

Member's Quarterly

Fall 2020 Edition

Feature

Ignorance is Not Bliss in the Duty to Accommodate

Failure to inquire costs employer over \$50K plus reinstatement

It is well established that an employer has a duty to inquire into their employee's mental and/or physical disability if they know or ought to have known about it and provide reasonable accommodation to the point of undue hardship. Willful blindness is not an option and failure to properly inquire and provide appropriate accommodation is a violation of the *Alberta Human Rights Act*. That said whether or not the duty to inquire is triggered will be fact dependent in relation to whether the employer had enough information to suggest that the employee may be suffering from a medical condition which requires accommodation.

In the recent Alberta Human Rights case, *Pratt v University of Alberta*, 2019 AHRC 24, the Commission stated the following regarding the duty to inquire:

The common thread running through all of the case law put before the Tribunal is that findings with respect to the employer's duty to inquire as to whether an employee is suffering from a disability will be heavily dependent on the facts of each particular case. In some cases, a change in behaviour over time may necessitate such an inquiry but in others, information with respect to an employee's isolated demeanour may be sufficient. In some cases, an emotional presentation that leads an employer to make recommendations for counselling may trigger a duty to inquire and in others even a history of serious illness may not be sufficient.

Further, should the circumstances dictate, a duty to inquire into potential medical conditions may arise, notwithstanding the employee's poor performance or failure to disclose.

In the *Pratt* case, despite the AHRC Tribunal finding that the performance concerns of the employer were valid and substantiated by the evidence (including the employee engaging in personal conversations, being late on three occasions and making personal calls and texts), discrimination was established as a result of a failure to inquire and discharge the duty to accommodate. In *Pratt*, the circumstances were such that the employer was given enough information to trigger their duty to inquire. In particular, the AHRC Tribunal accepted that the employee advised her employer that she was struggling with simple tasks, could not concentrate or absorb information, was seeing a counsellor and had sought support from family. In light of this disclosure, further information should have been sought by the University in order to provide accommodation. There was no evidence to suggest the University fully explored accommodation options prior to terminating the employee for poor performance.

In order to properly accommodate, an employer must sufficiently inquire into the employee's restrictions, even if limited information is initially provided by the employee. A failure to give proper consideration to the issue of accommodation, including what, if any, steps could be taken to modify the employee's current role or find another role in the organization constitutes a failure to satisfy the duty to accommodate. An employer is not necessarily expected to create an entirely new role or incur significant financial cost, and in such cases would need to demonstrate that to do so would create undue hardship. However, it is typically expected that the employer will incur some hardship in the accommodation process.



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Notably, the outcome in *Pratt* demonstrates that a failure to inquire can be costly. Specifically, the Commission ordered reinstatement of the employee (despite her employment being probationary and having ended 7 years prior to the AHRC decision), payment of lost wages for 18 months in the amount of \$34,795.40 and general damages in the amount of \$20,000.00 for injury to dignity and self-respect.

While every case will be fact dependent and we encourage employers to seek circumstance specific legal advice, generally speaking, there are some practical steps that employers can take to discharge their duty to accommodate and avoid an outcome similar to *Pratt*:

- Where potential health and/or behavioural concerns arise with an employee (even if such concerns appear to be minor), an employer should inquire as to whether the employee requires assistance or accommodation in order to properly discharge their duties.
- Obtain all relevant information about the employee's disability, at least where it is readily available. It could include information about the employee's current medical condition, prognosis for recovery, ability to perform job duties and capabilities for alternate work;
- Evaluate the employee's capabilities, skills and qualifications in light of any required modifications or restrictions;
- Analyze modifications to the employee's role which can be made, while still accomplishing the employer's work-related purpose;
- Canvass available alternative positions, which may differ from the position the employee currently occupies, in light of the necessary requirements for such a position; and
- Record this process in detail in order to document the accommodation steps taken.

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