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ILLNESS AND DISABILITY IN THE WORKPLACE

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What's New in This Update:

This release includes updates to Chapter 2 (Common Law), Chapter 4 (Human Rights Legislation) and Chapter 5 (Short- and Long-Term Disability Insurance).

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Highlights

- **Effect of Disability Benefits on Termination of Employment—Historical Summary—Collateral Benefits—**In the *Pasap v. Saskatchewan Indian Gaming Authority*, 2022 SKQB 200 (Sask. Q.B.), affirmed at 2025 SKCA 15 (Sask. C.A.), the Court found that an employee whose long-term disability benefits were engaged three days before the end of his common law notice period, was entitled to the benefits under that plan. The insured employee worked for the Respondent employer for just under five years. On August 17, 2012, the employee's employment was terminated. The Court determined that the employee's common law notice period was eight months, ending April 16, 2013. Four months into the notice period, in December 2012, the employee experienced a catastrophic medical event and was released from hospital in January 2013. The parties disputed the length of the employee's disability. The employee was covered by a long-term disability (LTD) benefits policy during his employment. Under the relevant LTD plan, benefits would begin after a "waiting period." Benefits would begin on the 120th day after the medical event. In this case, the 120th day was April 13, 2013: three days before the end of the employee's notice period. The Court found that it took the employee two to three years to be fit enough to work following the medical event in December 2012. The employee was unable to find work in 2013 and 2014. The trial judge concluded that the insured was totally disabled between April 13, 2013, and April 12, 2015 [own occupation], and/or between April 13, 2015, and October 18, 2021 [any occupation]. The details of the plan required that, after two years, the insured continue to be prevented from performing any gainful occupation he was, or could be, trained or qualified in that would enable him to earn 66.67% or more of his pre-disability earnings. The trial judge valued the plaintiff's damages for wrongful dismissal and for the loss of long-term disability benefits at $1,216,764.25. She also awarded moral damages of $25,000 and punitive damages of $25,000, as well as costs. The Court of Appeal upheld this finding.
- **The Bona Fide Occupational Requirement Defence — Pre-Meiorin—The Subjective Test—**The onus of proving a BFOR is on the employer, however, the decisions also vary regarding the burden of proof required to establish subjective good faith. The statement by the Supreme Court of Canada on the subjective aspect of BFORs is found in *Meiorin* where the court stated that the "subjective" component is not essential in determining whether a standard is a BFOR. However, it is one basis upon which the standard can be struck down (see *British Columbia (Public Service Employees*

Relations Commission) v. BCGSEU ("*Meiorin*"), [1999] 10 W.W.R. 1 (S.C.C.), at p. 25). In *Meiorin*, the government introduced evidence about the reasons for the impugned standard, including why it retained the researchers from the University of Victoria to create the standards in question. The Supreme Court of Canada rejected an analysis that skips over an inquiry into the legitimacy of workplace standards to focus only on whether an individual complainant can be accommodated. Where a workplace standard adversely impacts a person based on protected characteristics, a purposive human rights analysis considers the rationality and intention of that standard quite apart from the respondent's specific knowledge of the complainant's situation. The plaintiff in *Klewchuk v. City of Burnaby (No. 6)*, 2022 BCHRT 29 (B.C. H.R.T.) alleged that she had been discriminated against by her employer when it refused to accommodate her severe allergies to latex, garlic and onion. The plaintiff worked for the defendant as an auxiliary employee, which meant that she could be sent to various locations to complete a variety of tasks on any given shift. She asserted that the employer had discriminated against her by, amongst other things, sending her to job sites where she was exposed to the allergens listed above. The employer defended itself by stating that it had done its best to accommodate the plaintiff despite a lack of "clear and cogent information about the degree of risk, how a reaction could be triggered, and the appropriate response in the event of an exposure". It further claimed that "any allergy-related adverse impact [experienced by the plaintiff] is justified as a bona fide occupational requirement". In this case, the Tribunal has no difficulty concluding that the employer met its burden to establish that it adopted the workplace standard in good faith, for a purpose rationally connected to the performance of the job. The workplace "standard" at issue was presence of allergens. The presence of these substances was rationally connected to the nature of the plaintiff's work and in good faith. "Those facilities are designed to serve a large and diverse population undertaking a variety of recreational activities, including sports and exercise, community events and parties, cooking, and arts and science. They are accessed by members of the general public, ranging from children to seniors, who may bring any number of allergens with them into the facility."

