's Workplace Safety and Insurance Appeals Tribunal (WSIAT) has found that the limit on mental health claims under the *Workplace Safety and Insurance Act, 1997* ("WSIA") is **unconstitutional**.

The background features a collage of various elements. At the top, there are several rectangular signs with the word "HELLO" written in a simple, sans-serif font. Below these, the words "Stress", "Grief", "Anxiety", and "Depression" are written in a casual, handwritten script. At the bottom, the words "Frustrated" and "Shame" are also written in a similar handwritten style. The overall color palette is muted, with greys, whites, and soft blues.

LOOKING FOR SIGNS OF MENTAL ILLNESS:

What HR Ought to Reasonably Know

Tara Dubrow

Failure to Act

- Uncertainty: We often don't know what to do
- Fear: We are afraid to become involved
- Lack Confidence: We are not sure that our suspicions of a mental health issue are correct
- Hope: We want the problem to disappear on its own
- Bad memories: A similar personal experience can prevent us from taking action

Consequences of Failing to Act

- Employee's condition worsens
- Increased tension in employer/employee relationship and employee relationships with co-workers
- Co-workers feeling responsible to perform fellow employee tasks
- Co-worker resentment at increased responsibilities and shunning employee
- Low morale
- Increased absenteeism
- Lower productivity
- Greater costs (disability)
- Firing employee
- Loss of skilled worker

WARNING SIGNS

How do we know if some one might have a mental health problem?

- Decreased productivity
- Inability to work with others/lack of cooperation
- Frequent absences or late arrivals
- Difficulty with concentration, decision making or memory
- Decreased involvement or interest in work
- Increase in complaints, such as fatigue and physical pains
- Excuses for poor performance and missed deadlines
- Excessive overtime work
- Displays of aggression/anger/defensiveness
- Strange ideas
- Increased accidents or safety issues

How to Address the Problem

1. Arrange a meeting
2. Prepare for the meeting:
 - Resources available for employee;
 - Company policies;
 - Ideas to encourage safety and comfort;
 - List of employee strengths;
 - List of questions to encourage employee's ideas of best support
3. Monitor situation following meeting
4. Follow up

DON'T

- Probe
- Diagnose
- Promise what you cannot

Statistics

20% of the population will experience mental illness in their lifetime (reported)

33% of managers report mental health training

81% of employers report feeling comfortable talking to employees regarding their mental health

Under 30% of employees believe managers are knowledgeable regarding mental health

Over 1/3rd of employees expressed a discomfort talking to their employers about mental health issues

Statistics

Depression will rank second only to heart disease as leading cause of disability worldwide by 2020

Psychiatric claims are the fastest growing category of long term disability in Canada

Canada's economy loses an estimated \$30 billion annually in lost productivity caused by mental health and addiction issues

Stigma

- Lack of understanding of mental health issues
- Lack of supportive resources
- Fear of being shamed and stigmatized



**MENTAL ILLNESS IN THE
WORKPLACE AND ACCOMODATION:
*RECENT CASE-LAW***

Marty Rabinovitch

OVERVIEW:

1. Mental illness and absenteeism:
 - *Schulz v. Lethbridge* (2012, Alberta)
2. Connection between incident leading to dismissal and disability:
 - *Walton Enterprises v. Lombardi* (2013, Ontario)
 - *Gulick v. Ottawa City Police Services* (2012, Ontario)
3. Duty of employees to provide information:
 - *West Vancouver District v. West Vancouver Fire Fighters' Union* (2012, BC)
 - *Casino Niagara v. Ontario Public Service Employees Union* (2012, Ontario)
4. Dangerous employees and undue hardship for employers:
 - *Agropur Div. Natrel v. Teamsters Local 647* (2012, Ontario)
5. Duty of employers to consider alternate positions:
 - *Fair v. Hamilton-Wentworth* (2012, Ontario)

