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Employee Safety, Privacy & Addiction in the Healthcare Sector

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Agenda

1. **Employee Safety & Privacy Rights** – But what about the patient?

   - Considering the extent to which employee safety and privacy rights may impact a healthcare facility's right to manage its operations.

2. **Addiction and Impairment Defence** – Get out of jail free card?

   - Assessing how health care facilities can best respond to issues of workplace impairment and addiction amongst the employee population.

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Employee Safety & Privacy Rights

Employee Safety & Privacy Rights

- Balancing between employee rights and patient care

  - *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31
  - *Occupational Health and Safety Act*, R.S.O. 1990 c. O.1
  - *Regulated Health Professions Act, 1991*
  - College regulation – e.g. College of Nurses of Ontario
  - Arbitral jurisprudence

Employee Safety & Privacy Rights

- *Prairie North Health Region and CUPE, Local 5111*, 2015 CarswellSask 768, 264 L.A.C. (4th) 16 (Ponak)
- Employer's new name tag policy added employees' last names to their previously required photo, job title and first name
- Arbitrator struck down the policy on three grounds:
  - the requirement to include last names violated employee privacy rights under Saskatchewan's privacy legislation;
  - it increased personal risk, violating employee rights to a safe workplace; and
  - it was an unreasonable exercise of management rights under the collective agreement

Employee Safety & Privacy Rights

- *Cambridge Memorial Hospital v. O.P.S.E.U., Local 239*, 2018 CarswellOnt 3847 (Marcotte)
- First and only case in Ontario addressing union challenge to the Hospital's requirement that employees fully identify themselves to patients
- Specifically whether the Hospital can unilaterally require full name, first and last, on employee name badges
- **Spoiler Alert**: Arbitrator ruled against the Hospital, but not a definitive "no", more of a "not yet"

Employee Safety & Privacy Rights

- Issue arose in the context of new building expansion and upgrade to facilities, opportune time to upgrade security and employee identification
- Current practice was varied by bargaining unit, department, sometimes manager within department
- Some employees had full name but were obscuring with a button or turning around when seeing patients
- Desire to harmonize the practice and enhance professionalization

Employee Safety & Privacy Rights

- Hospital had excellent evidence on its “environmental scan”, i.e., prevailing practices at other hospitals, best practices, evolving patient experience focus:
  - Full identity requirement bore a strong relationship to patient experience, transparency, trust, integrity, accountability, collegiality, professionalism (e.g. CON “requires” self-identification for regulatory purposes)
  - “If someone is asking me to disrobe to be probed or prodded, would at least like to know their first name, if not buy me dinner.”

Employee Safety & Privacy Rights

- Applying the 1965 KVP analysis, Arbitrator Marcotte found:
  - the Hospital's proposed identification policy had a reasonable objective
  - there was also no inconsistency or contravention associated with the CBA
- The issue was the balancing interests part of the test and health and safety
- Unfortunately he accepted the purely speculative evidence of the union, even though no actual harm was demonstrated:
  - someone received the one finger salute, another one was asked out by a patient, and a final one where a patient said, while at the hospital, "I know where you work."
  - unclear how the presence or absence of a name tag was relevant
  - no employee ever requested a safety plan related to personal identification risks
- All acknowledged that employee full names must and would be provided upon request in any event

Employee Safety & Privacy Rights

- The Hospital had consulted a variety of stakeholders, discussed the policy change at labour management meetings, and had a well-developed harassment in the workplace policy
- However, no formal risk assessment had been undertaken to take into account any new potential risks posed by uniform adoption of a full names requirement
- For Arbitrator Marcotte, this amounted to a breach of OHSA and thereby rendered the rule unreasonable on the overall balancing of interest requirement under the KVP test
- No breach of FIPPA as full name disclosure clearly related to the performance of employment duties

Employee Safety & Privacy Rights

- Arbitrator Marcotte distinguished another case from arguably more dangerous circumstances, *Toronto Police Assn. v. Toronto Police Services Board*, 2010 CarswellOnt 18945, [2010] O.L.R.B. Rep 940 where the Association challenged TPS on same issue, mandatory full names, citing risks associated with:
  - Biker gangs, organized crime, disgruntled people and other adverse encounters which may trigger desire to cause real harm
- Vice Chair Anderson found that the Association had failed to prove the full name disclosure materially increased the risk of stalking, threatening, locating etc.
- Arbitrator Marcotte glossed over the need to prove a material risk before there could be a finding of a breach of section 25 of OHSA

Employee Safety & Privacy Rights

- What to take from the case:
  - As with many areas in the law, any ambiguity or uncertainty will likely be resolved in favour of employee interests over that of the employer (or its clients, even vulnerable ones)
  - Conduct a risk assessment, even where the potential risks to employees are seemingly insignificant or largely speculative
  - Ensure a well articulated rationale to provide the foundation for the policy (see CEO's letter)
  - Hospital interests in transparency, accountability and patient experience will outweigh employee privacy concerns, and likely, their health and safety concerns

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Addiction and Impairment

Addiction and Impairment

- Increasing concern with opioid crisis and now legalization of cannabis
- Presumption that all employees report to work fit for duty and maintain that status, especially in the healthcare sector
- On October 17, 2018, the legalization of cannabis date, the College of Nurses of Ontario reminded its members:
  - Under the *Regulated Health Professions Act, 1991*, working while impaired is considered professional misconduct
  - Nurses with impaired judgment affected by any substance (e.g, opiates, alcohol and/or cannabis) must not provide patient care. Failing to meet this expectation may result in an investigation by CNO.
  - Nurses are also responsible to report to their employer when they believe another nurse or health care provider is impaired.

