HUMAN RIGHTS TRIBUNAL OF ONTARIO

BETWEEN:

Andrew Scarlett

Applicant

-and-

Hamilton Health Sciences Corporation

Respondent

DECISION

Adjudicator: Sherry Liang

Date: January 4, 2010

File Number: 2008-00504-I

Citation: 2010 HRTO 5

Indexed as: **Scarlett v. Hamilton Health Sciences Corporation**

APPEARANCES:

Andrew Scarlett, Applicant	)))	On his own behalf
Hamilton Health Sciences Corporation, Respondent	))))	Mark Zega, Counsel

01/04/2010 MON 17:19 [TX/RX NO 6819] 003

[1] This is an Application filed on October 8, 2008, under section 34 of Part IV of the *Human Rights Code*, R.S.O. 1990, c. H.19, as amended (the "*Code*"). The applicant alleges that his employer, the Hamilton Health Sciences Corporation (the "Hospital") discriminated against him on the basis of disability in terminating his employment effective August 26, 2008.

BACKGROUND

[2] As of the date of his discharge, the applicant had been employed by the Hospital for approximately six and a half years, most recently in the position of Co-Generation/Building Operator. He was represented in his employment by the Canadian Union of Public Employees, Local 4800 ("CUPE"). CUPE has filed a grievance challenging the applicant's discharge. At the time of the hearing of this Application, the arbitration of that grievance was still pending.

[3] During the year 2008, the applicant experienced a number of absences from the workplace. Most significantly, he was off work from June 18 until his discharge. The applicant was denied sick pay, on the basis that the information he provided did not support a total disability. The applicant remained off work and the Hospital subsequently terminated his employment, considering him absent from work without leave and relying on a "deemed termination" provision in the collective agreement.

[4] The applicant's entitlement to sick pay was the subject of a grievance which was referred to arbitration under a special expedited procedure for the resolution of such disputes (the "ADRP process"). This resulted in a decision of an arbitrator on February 16, 2009 (the "Mikus award"), in which the arbitrator found that the applicant did not qualify for sick pay.

[5] The Hospital takes the position that the matter of the applicant's entitlement to sick pay has been decided by the arbitrator and cannot be re-litigated. The applicant does not dispute this. In arriving at my determinations, I have accepted the arbitrator's findings, to the extent they overlap with issues before me. I am satisfied that the legal

doctrine of "issue estoppel" applies to prevent the applicant from challenging the essential issue decided by the arbitrator (whether the medical evidence supported a finding of total disability) and any constituent issue or fact put before the arbitrator on which she made a determination (see *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 S.C.R. 460).

[6] Although the Application raises a number of issues, the scope of the Application was narrowed through correspondence prior to the hearing and the Tribunal's Interim Decision 2009 HRTO 731 (CanLII). The Application as originally framed alleges discrimination in the applicant's dismissal, as well as in the denial of sick pay, on the grounds of disability and race. In his materials, the applicant also made a claim of "systemic discriminatory practices" in the administration of the sick plan. He wished to challenge the findings in the Mikus award as based on "flawed and inadequate information". By the time of the hearing, the applicant had withdrawn the allegations of discrimination on the basis of race. He confirmed that he was not seeking to overturn the finding in the Mikus award that he was not entitled to sick pay. At the hearing, the applicant further clarified that he was limiting his claim to the termination of his employment, and was not advancing a claim about discrimination in the administration of the Hospital's sick plan.

[7] The Tribunal also made certain rulings at the hearing on the scope of the evidence. Despite the applicant's position that he was not challenging the Mikus award, he had served a Tribunal summons on Ms. Mikus. The applicant stated that he wished to "question her expertise with hernias", as well as cross-examine her about some of her findings.

[8] Counsel for Ms. Mikus appeared at the hearing to oppose the summons. I ruled that the evidence of the arbitrator was inadmissible. The Tribunal does not act as an appeal court from decisions of arbitrators. Their decisions are final and binding, subject only to judicial review, and cannot be challenged through seeking to cross-examine an arbitrator at a Tribunal proceeding. In addition, I note that section 120(2) of the *Labour Relations Act, 1995*, S.O. 1995, C. 1, Schedule A (the "*LRA*") provides that an arbitrator

cannot be compelled to give evidence about matters arising in the course of an arbitration.

[9] The applicant sought to rely on some written statements he had obtained from his doctors just prior to the hearing. I did not accept them as the doctors were not available to be cross-examined and, in any event, it appeared that the purpose of the statements was to challenge findings made in the Mikus award.

THE EVIDENCE

[10] The following description of the facts is based on the oral and documentary evidence of the parties. The evidence of the parties was substantially consistent and to the extent there were minor differences, they had no bearing on my determinations.

[11] In addition to giving evidence himself, the applicant called three witnesses: his union representative, and two members of management with the Hospital. The Hospital called two witnesses, Daniel Karschti, Manager of Engineering for the McMaster site and Rosalie Prokopetz, the Human Resources Manager.