MENTAL ILLNESS AND INNOCENT
ABSENTEEISM

SCHULZ V. LETHBRIDGE INDUSTRIES LIMITED
2012 AHRC 3 (ALBERTA)

- Middle-aged employee with 25 years seniority suffered from chronic depression as well as migraines
- Regularly absent due to mental or physical problems, always with his manager's permission, and never given a warning regarding his absences
- He clearly suffered from mental and physical disabilities
- Fired after returning to work from his 7th hernia surgery

SCHULZ V. LETHBRIDGE CONT'D

- Prima facie case of discrimination: connection between his group membership (person with disabilities who cannot attend work regularly) and the arbitrariness of the disadvantaging conduct (sudden introduction of retroactive enforcement of attendance standards)
- The employer needed to show that it would be impossible to accommodate him without undue hardship to the employer

SCHULZ V. LETHBRIDGE CONT'D

- Lethbridge Industries discriminated against Mr. Schulz by:
 - dismissing him for absences when they had previously allowed them without complaint;
 - not inquiring into his health issues as they pertained to the absences;
 - not giving him the opportunity to provide medical information; and thereby
 - not considering if some form of accommodation might help him to make a useful contribution in the future.

SCHULZ V. LETHBRIDGE CONT'D

- The Plaintiff was awarded:
 - \$85,239.30 plus interest for lost wages, based on a 30 month period; and
 - \$10,000 for injury to his dignity and self-respect as a result of the employer's discrimination.

SCHULZ V. LETHBRIDGE CONT'D

- Excess innocent absenteeism can be grounds for termination, even where the absence is a result of disability; BUT the employer must:
 - advise the employee of the seriousness of the situation;
 - obtain the relevant information on the absences; and
 - explore any possible avenues of accommodation



CONSISTENT WITH ONTARIO LAW

- In *Thunder Bay Catholic District School Board v. O.E.C.T.A.* (2011 CarswellOnt 5334) the Arbitration board cites the Supreme Court of Canada, concluding that:
 - In the case of chronic, innocent absenteeism, if the employer shows that despite measures taken towards accommodation, the employee will be unable to resume his or her work in the reasonably foreseeable future, then they have discharged their burden to accommodate and established undue hardship

In *Schulz v. Lethbridge*, the employer had not taken sufficient measures towards accommodation.

CONNECTION BETWEEN DISMISSAL AND DISABILITY

WALTON ENTERPRISES V. LOMBARDI

2013 ONSC 4218

- Employee suffered from depression and hypothyroidism
- He was harassed by coworkers for perceived obesity, perceived homosexuality, and depression, through offensive comments and text messages
- He reported this to his supervisors but nothing was done

WALTON V. LOMBARDI CONT'D

- Physical fight with a coworker after a disagreement over the timing of repair jobs
- He denied starting it and said he could not back down because he would be teased/harassed more
- Investigation revealed that he threw the first punch, and he was dismissed
- The court found that he was harassed, but his dismissal did not constitute discrimination

WALTON V. LOMBARDI CONT'D

- There was minimal evidence to connect this fight to past harassment or to his depression
- The employee has an obligation to ensure the employer has enough information to trigger the employer's duty to investigate whether accommodation is needed
- No evidence here, his depression appeared to be controlled by medication and the fight appeared to be unrelated

WALTON V. LOMBARDI CONT'D

- An employee who engages in misconduct that rises to the level of a crime, cannot prove discrimination on the basis of disability where:
 - that disability played no part in the employer's decision to dismiss; and
 - the employee suffered no greater impact for his misconduct than any other employee would have





GULICK V. OTTAWA CITY POLICE SERVICES

2012 ONSC 5536

- another case where there was not enough evidence to connect the incident to a disability
- A suspended police officer assaulted 4 officers who came to his home, threatened to kill 2, and was taken into custody
- He was sentenced to resign or be summarily dismissed
- Though he had a history of alcohol and drug addiction (an established disability/mental illness), the incident was connected only to his pre-existing anger management issues, which is not a recognized disability

