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HUMAN RIGHTS

Ontario Human Rights Commission Releases New Policy on Mental Disabilities and Addictions

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One of the most significant challenges facing employers today involves identifying, managing and accommodating mental health and addiction issues in the workplace.

In June 2014, the Ontario Human Rights Commission (“the Commission”) issued a new policy dealing with this issue. The new policy, entitled *Policy on preventing discrimination based on mental health disabilities and addictions*,¹ is the result of an extensive consultation process undertaken by the Commission between 2009 and 2011.

In this article, we review a number of features of the Commission’s new policy which may be of interest to employers and service providers, particularly in light of the greater role these policies are expected to play in human rights proceedings in the future.

Background – The Role of Commission Policies

The Commission’s policies reflect the Commission’s interpretation of what the Ontario *Human Rights Code* (“Code”) requires. They are not legally binding on Ontarians, nor are they legally binding on the Human Rights Tribunal of Ontario (“the Tribunal”) or on other human rights decision-makers (such as arbitrators or the courts). Historically, some of the Commission’s policies have found more favour with human rights decision-

makers than others. As a result, while some of the Commission’s policies are frequently referred to in human rights proceedings, others are not.

However, when the *Code* was amended in 2008, new provisions were added to it which have the potential to enhance the role Commission policies will play in proceedings before the Tribunal in the future. Section 45.5 of the *Code* requires the Tribunal to consider Commission policies if one of the parties or an intervenor (possibly, the Commission itself) requests it to do so. Further, where the Commission participates in a human rights proceeding as a party or intervenor, and believes that the final decision or order issued by the Tribunal is not consistent with one of its policies, the Commission may ask the Tribunal to refer the case to the Divisional Court to address the inconsistency. This process provides the Commission with an opportunity to seek a ruling from the Divisional Court on whether its interpretation of what the *Code* requires or the Tribunal’s interpretation should prevail.

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The New Policy on Mental Health Disabilities and Addictions

Set out below are some of the more noteworthy features of the policy of interest to employer and service providers.

General

The Commission's policy adopts what is often referred to as the "social approach" to disability, which recognizes that the concept of what constitutes a disability evolves as social attitudes and perceptions evolve, and that "discrimination is based as much on perceptions, myths and stereotypes, as on the existence of actual functional limitations." It contemplates that the categories of mental health disabilities and addictions protected by the *Code*, and thus covered by the policy, will evolve over time.

The policy recognizes that the *Accessibility for Ontarians with Disabilities Act*² (*AODA*) addresses the right to equal opportunity for people with disabilities, including mental health disabilities and addictions, and that employers and service providers are required to comply with the accessibility standards established under the *AODA*. However, the policy also expressly states that compliance with the *AODA* standards will not always result in compliance with the *Code*.

The policy contains a lengthy discussion about mental health profiling, which is defined as "any action undertaken for reasons of safety, security or public protection that relies on stereotypes about a person's mental health or addiction rather than on reasonable grounds, to single out a person for greater scrutiny or different treatment." The policy notes that individuals with perceived or known mental health or addiction issues are often stereotyped as being a risk to public security and safety in the absence of objective evidence to support this perception. It emphasizes that, "Organizations and individuals must assess risk based on a person's individual circumstances, using objective evidence or criteria, and not on blanket assumptions or speculations based on a person's diagnosis or perceived mental health issue." However, at the same time, the policy recognizes that it is not discriminatory to respond to the actual behaviour of individuals with mental health disabilities that causes risk.

Harassment

The policy identifies a number of behaviours that could be considered harassment of individuals with psychosocial disabilities, such as mental health disabilities or addictions, including:

- slurs, name-calling or pejorative nicknames based on psychosocial disability
- graffiti, images or cartoons depicting people with psychosocial disabilities in a negative light
- comments ridiculing people because of mental health or addiction-related characteristics
- intrusive questioning or remarks about someone's disability, medication or accommodation needs
- singling out a person for teasing or jokes related to psychosocial disability
- inappropriately disclosing someone's psychosocial disability to people who do not need to know
- repeatedly excluding people from the social environment, or "shunning"
- circulating offensive material about people with psychosocial disabilities at an organization by email, text, the Internet, etc.

The Duty to Accommodate

The approach to the duty to accommodate reflected in the Commission's policy on mental health disabilities and addictions is interesting, insofar as it represents a departure from the Commission's past policy statements regarding the scope of the obligation to provide accommodation. The Commission has traditionally taken a very strict approach to the duty to accommodate, which places very high standards on employers and service providers with respect to accommodation. This is one aspect of the Commission's previous policies that has not generally found favour with human rights decision-makers, many of whom have taken the view that the Commission's approach places a higher burden on employers and service providers than the *Code* requires. While the Commission's traditional approach to the duty to accommodate is still referenced in the policy, there are also signs in the policy that the Commission now recognizes that the case law trends support a broader view of the duty to accommodate. This is a positive development for employers and service providers, given the greater role Commission policies are expected to play in future human rights proceedings.

The key features of the discussion of accommodation in the policy are set out below.

The policy emphasizes that the duty to accommodate involves both a proactive and a reactive component. The proactive component is the obligation to take proactive

steps to achieve integration and full participation by removing existing barriers and engaging in barrier-free and inclusive design. The reactive component is the obligation to respond to individual requests for accommodation. In the discussion below, we focus primarily on the latter of these two obligations — the obligation to respond to individual accommodation requests.

