Aids: An Employer Challenge

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The emergence of AIDS as the disease of the 1980s has created numerous challenges for employers. On the one hand, employers must contend with the rights of employees or prospective employees who either have or are suspected to have AIDS. On the other hand, the interests of employees who are not infected with AIDS must be addressed in the context of an employer's obligation to provide a safe working environment.

In addition, employers are faced with the potential of spiralling benefit costs as the number of AIDS cases in the work force increases. This paper will address some of the legal issues of which an employer must be cognizant in dealing with AIDS in the employment context.

I. HUMAN RIGHTS ISSUES

Although in practical terms employers rarely discover prior to making an offer of employment that a job candidate has AIDS, there may be circumstances in which such information is known by or disclosed to the prospective employer. In addition, an employer may discover in the course of an employee's employment that he/she is infected with AIDS and may be faced with complaints by co-workers that they do not wish to have the infected employee continue in employment with the employer. The employer in both scenarios is faced with the issue of when it may lawfully refuse to hire or to continue to employ a person with AIDS.

In Ontario, an employer in this situation must be aware of the provisions of the Ontario *Human Rights Code, 1981*[1]. Section 4(1) of the Code prohibits discrimination in employment because of, amongst other things, "handicap". The term "handicap" is defined very broadly in Section 9(1)(b) of the Code to include a case where a person has or has had or is believed to have or have had any degree of physical disability caused by illness.

Although no board of inquiry in Ontario has decided whether or not AIDS falls within the definition of "handicap", it is difficult to believe that it would not be so interpreted. Furthermore, the Ontario Human Rights Commission has clearly taken the position in its policy statement entitled "HIV/AIDS — Related Discrimination" that AIDS is an illness which falls within the definition of "handicap".

The Code also prohibits discrimination in employment on the basis of a person's "sexual orientation". This prohibited ground of discrimination may be relevant in a case involving a person with AIDS given the perception, erroneous though it may be, that AIDS is a "gay disease".

Furthermore, Section 10 of the Code generally prohibits constructive discrimination on a prohibited ground, including "handicap". Constructive discrimination in the AIDS context could occur, for example, if an employer requires medical testing that is neutral on its face but that has the result of excluding from employment persons who suffer from AIDS.

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1. S.O. 1981, c. 53 as am. [hereinafter the Code].

An employer should also be aware that Section 22(2) of the Code prohibits written or oral inquiries as part of an application for employment that directly or indirectly classify applicants on a prohibited ground of discrimination such as "handicap". This could arise, for example, in respect of questions dealing with the medical condition of an applicant that would have the effect of classifying applicants who are infected with AIDS.

In summary, therefore, the Code generally prohibits an employer from refusing to employ or continuing to employ or discriminating in the course of employment against a person infected by AIDS as this would constitute discrimination on the basis of "handicap". Furthermore, discrimination in employment because of a person's "sexual orientation" is also prohibited as is constructive discrimination on the basis of "handicap" or "sexual orientation".

A key exception to this general rule is outlined in Section 16(1) of the Code, which states that discrimination on the basis of "handicap" is allowed if the person is "incapable of performing or fulfilling the essential duties or requirements" of his or her job. Section 16(1)(a) provides that such incapacity will not be found to exist unless it can be established that the employer cannot reasonably accommodate the person without undue hardship given the cost, outside sources of funding, if any, and health and safety requirements, if any, which are relevant to the situation.

Given the wording of Section 16(1), the duties of the job of the AIDS-infected employee or applicant would have to be examined to ascertain the essential functions of the job. An employer may wish to retain a job analyst or other expert to provide an opinion with respect to what are the essential duties involved in any particular job.

The employer would next have to establish that a person with AIDS is incapable of performing those essential functions because of his or her handicap. It is recommended that a medical opinion or opinions with respect to alleged incapacity be obtained before an employer reaches a decision having an employment impact on a person affected with AIDS.

The third step is for the employer to examine whether or not reasonable accomodation of the AIDS-infected person may be made without undue hardship.

Although Section 16(1)(b) of the Code states that the Ontario Human Rights Commission board of inquiry appointed pursuant to the Code or a court shall consider any standards prescribed by the regulations for assessing what is undue hardship, no such regulations have yet been promulgated.