- **The Bona Fide Occupational Requirement Defence—Pre-Meiorin—BFORs Based on Safety Requirements—Individual Testing—**Individualized testing does not necessarily mean a medical or scientific test. Science has not yet developed testing resources that allow an employer to adequately and accurately measure impairment arising from cannabis use on a daily or other regular basis. The absence of

such test for medically authorized cannabis use is not enough to satisfy the *Meiorin* and *Grismer* requirements. In *International Brotherhood of Electrical Workers, Local 1620 v. Lower Churchill Transmission Construction Employers' Association Inc.*, 2020 NLCA 20 (N.L. C.A.), the union filed a grievance on behalf of one of its members who was refused employment when he failed to pass a drug test. The grievor, a general labourer, had disclosed that he used medically authorized cannabis to manage chronic pain. The Court of Appeal was tasked to decide whether the arbitrator appropriately completed the accommodation analysis. The union argued that the employer was required to, but failed, to undertake an individual assessment of the grievor. The arbitrator concluded that the grievor's use of medically authorized cannabis created a risk of impairment on the jobsite, and further, that "more research and knowledge than is currently possible [is necessary] in order to ensure an employer's ability to determine impairment in a construction environment". Consequently, the arbitrator determined that the employer's "inability to measure and manage that risk of harm constitutes undue hardship for the Employer." The employer argued that there is no scientific or medical standard to determine if the grievor was impaired, and if so, the extent of impairment after the passage of time. The arbitrator accepted that the scientific and medical evidence is not at a level of sophistication to enable a similar defined standard to establish impairment where the use of medically authorized cannabis is at issue. The Court of Appeal, however, determined that this was not the end of the analysis, finding that "the arbitrator's decision was unreasonable insofar as he failed to address the employer's onus to establish that to accommodate the grievor by means of individual assessment of his ability to perform the job safely, regardless of the absence of a scientific or medical standard, would result in undue hardship" (para 36).

- **Long-Term Disability Insurance—Availability of Work—**A defendant is not necessarily required to show that a job was available and waiting for the plaintiff. As summarized in *Wondrasek v. Fenchurch General Insurance Co.*, 2021 SKQB 30 (Sask. Q.B.), at para 139, citing *Thevenot v. Manufacturers Life Insurance Co.*, 2006 MBQB 58 (Man. Q.B.) at para. 81, (2006), 202 Man. R. (2d) 106 (Man. Q.B.), a case cited in *Eichmuller v. Provident Life and Accident Insurance Co.*, 2012 ABQB 690, 548 A.R. 359 (Alta. Q.B.):

  The defendant is not required to show that a job was available and waiting for the plaintiff but is required to submit evidence of an occupation for which the plaintiff is capable and reasonably qualified by education, training and experience. The plaintiff's claim is for disability insurance and not unemployment insurance. The law is

that the unavailability of employment for which the person is qualified or the inability to find such employment are normally not relevant considerations. The test is whether a person can do a job based upon education, training or experience. ...

- In *Wondrasek*, the defendant undertook a comprehensive review of the plaintiff's case and determined that while she was unable to return to her "own" occupation as a miner's helper. That said, she could perform non-physical, sedentary employment. Based on her previous experience, physical limitations and skills, occupations available to the plaintiff were assessed to include clerical, sales representative, ticket agent/clerk or hotel front desk clerk. The plaintiff did not meet the definition of "disabled" under the specific policy.

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