Although the case law generally adopts the principle of “reasonable” accommodation to the point of undue hardship, the Commission’s policy uses the concept of “appropriate accommodation.” The policy states that the *Code* requires “that the most appropriate accommodation be determined and provided, unless that causes undue hardship.” The policy defines “the most appropriate accommodation” as the one that most:

- respects dignity (including autonomy, comfort and confidentiality)
- responds to a person’s individualized needs, and
- allows for integration and full participation

The policy also states that, “The highest point on the continuum of accommodation must be achieved, short of undue hardship.” However, the policy expressly recognizes that, “If there is a choice between two accommodations that equally respond to the individual’s needs in a dignified way, then the accommodation provider is entitled to select the one that is less expensive or less disruptive to the organization.”

The policy states that accommodation providers, such as employers and service providers, have the following duties and responsibilities in the accommodation process:

- be alert to the possibility that a person may need an accommodation even if he or she has not made a specific or formal request
- accept the person’s request for accommodation in good faith, unless there are legitimate reasons for acting otherwise
- get expert opinion or advice where needed (but not as a routine matter)
- take an active role in ensuring that alternative approaches and possible accommodation solutions are investigated, and canvass various forms of possible accommodation and alternative solutions
- keep a record of the accommodation request and action taken

- maintain confidentiality
- limit requests for information to those reasonably related to the nature of the limitation or restriction, to be able to respond to the accommodation request
- implement accommodations in a timely way, to the point of undue hardship
- bear the cost of any required medical information or documentation (for example, the accommodation provider should pay for doctors’ notes, psychological assessments, letters setting out accommodation needs, etc).

With respect to the last of these “requirements”, it is noted that the case law does not clearly establish an expectation that employers or service providers must always pay for the initial documentation required to establish a need for accommodation, although they may be expected to pay for any supplementary medical information or documentation they request an individual to provide.

The policy addresses the type of medical information an individual may generally be expected to provide in support of an accommodation request, namely:

- that the person has a disability or a medical condition
- the limitations or needs associated with the disability
- whether the person can perform the essential duties or requirements of the job or of being a service user, with or without accommodation
- the type of accommodation(s) that may be needed to allow the person to fulfill the essential duties or requirements of the job or of being a service user

The Commission’s policy recognizes that there may be situations in which there is a reasonable basis to request additional information to establish the legitimacy of or better understand an accommodation request. The Commission states in the policy that, “an organization must not ask for more confidential medical information than necessary because it doubts the person’s disclosure of their disability based on its own impressionistic view of what a mental health disability or addiction disability should ‘look like.’” The Commission also states that, generally, an employer or service provider does not have a right to information about the cause of an individual’s disability, the diagnosis, the symptoms or the treatment. However, the Commission recognizes that, where the

person's needs are complex, challenging or unclear, more information may be required. In some rare cases, a person may be asked to cooperate by providing more information, including a diagnosis, but the accommodation provider must be able to clearly justify why this information is needed.

The Commission's policy states that individuals seeking accommodation cannot be compelled to receive treatment or a particular kind of treatment. However, it also recognizes that a refusal to get treatment, where the requirement to take part in treatment is reasonable and *bona fide*, may have repercussions – and ultimately may undermine the employer's ability to provide accommodation.

The policy recognizes that, in the area of mental health and addictions, it may be necessary for others (such as co-workers or other service users) to know that a person requires an accommodation in order to facilitate the accommodation. However, the policy states that "care must be taken to protect the individual's privacy, to not reveal any more information than is necessary, to make sure they are not 'singled out', and that their dignity is respected."

The policy notes that, since everyone experiences disabilities differently, employers and service providers have an obligation to educate themselves about the nature of an individual's disability through the accommodation process, take steps to resolve any tension or conflict with others whose cooperation is required to implement an accommodation, and dispel any misperceptions or stereotypes that others may have about persons with disabilities.

In terms of undue hardship, the policy reiterates the Commission's traditional view that only the three factors expressly listed in the *Code* – cost, outside sources of funding, if any, and health and safety requirements, if any – are relevant to the undue hardship analysis. In terms of cost, the policy also reiterates the Commission's traditional view that costs will only amount to undue hardship if they are:

- quantifiable
- shown to be related to the accommodation, and
- so substantial that they would alter the essential nature of the enterprise, or so significant that they would substantially affect its viability

However, despite these statements, the policy also recognizes a number of other limits on the duty to accommodate which have been recognized in the human rights case law. For example:

- A measure that would not otherwise constitute undue hardship based on cost or health and safety

may not be required if it would fundamentally alter the nature of the employment or service or would still not allow the person to fulfil the essential duties attending the exercise of the right.

- The duty to accommodate does not guarantee an indefinite leave of absence stretching over many years.
- The duty to accommodate does not require an employer to provide pay for work that has not been provided, nor does it require an employer to permanently create or bundle a set of tasks that does not result in a job that is useful to its operations, or to permanently assign an employee's essential duties to other employees or hire another employee to perform those duties.
- An employer's duty to accommodate may end where the employee is no longer able to fulfil the basic obligations associated with the employment relationship for the foreseeable future, even with accommodation.
- An employer's or service provider's duty to accommodate may also end where the person seeking accommodation fails to participate in or cooperate with the accommodation process. This may include refusal to comply with reasonable requests for information to show and/or meet their accommodation needs or refusal to take part in developing accommodation solutions.

Finally, there may be rare instances where an accommodation request cannot be implemented in whole or in part because doing so would create a conflict with the legal rights of others.

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¹ <http://www.ohrc.on.ca/en/policy-preventing-discrimination-based-mental-health-disabilities-and-addictions>.

² S.O. 2005, c. 11.