The Ontario Human Rights Commission has, however, published "Guidelines for Assessing Accommodation Requirements for Persons with Disabilities" which outline the Commission's interpretation of the requirements of reasonable accommodation and undue hardship.

A recent board of inquiry decision in the case of *Gohmit* c. *Domtar Inc.*[2] has also established that an employer must make substantial efforts to reasonably accommodate, and that *de minimis* attempts are not sufficient.

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2. (1990) 11 C.H.R.R. D/420.

It should be noted that a defence to a complaint of indirect or constructive discrimination on the basis of handicap is found in Section 10(1)(a) of the Code, which states that if a requirement, qualification or factor is reasonable and *bona fide* in the circumstances, constructive discrimination on the basis of hanbdicap is permissible. However, Section 10(2) states that a requirement, qualification or factor will not be held to be reasonable and *bona fide* unless it can be established that reasonable accommodation cannot be made without undue hardship.

There has not yet been a board of inquiry decision in the Province of Ontario dealing with an AIDS-related complaint of discrimination. A board of inquiry was appointed in Ontario to hear the complaint of Lentz against the Toronto Hospital (Western Division) that he was dismissed as a nurse at the Hospital because he had AIDS. A settlement was reached prior to a board of inquiry hearing and Lentz was reinstated as a nurse. He received full back pay, benefits, and an amount for legal fees. Lentz was able to work for only approximately one month after his reinstatement due to his deteriorating medical condition, and he died on December 25, 1988.

AIDS cases have, however, been decided by other human rights tribunals in Canada. For example, an Alberta board of inquiry appointed pursuant to the Alberta *Individual's Rights Protection Act*[3] has dealt with a case of AIDS-related discrimination in a dismissal situation. The case was *S.T.E.* c. *Bertelsen*.[4] The case involved a drummer in a band who co-habitated with the other band members in an apartment and, therefore, had normal household contact with them. He developed AIDS and was fired from the band.

The board of inquiry held that AIDS is a physical disability within the meaning of the Alberta *Individual's Rights Protection Act* and that the drummer was fired because he had AIDS. The board concluded that the band leader had discriminated against the complainant, and held that the discrimination was not reasonable and justifiable in the circumstances. This finding was based on expert evidence, which established that there is no risk of contracting AIDS from ordinary household or workplace contact. The band leader's subjective view that the risk of infection was real was insufficient as it was not based on objective information. The board upheld the complaint and awarded the drummer lost wages and the value of lost room and board, with interest.

Similarly, a federal human rights tribunal in *Fontaine* c. *Canadian Pacific Limited*[5] held that a cook who tested HIV-positive had been constructively dismissed as a result of his "disability". He confided the fact that he had tested positively to a member of a Canadian Pacific railroad maintenance gang and the news spread throughout the camp. The cook was advised that supervision would be unable to control the other members of the gang if they decided to attack him and that no one would continue to eat his food. As a result, he fled the camp immediately. Given the intolerable working atmosphere created, the Commission held that the cook's employment had been constructively terminated.

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3. R.S.A. 1980, c. I-2.

4. (1989) 89 CLLC 17,017, 10 C.H.R.R. D/6294.

5. (1989) 89 CLLC 17,024, 11 C.H.R.R. D/288.

Canadian Pacific Limited was ordered to pay the cook lost wages, $2,000 in general damages and also to apologize. It was pointed out that the Company's failure to develop an AIDS policy contributed to a difficult situation.

In summary, the Code offers substantial protection in the employment context to persons infected with AIDS. An employer cannot refuse to employ or continue to employ or otherwise discriminate in employment against a person with AIDS unless it can be established that the person, because of his or her AIDS condition, is actually incapable of performing the essential duties of the job. It is submitted that this would be most difficult to establish in the early stages of the disease or in the case of a person who is a carrier of the AIDS virus.

Even if such incapacity could be established, an employer is still under an obligation to reasonably accommodate the AIDS-infected person unless to do so would cause undue hardship. It would be exceedingly difficult, if not impossible, to establish that the risk of infecting a co-worker, patient or other person in the workplace with AIDS would be a sufficient enough health and safety risk to constitute undue hardship.

