Case In Point

Human Rights Tribunal Rules that Miscarriage is a Disability

Date: April 7, 2016

In a recent decision, the Human Rights Tribunal of Ontario (Tribunal) found that the Applicant, who had suffered a miscarriage, had a disability within the meaning of the *Human Rights Code* (*Code*). While this decision has garnered much attention in the media, its potential significance for employers going forward may not result from the particular disability at issue, but from the analysis leading to this conclusion.

The Applicant alleged that she had experienced a series of unconnected events in 2013 that together “profoundly affected her health and well-being.” These included injuries from a slip-and-fall, a subsequent miscarriage and the death of her mother-in-law. The employer terminated her employment following a period of absences from work. At issue at this stage of the proceedings was whether the Applicant fell within the protections of the *Code*.

With respect to the Applicant’s miscarriage in particular, the Applicant testified that she continues to experience “significant emotional distress from the miscarriage even today.” The Tribunal accepted this evidence and went on to find that the miscarriage constituted a disability within the meaning of the *Code*. In doing so, the Tribunal ruled that a miscarriage is neither a common ailment, nor is it transitory. The Tribunal further noted that a miscarriage may also be protected under the ground of sex or as an intersection of sex and disability.

As such, although the Tribunal found that the physical event of miscarriage may constitute a disability and is itself disabling, the Applicant’s subsequent significant “emotional distress” appears to have been a consideration in reaching the conclusion that the Applicant was disabled. This was notwithstanding the fact that the Applicant did not assert a mental health disability in seeking to establish her claim.

Moreover, while there is significant jurisprudence establishing that temporary and transitory illnesses and ailments are not disabilities, the Tribunal expressly rejected the assertion that in order to constitute a disability, the condition must have “an aspect of permanence and persistence.”

Prudent employers should remain mindful of the various legal obligations that arise under the *Code* when a disability is asserted – be it physical or mental in nature – and adopt a “best practices” approach. This includes responding sensitively to all disability-related requests on an individual basis, and inquiring further into the employee’s specific needs to ascertain whether accommodation is appropriate in the circumstances.

Mou v. MHPM Project Leaders, 2016 HRTO 327 (CanLII)