Addiction and Impairment

- *Cambridge Memorial Hospital v Ontario Nurses' Association*, 2017 CanLII 2305 (ON LA)
- A registered nurse was terminated for cause after she was caught stealing Percocet and Tylenol 3s from the Hospital and diverting them from patients (and falsifying the MAR accordingly)
- 28 years' service and a perfect record
- Grievor admitted to stealing, but challenged her dismissal on the basis that the hospital had failed to accommodate her opioid addiction in accordance with the *Human Rights Code*
- ONA relied on several prior awards that addressed the addiction defence and argued that the arbitral consensus dictated a non-disciplinary approach in these circumstances
  - Arbitrators had reinstated RNs who had been terminated for the theft of drugs from hospitals and/or patients where the RN pled an addiction

Addiction and Impairment

- *Cambridge Memorial Hospital v Ontario Nurses' Association*, 2017 CanLII 2305 (ON LA)
- Arbitrator Dana Randall upheld the discharge
- Arbitrator Randall held that simply pleading a nexus between the addiction and the misconduct is not in itself a defence against termination as such a nexus alone is not *prima facie* evidence of discrimination
- Although Arbitrator Randall found that 'but for' her addiction, the grievor would not have stolen she did not establish that the theft was the result of a compulsion, rather more of a controlled habit
  - The result would have been different had the grievor voluntarily disclosed her addiction before she being caught stealing

Addiction and Impairment

- Arbitrator Randall also noted the importance of general deterrence in assessing whether to vary the penalty imposed, especially important for hospital employers and those in the healthcare sector generally:
  - “I would be remiss to not mention my concern with respect to general deterrence. It is trite to note that workplace discipline has both specific and general deterrence purposes. At a time when opioid addiction is rampant in the culture and a major issue for healthcare professionals, sending the message that pleading addiction, only after being caught stealing one’s drug of choice, should be strongly deterred.”

Addiction and Impairment

- Lessons for Healthcare employers:
  - ensure policies articulate the requirement to disclose prior to detection in order to avoid disciplinary consequences
  - ensure policies also provide for robust statements and protocols evidencing Employer willingness to accommodate and assist employees who come forward with addiction claims
  - in deciding which penalty is appropriate, employers should undertake an analysis regarding the severity of the impairment
    - measure the degree of addiction and compulsion
    - consider consultation with a medical expert and/or counsel before acting
  - Consider reporting any narcotics thefts to local police given the seriousness of the misconduct and *Criminal Code* implications

Addiction and Impairment

- Reinforcing the importance of imposing disclosure obligations:
- In *Stewart v Elk Valley Coal Corp*, 2017 SCC 30, the SCC held that dismissal of the employee was justified based on his failure to adhere to the employer's drug and alcohol policy rather than due to his addiction to cocaine
- The human rights tribunal found that the termination was due to Mr. Stewart's breach of the policy, and not because of his addiction
- Supreme Court of Canada upheld the tribunal's decision
- Stewart had the capacity to comply with the policy, but failed to do so and termination letter clearly set out termination was for policy breach

Testing for Drugs

- *ATU, Local 113 v. Toronto Transit Commission*, 2017 the Court found that random drug testing of employees in safety-sensitive positions was permissible and would increase public safety.
- TTC led comprehensive evidence of a "culture of drug and alcohol use" in its workplace.
  - As indicated by the SCC in *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd*., 2013 SCC 34, and the Court of Queen's Bench of Alberta's later decision in *Suncor Energy Inc v Unifor Local 707A*, 2016 ABQB 269, employers seeking to implement universal random testing are first required to demonstrate that they (i) have a safety-sensitive workplace and (ii) have evidence of a general problem with drug or alcohol abuse.

Addiction and Impairment

- In *Lower Churchill Transmission Construction Employers' Association and IBEW, Local 1620*, 2018, Arbitrator John Roil, Q.C., found that the employer had reached the point of undue hardship when it refused to hire an employee for a safety-sensitive position who was prescribed medical marijuana
- Based on the evidence, the Arbitrator made the following observations:
    1. Use of medical marijuana can cause impairment which can last for up to 24 hours after use.
    2. Residual impairment can impact functions the day after evening medical marijuana use.
    3. A general physician is not in a position to adequately comment on the impact of medical marijuana on workplace safety.
    4. There are no readily available testing resources to allow the Employer to accurately measure impairment arising from regular use.
- If risk is to be managed, an employer must be able to measure the impact of that cannabis on the performance of the worker

Questions?

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