II. OCCUPATIONAL HEALTH AND SAFETY

An employer is under a legal obligation to provide a safe working environment. This is outlined, for example, in Section 14 of the Ontario *Occupational Health and Safety Act*.[6]

An employer may be faced with a refusal to work by an employee who takes the position that a co-worker with AIDS or a person other than a co-worker with AIDS to whom the employee is exposed in the course of his or her employment poses a safety risk that enables the employee to refuse to work in the circumstances. For example, Section 23(3) of the *Occupational Health and Safety Act* permits an employee to refuse to work where he or she believes that the physical condition of the work place is likely to endanger his or her health.

To date, there have been six such work refusals pursuant to the Ontario legislation, because of an employee's fear of contracting AIDS on the job. Three of the cases involved hospital employees. In five of the six cases, Ministry of Labour officials investigating the refusal to work concluded that the situation was not likely to endanger the employee. The only case in which a situation was held likely to endanger a worker involved a funeral home where a worker had refused to carry out embalming on an AIDS victim. It was concluded that the worker was likely to be endangered and orders were made for appropriate procedures to be followed, including wearing of protective clothing and provision of adequate showers.

It is significant that there has been no refusal to work under the Ontario legislation in approximately the last two and a half years, and this may be the result of greater public education concerning AIDS and employers making better efforts to both educate and train their employees to deal with AIDS in the workplace.

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6. R.S.O. 1980, c. 321, as amended.

The issue of AIDS-related work refusal was dealt with at the federal level by the Public Service Staff Relations Board in *Walton* c. *Treasury Board (Correctional Services Canada)*.[7] This case involved a prison guard who refused to work with certain inmates who were suspected of having both AIDS and Hepatitis B. The basis of the work refusal was a fear that the inmates would throw at him pails containing their feces, urine or semen and that they would also bite him or spit on him. A safety officer concluded that there was no danger and the matter was referred to the Public Service Staff Relations Board pursuant to Section 86(5) (now Section 129(5)) of the *Canada Labour Code*.[8]

The Board concluded that there was no evidence that the forms of contact feared by the guard would lead to the transmission of AIDS and that his mere speculation that this would occur was insufficient to justify his refusal to work based on the evidence. However, the Board concluded that the threat of contracting Hepatitis B, which is more easily transmitted, constituted a sufficient "danger" within the meaning of Section 79(1) (now Section 128(1)) of the Code to justify the guard's work refusal.

III. AIDS TESTING

Some employers consider implementing mandatory AIDS testing of current and prospective employees. However, the circumstances in which such testing is legally permissible in the Province of Ontario are exceedingly limited. Sections 4 and 10 of the Ontario *Human Rights Code, 1981*, severely restrict medical testing used to prohibit hiring or continuing to employ a person infected with AIDS.

First, it is the policy of the Ontario Human Rights Commission that pre-employment medical testing is not permissible unless and until an offer of employment has been made.

Second, medical testing in order to satisfy the requirements of Section 10 of the Code would have to be "reasonable and *bona fide* in the circumstances" and in order to satisfy Section 16(1) of the Code would have to be designed to test a person's ability to perform the essential job duties in question.

Even if medical testing met these requirements, an employer would have to reasonably accommodate either an applicant or an employee who was found to have AIDS unless to do so would cause undue hardship.

IV. ARBITRAL JURISPRUDENCE

7. (1987) 16 C.C.E.L. 190.

8. R.S.C. 1985, c. L-2.

Employers dealing with an AIDS-related employment issue in a unionized environment should be aware of the arbitral jurisprudence on point. To date, there would appear to have been only two arbitration awards in Canada dealing with AIDS-related issues.

The first such case was *Re Pacific Western Airlines Ltd. and Canadian Air Line Flight Attendants Association*.[9] The issue involved whether the employer's suspicions that a flight attendant had AIDS were sufficient justification to suspend him with pay.

The arbitrator held that the medical evidence disclosed no risk that an employee with AIDS could transmit the virus to fellow employees or passengers, nor was there any evidence that the disease had rendered the employee incapable of performing his job duties. As a result, the grievance was upheld, but the arbitrator stated that if there was evidence that an employee with AIDS had an adverse impact on an employer's business interests either because the disease had rendered him or her incapable of performing the job duties in question or because the presence of such an employee represents an actual rather than a hypothetical risk to safety, the employer would be justified in suspending the employee.

