

Employment and Disability: Some of the Challenges

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Cases Considered:

United Nurses of Alberta, Local 33 v. Capital Health Authority (Royal Alexandra), [2008 ABQB 126](#)

The recent decision of Justice D.A. Sulyma in *United Nurses of Alberta, Local 33 v. Capital Health Authority (Royal Alexandra)* provides insight into the challenges faced by both an employer and an employee in accommodating a disability in the workplace. The employer seeks information about the disability and how it should be accommodated, while the employee seeks to protect his or her privacy, in addition to an accommodation of the disability. The court must sort these issues out while also determining whether the employee has a disability.

Schram (“the employee”) was a nurse with 30 years of experience working at a hospital in Edmonton (the “employer”). The employer required her to work a new shift rotation requiring more hours per shift and more consecutive shifts. She asked to be exempted from the new shift rotation because of a disability. Schram submitted two letters: one from her doctor and one from an occupational health specialist. The employer, however, said that these letters were insufficient to establish that she suffered a disability requiring accommodation. The United Nurses of Alberta, Local 33 (“the union”) grieved the employer’s decision to require the employee to the new shift rotation.

After it heard from the employer, employee and union, the Arbitration Board (“Board”) concluded that the medical information provided by Schram had the following problems:

1. it did not indicate what illness or injury caused her symptoms;
2. it did not provide treatment information;
3. it did not indicate whether the medical problems were temporary or permanent;
4. it did not link the 12-hour workdays and her symptoms; and
5. the occupational health specialist’s restrictions and recommendations were “so cautiously stated that they invited more inquiry, inquiry which was foreclosed to the Employer because the Grievor refused to allow the Employer to communicate with her doctors” (at para. 9)

The Board listed the type of information that may be necessary when dealing with accommodation requests:

1. nature of the illness, although a diagnosis is not required;
2. a description of permanent or temporary disability or illness;
3. restrictions and limitations in as much detail as possible;
4. how the medical conclusions were reached;
5. treatment and medication that might impact accommodation or the employee's ability to do the job (at para. 10).

The Board denied the grievance, concluding that it was reasonable for the employer to seek further information, and when that information was not provided, to deny the employee's request for accommodation.

The union appealed the Board's decision to the Alberta Court of Queen's Bench, arguing that:

- the Board misinterpreted and misapplied the law on disability;
- the Board misapplied the law on duty to accommodate and privacy rights; and
- the Board misinterpreted and misapplied the examination of the process used by the employer.

Justice Sulyma concluded that the applicable standard of review of the Board's decision was that of reasonableness *simpliciter*. This means that the reviewing court "must assess the basic adequacy of a reasoned decision (at para. 21, citing *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247).

One issue the Court addressed was what evidence is required to prove that an employee has a disability. The employee argued that recent human rights cases had moved from a pure biomedical approach on disability to a more functional limitations approach. The Supreme Court of Canada case of *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Montréal (City) (Boisbriand)*, [2000] 1 S.C.R. 665 held that the biomedical approach to disability focuses on the cause of the disability and is therefore too narrow; an approach that considers the socio-political dimension of "handicap" is more desirable. Thus, the emphasis should be on the exclusion or preference the person experiences rather than the precise cause or origin of the disability.

The employer argued, and the Court accepted, that *Boisbriand* should be distinguished because it was a case about perceived disability—the handicap existed because of the effects of a distinction drawn by employers rather than an actual disability. The Court held that the definition of "disability" in Alberta's *Human Rights, Citizenship and Multiculturalism Act*, R.S.A. 2000, c. H-14, required that there be evidence of injury, birth defect or illness. So, the Board was reasonable in assessing whether the employee had established that she had a functional limitation caused by injury, birth defect or illness. The Board had indicated that while a diagnosis was not required, the information provided by the employee could not establish whether she could work

the new shift schedule. The Court held that in deciding whether the employee had a disability, the Board had actually taken a functional approach that was consistent with human rights jurisprudence.

On another issue, the Court held that since the employee had not established she had a disability, there was no need for the Board to address whether the employer had accommodated the employee to the point of undue hardship (as is required by the legal test for accommodation set out by the Supreme Court in *Meiorin (British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3)). In absence of information about the illness or injury that caused the employee's symptoms, the duration of the medical problem and the linkage between work hours and symptoms, the employer did not have enough information to explore the range of appropriate and suitable accommodations.

The Court noted that the privacy interest of the employee was not raised by the union at the Board hearing, and found reasonable the Board's decision not to take into account the employee's privacy rights.

Finally, because the employer did not receive the information it needed in order to investigate alternative approaches, such as alternative shift patterns, the Court found that the Board did not misinterpret or misapply the correct process principles.

The impact of this decision is that the employee must provide more detailed information about her medical condition if she needs to be accommodated for a disability. Unfortunately, the case does not deal in any detail with the impact of privacy issues on disability and accommodation. The case of *Peace Country Health v. United Nurses of Alberta*, [2007] A.G.A.A. No. 17 (Sims) deals directly with the issue of privacy and disability. This case notes that employers are entitled to baseline information about an employee's illness, but must use the least intrusive method to gain this information before asking for further details. The exact diagnosis is rarely required.

For reasons unknown, the employee in the case at bar was reluctant to provide the level of detail requested by the employer. Perhaps she feared negative consequences that might affect her employment in other ways. For example, if the exact diagnosis were known, she might have feared enhanced employer scrutiny of her ability to perform her job. Privacy is an important issue that, if considered, could have affected the outcome of the case.