EMPLOYEE'S DUTY TO PROVIDE NECESSARY INFORMATION



*WEST VANCOUVER DISTRICT V. WEST VANCOUVER FIRE
FIGHTERS' UNION, LOCAL 1525*

2012 CARSWELL BC 4240

- Demands from employer for medical documentation after leave for physical problems led to the development of severe anxiety
- Received disciplinary warnings for providing insufficient medical information; finally indicated that he had anxiety, but still little information and refused to attend a scheduled assessment
- Employers are to request information to least intrusive extent that is reasonably necessary, BUT:
- They were entitled to medical information regarding his job restrictions and the duties he was able to carry out

*COMPLEX SERVICES INC. (C.O.B. CASINO NIAGARA) V. ONT.
PUBLIC SERVICE EMPLOYEES UNION, LOCAL 28*
2012 CARSWELL ONT 3177

- Physical disability led to missed work with only vague explanations and a resistance to providing medical information
- Employee eventually claimed that she suffered from a mental illness, but insisted that no further information was needed for them to accommodate it and would not consent to a review of medical documentation
- The employer was entitled to request an independent medical review to establish:
 - That she did in fact have a mental illness; and
 - That the demanded accommodation was required

MENTAL ILLNESS, VIOLENCE, AND
UNDUE HARDSHIP

*AGROPUR DIV. NATREL V. TEAMSTERS
LOCAL 647*

2012 CANLII 69477 (ON LA)

- Employee had a traumatic childhood, had been sexually abused, and had severe psychiatric disorders including:
 - post-traumatic stress disorder
 - Impulse control disorder
 - Explosive type
 - Attention deficit disorders, as well as
 - Several incurable personality disorders

AGROPUR V. TEAMSTERS CONT'D

- Over 100 days of work missed due to a personal crisis, including “homicidal thoughts”
- Employee was treated, but when he returned he became erratic, including being charged with assault and incarcerated
- His employer believed he was dangerous to the health and safety of the other employees and dismissed him

AGROPUR V. TEAMSTERS CONT'D

- An employer is entitled to consistent medical evidence to suggest an employee with serious, incurable psychiatric disorders poses little cause for concern
- Active reinstatement was not appropriate:
 - still suffered the “occasional brief psychotic outbreak”; and
 - all evidence and behaviour suggested he was dangerous
- Imposing active reinstatement would constitute undue hardship on the employer, and endanger employees (*though he was inactively reinstated for the purposes of applying for LTD*)

EMPLOYERS' DUTY TO EXPLORE AVENUES OF ACCOMMODATION

FAIR V. HAMILTON-WENTWORTH DIST. SCHOOL BOARD

2012 HRTO 350

- Employee working as Supervisor, Regulated Substances, Asbestos developed a generalized anxiety disorder, required hospitalization and was ultimately diagnosed with depression and post-traumatic stress disorder
- Disability associated with her highly stressful position and her fear of making a mistake and attracting personal liability
- After a long period of absence, she was dismissed



FAIR V. HAMILTON-WENTWORTH CONT'D

- Despite the employee cooperating in the accommodation process, the school board failed to properly and promptly consider solutions to accommodate her, including:
 - failing to meet with her vocational rehab consultant;
 - failing to inform the employee of her essential duties;
 - failing to meet with her promptly;
 - failing to obtain clarifying information from her doctor, regarding her abilities; and
 - not being open to placing her in a more suitable position.

THINGS TO REMEMBER:

- Employers have a duty to accommodate, including looking for more suitable positions for a mentally ill employee
- Employees have a duty to cooperate in this process, including providing necessary medical information
- Disabled employees can be dismissed for innocent absenteeism where accommodation would amount to an undue burden for employer
- Disabled employees that commit crimes can be dismissed where other employees would have been treated the same way
- Employees that are dangerous due to disability can be dismissed for this reason where it constitutes undue hardship

AND WHEN ALL ELSE FAILS:



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