Navigating the Storm: A Legal Perspective on Workplace Mental Health

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Workshop Objectives

• A little bit about us
• Why we think you should care
• Common Mental Illnesses
• A framework to have the conversation
• Key legal concepts
• Illustrative case studies
• Questions
• Additional resources

About CMHA

• One of Canada’s oldest national charity – soon to be 100 yrs old
• Our policies and programs anchored in evidence and informed by people’s personal experience
• We work towards mental health for all, including people with addictions.
• Over 120 branches throughout Canada; 17 in BC
About Roper Greyell LLP

- A Vancouver-based employment and labour law firm
- 24+ lawyers
- Represents a diverse list of private and public sector employers, including construction, forestry, health care, retail, utilities and municipalities
- Practice areas include management-side labour law, human rights law, wrongful dismissal litigation, privacy law, employment standards and workers compensation

Mental Health in the Workplace: Why we think you should care.

- According to GWL – 30% of disability claims are due to mental health issues – But in 75% of claims, depression is the secondary diagnosis
- 44% of employees reported mental health issues
- 500,000 Canadians missed work today due to a mental illness
- 51 Billion – Cost of mental illness to the Canadian economy
- 6.6 Billion – BC’s share of the burden each year
- The average company loses up to 12% of its payroll to employee disability through loss of productivity and sick leave

Continuum of Mental Health

Common Mental Illnesses - Anxiety

• Anxiety is a disorder when it lasts for a long time and interferes with the person’s ability to function
• Most common mental disorder
• Women (16%)>Men (9%)
• Commonly occurs with depression
• Characterized by excessive worry, speeding/slowing thoughts, fear, insomnia, physical symptoms (i.e., shortness of breath, rapid heart beating, stomach upset, muscle ache etc)

Substance Related Disorder

• Substance abuse: When a person continues to use a substance despite negative consequences
• Substance dependence: When a person experiences withdrawal
Depression

- Mood disorder – most common mood disorder
- Affects 13% of Canadians
- In people under 65, women are twice as likely to be diagnosed as men
- Leading cause of disability
- Characterized by low mood or the loss of interest in nearly all activities
- Up to 15% of people with clinical depression die by suicide

Bipolar

- Mood disorder
- Also called manic depression
- 1-2% of population
- Extreme mood swings
- Onset is between ages 15-24
- Mania: elevated mood, grandiose ideas, irritability, lack of insight
- Depression: low mood, hopelessness, withdrawal, loss of interest, fatigue

Risk Factors

- Genetics
- Trauma
- External Stressor (workplace, family etc)
- Social Isolation
Invisible Disabilities?

- Not truly invisible
- Show up in the workplace as changes in:
  - Performance
  - Absenteeism
  - Punctuality
  - Personal appearance
  - Sick days
  - Sociability
  - Response to new task or new situations

Duty to Inquire

- When an employee’s performance is an issue, it is easy to think “performance management.” Be cautious!
- When an employee displays inappropriate or uncharacteristic behaviour, an employer has a duty to inquire whether there is a connection to a mental illness or mental health issue
- If an employer fails to make these inquiries and disciplines the employee - that discipline can amount to a breach of the Human Rights Code.

Address Behaviours Early

1. I notice...
2. I’m wondering...
3. Let’s focus on solutions at work.
It doesn’t start with “I notice”

It starts with you.
• Are you in the right frame of mind to start this discussion?
• Are you aware of your triggers?
• Have you envisioned what success will look like?
• Do you have access to resources you may need?
• Do you have some time blocked off?
• Are you able to defer some of your needs (a need for fairness; to be heard, to express yourself)?

Now you’re ready for “I notice”...

Speak to what you see. What have you noticed? Look for changes in:
• physical health
• eating habits
• personal appearance
• sociability
• errors, quality of work, accidents
• punctuality
• response to new tasks and familiar tasks
• working more, unable to take a break

Next Step: “I’m wondering”

Step back from assumptions
Be curious
Listen for understanding:
  — ask one question at a time
  — listen for the answers, allow pauses
  — avoid interrupting
  — seek clarification
  — don’t problem solve, take more time to gather information than you normally would
  — be aware if you are arguing or defending
Final Step: “How can I help you...”

- What can I do to support your success at work?
- How can I help you be successful at work?
- Consider small “a” accommodations (everyday changes and supports)
- Ask what the employee is going to do to also contribute to their success
- Write next steps down either with the employee or after the meeting

Reflecting...

- It’s important to take a moment thank yourself and acknowledge that you have approached an important conversation and have started to build a stronger relationship with another person
- Take a walk
- Grab a coffee
- Sit in silence for a few minutes

Let’s try it out!

How do you present?

1. I notice...
2. I’m wondering...
3. Let’s focus on solutions at work.

Reflect
The Key Concepts

Mental Disability. Mental Illness.