The second arbitral award involving AIDS in the employment context is the case of *Centre d'Accueil Sainte-Domitille* c. *Union des Employés de Service, Local 298 (F.T.Q.)*[10] involving the grievance of Louise Lamothe. The case involved a school teacher who was suspended by her employer for refusing to submit to an AIDS test. The employer took the position that the nature of her work, teaching maladjusted teenagers, involved intervening in fights between students, which could result in bites and thereby create a risk of AIDS transmission to others in the work place.

The arbitrator held that there was no evidence that the employee was unable to perform her job functions. In addition, based on expert evidence, it was held that the risk of transmitting the virus was very low in the employment context in question if proper hygiene practices were followed. Accordingly, the arbitrator upheld the grievance.

V. COMMON LAW

At common law, an employer may be justified in terminating the employment of an employee if the employee is incapacitated by reason of illness or injury. The right is based on the doctrine of frustration inasmuch as the illness or injury is deemed to have frustrated the employment relationship.

In order to justify such a dismissal, it must be established that the illness or injury is "permanent" in the sense that it would be improbable that an employee would be able to carry out his or her employment obligations in the reasonably foreseeable future.

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9. (1987) 28 L.A.C. (3d) 291 (J. Hope).

10. D.T.E. 89 T-453 (T.A.).

In a case of an employee with AIDS, the common law doctrine of frustration would only apply in the advanced stages of the disease. While an employer may be justified in terminating the relationship at common law in those circumstances, the same employer may not be able to take such a step pursuant to the Ontario *Human Rights Code 1981*, as has been outlined above.

VI. EXCLUSION FROM BENEFIT PLANS

Faced with the fact that costs of employer benefit plans will skyrocket as the result of employees suffering from AIDS, an employer may wish to exclude such employees from benefit plan coverage in order to effect substantial cost savings. However, under the Ontario *Human Rights Code, 1981*, such exclusion would constitute prohibited discrimination on the basis of "handicap".

An exception to this general rule is found in Section 24(3) of the Code, which allows employees to be excluded from benefit plans if such exclusion is reasonable and *bona fide* in the circumstances and if there is a pre-existing handicap that substantially increases the risk of a claim being made pursuant to the benefit plan. This Section also provides that a substantial increase in risk need not be established in the case of a benefit plan offered by an employer with fewer than 25 employees, provided the exclusion remains reasonable and *bona fide*.

It should be noted, however, that Section 24(4) states that an employer must pay an employee who is excluded from coverage pursuant to a benefit plan offered by an employer, compensation equivalent to the contribution that would normally be made to the plan on behalf of an employee who is not handicapped.

Prior to relying on this Section, an employer should obtain evidence from insurers of risk and claims experience involving employees suffering from AIDS, and of the potential economic impact on the employer of continuing to provide coverage to an employee suffering from AIDS.

VII. EDUCATION AND TRAINING

Given the myriad laws that pertain to a person suffering from AIDS in the employment context, it is recommended that employers consider implementing policies to deal with AIDS in the workplace and educating employees with respect to HIV infection generally and on how to deal with HIV infection in the context of the employment relationship. As outlined above, it was held in the case of *Fontaine* v. *Canadian Pacific Limited*[11] that the failure of the employer to have an AIDS policy in place exacerbated an already difficult situation.

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11. *Supra* note 5.

Employers adopting this proactive approach will not only enhance their reputations for being both fair and progressive, but will significantly reduce the costs, both direct and indirect, of dealing with human rights complaints, wrongful dismissal actions, grievances and work refusals. Employers are well advised to review any proposed policy with legal counsel prior to its implementation. An employer may also wish to have a proposed policy reviewed by the Ontario Human Rights Commission prior to implementing it.

If an AIDS policy is implemented by an employer, it should be clearly communicated to all employees in question, and consideration should also be given to posting it in the workplace. Furthermore, an employer is well advised to have information sessions with employees in order to discuss the policy and AIDS in general in the context of the workplace. Appropriate experts could be brought in for such sessions, to address any questions or concerns.

CONCLUSION

Employers dealing with AIDS in the employment context not only face myriad legal issues with which to contend, but also face the problem of confronting ignorance and misperception about HIV infection, both in the work force generally and with customers and clients who may refuse to deal with an employee with AIDS or who is suspected of having AIDS. A responsible employer in the 1990s will be well advised to combat such ignorance and misperception with proper education and training, and by showing leadership in formulating policies designed to deal with AIDS-related issues in the employment context.