- Employees are protected from discrimination in employment on the basis of mental disability. A mental disability may be temporary or permanent.
- A mental disability includes a diagnosed mental illness (depression, anxiety, schizophrenia, bi-polar etc.).
- It also includes a drug or alcohol addiction.
- Not all mental illnesses are disabling. For instance being “stressed out”, without more, is not a mental disability.

Discrimination

- Employees are protected from discrimination in employment on the basis of mental disability, which may be temporary, intermittent or permanent.
  - Human Rights Codes
  - Also implied in all Collective Agreements
Discrimination

Discrimination on the basis of a mental disability is where:

1. an employee has a mental disability
2. the disabled employee experiences adverse treatment
3. the adverse treatment is connected in part or in whole to the disability

Adverse Treatment

Adverse Treatment is any treatment that has a negative impact on the employee.

Examples can include:
- a demotion;
- a change in schedule;
- loss of money;
- discipline; or
- termination

The Nexus

- Most human rights complaints are in relation to this part of the test
- The disability must be a factor in the adverse treatment
  - It does not have to be the only factor, or even the major factor, that it was a factor is sufficient
Duty to Accommodate

• Disabled employees have the right to accommodations in the workplace.
• Accommodations must be individualized
• Accommodations must be reasonable, but they do not have to be perfect.
• Accommodation is a shared duty between the employer and employee and the union if there is one.

Duty to Accommodate

• Examples of accommodation include:
  – flexible start times/scheduling,
  – additional break times or time off for appointments,
  – a change in office environment (more privacy, more quiet), or
  – a modification in the way instructions are given

Undue Hardship

• An employer is required to accommodate an employee's disability up to the point of "undue hardship".
• This means that employers are expected to endure some hardship.
• Determining what is "undue hardship" is also individualized.
  – What is "undue" for a small business may not be "undue" for a large employer.
Duty to Accommodate

• Duty to accommodate is procedural as well as substantive.
  1. Duty to Inquire;
  2. Duty to gather necessary medical;
  3. Can employee return to own position, with or without modification?
  4. Can the employee be accommodated into another position, with or without accommodation?

First Duty – The Duty to Inquire

Medical Information

• Often necessary to determine:
  – Is there a disability?
  – Is it causally connected to job performance?
  – What functional restrictions/limitations, job modifications, etc. required to allow the employee to return or stay at work?
• Often the most difficult part of the accommodation process – for everyone.
• Doctor’s notes can be vague and give inconsistent information.
Second Duty – Duty to Accommodate

Employee’s Responsibilities
- Ask for medical info
- Participate in accommodation

Union’s Responsibilities
- Provide medical info
- Participate in accommodation

Failure to Meet These Duties

Bullying and Harassment

- WorksafeBC defines it as any inappropriate conduct or comment by a person towards an employee that the person knew or ought to have known would cause that employee to be humiliated or intimidated.

  - It does not include reasonable action by a supervisor or employer to manage and direct a worker, including discipline.

- What’s important to know is that an employee can develop a compensable mental disorder from bullying and harassment (which impacts premiums)
The bully
A previously good employee starts to complain about her supervisor. When you investigate, the supervisor pleads his innocence. He says the employee's performance has been terrible. You start to think the employee is lying and trying to ruin the supervisor's reputation. After you investigate you discipline the employee for making false allegations against her supervisor. A few days later she quits and files a lawsuit.
http://canlii.ca/t/g6xvb

Bizarre Behaviour
I just hired this guy in a very important and high level security position. Within a week he tells me he has some kind of mental disorder and wants me to call his wife if he starts acting weird. Within a few days his emails become completely inappropriate. His co-workers are coming to me telling me he is acting bizarre and frightening them. I speak to my boss and we decide to terminate him immediately.
http://canlii.ca/t/205dq

The doctor’s note
It’s that time of year – the performance review. You and Marie sit together and identify opportunities for change. Marie does seem a little out of sorts when she leaves your office. She calls in sick the following day, and after a week you receive a doctor’s note citing stress. There are few details and no indication about how long she will be away from the workplace.
The crab
She has rubbed people the wrong way for a while. On top of that, she isn’t always performing to the same level as her colleagues. She if often late, and when she is around, she is irritable. You have talked to her about it before but it's not getting better. You’re wondering if it’s time to let her go.

http://canlii.ca/t/ftjre

The addict
When you started working here, you were told he takes long lunches at the pub down the street. It was said flippantly, and with the caveat that it’s best to catch him in the mornings if you want something done. But sometimes he has afternoon meetings with clients, and he drives. And you found out his wife just left him.
Mental Health for All: Adults

Free or low cost coaching:
• Provide practical tools and strategies
• Reduce stress and boost mood
• Improve motivation and problem-solving skills
• Change unhelpful thoughts and behaviours

Mental Health for All: Workplace

Workshops on:
• Bullying and Harassment / Mental Disorder Legislation
• Leadership Training
• Mental Health Awareness
• Social Support in the Workplace
• How to Respond with Respect
• Mental Health First Aid

Opportunities to talk about mental health

• Mental Health Week 2015 is coming up: May 4 to 10
• Ride Don’t Hide 2015: June 21
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