[12] The Hospital provides total disability benefits for its employees under the Hospitals of Ontario Disability Income Plan. The Hospital has retained a consultant, Cowan Benefits Consulting ("Cowan") to determine eligibility for benefits under its plan. Cowan receives medical documentation from employees in support of a claim for sick pay benefits, and advises the Hospital whether or not an employee is entitled to the sick pay. The Hospital does not review the medical documentation, but accepts Cowan's decisions on claims.

[13] The validity of the Hospital's reliance on Cowan for this purpose was challenged under the collective agreement between the Hospital and CUPE, and upheld in an award of an arbitrator (unreported decision of Paula S. Knopf, July 10, 2007). In the same award, the arbitrator directed that the Hospital continue to pay benefits until it has considered and accepted a recommendation from Cowan to reject a claim. Further, in

the process of considering a claim, if Cowan determines that additional medical information is required for it to make a determination of eligibility, Cowan shall advise the employee whenever possible of the extent or type of further medical information required to adjudicate the claim, and the employee will be given 15 days or such timeframe to be agreed upon between the employee and Cowan to obtain the information. The Hospital will continue benefits during the period during which medical information is sought. The arbitrator also upheld the use of the Hospital's Medical Certificate of Disability (MCD), with specific amendments.

[14] The Hospital uses another consultant, Telus Sourcing Solutions ("Telus"), to manage other aspects of its employee relations, including arrangements for modified work. The documentary evidence in this case included much correspondence between Telus, Cowan, the Hospital and the applicant throughout the period in question.

[15] Disputes over eligibility for benefits are processed under an expedited process that the workplace parties refer to as the ADRP process. Under this process, grievances reach arbitration more quickly than the regular process under the collective agreement, and result in the appointment of one of three named arbitrators. The Hospital and CUPE exchange written submissions and/or evidence prior to the hearing but may also present oral evidence. Grievors provide written authorization for disclosure of their Cowan file to the Hospital. Under the ADRP process, the arbitrator may consult with impartial medical consultants agreed to by the parties and may request an interpretation of medical reports, test results and other medical documentation on file. The arbitration is governed by the *LRA* and the decision is subject to judicial review.

[16] The applicant was absent from work March 26, 27, 31, April 1, 6 and 15, 2008. The Hospital determined, based on advice from Cowan, that he was not eligible for sick pay, and notified the applicant of its intent to recover the overpayment of sick benefits. While the Hospital was still in communication with the applicant over the terms of repayment, the applicant began another absence from work, starting June 18, 2008.

[17] The applicant testified that early in the morning of June 18, he felt a sharp pain in his abdomen. He could not go to work, and went to see his doctor. Over the course of the next few days, he had some medical tests performed. He continued to seek an answer for his symptoms over the course of the next several months. He explained that the reason for his absence from work in this period was that he was going "from doctor to doctor" trying to find an answer to the pain he was experiencing.

[18] On or about August 1, he had a conversation with his supervisor, in which he stated that he should be available for work "mid August". There was a further conversation on that date between the applicant and Mr. Karschti during which the applicant was informed that he was expected to attend work for his next shift on August 4. The applicant asked "what if I am in pain or discomfort?" Mr. Karschti stated that he understood that there was a lack of medical documentation to support his absence. He repeated the request that the applicant report for his next shift and stated that if he was having issues, he could report to employee health services.

[19] The applicant attended at the workplace on August 4 and decided to attend at Emergency because of abdominal pain. At that time, he was diagnosed with a hernia. He did not return to work after that.

[20] Sometime shortly after this, in early August, the applicant consulted with a specialist about the hernia. At this time, he was experiencing intermittent pain, but the specialist did not consider it an urgent matter and no course of treatment was suggested other than a return appointment if the pain became debilitating.

[21] The applicant remained off work throughout August. He states that he then experienced severe pain that led him to return to the specialist on August 26. At that time, he was told that he would require surgery for his hernia. No date was set, but it appears that he was told to expect an operation around November 2008.

[22] During this period, the applicant was receiving sick pay, and was being asked to provide medical documentation to support his entitlement to these benefits. The initial

medical documentation submitted in the form of an MCD dated July 4, 2008 did not contain a diagnosis of a hernia. Cowan did not view it as supporting total disability. When it received information about a hernia diagnosis, Cowan was still not satisfied that a total disability had been established. Its view was that a diagnosis of a hernia was not, in and of itself, an absolute cause of total disability. While many individuals, in its view, can go for months without significant symptoms, others can require emergency repair. Cowan decided it required more information about the applicant's actual symptoms. Its representatives therefore asked the applicant to forward a request for additional information to his doctor.

[23] During this period, the issue of whether the applicant should be offered modified work was also in the background. A letter to the applicant's doctor in May 2008 noted that modified work can be made available. The MCD form contains questions for an employee's doctor about what functional limitations affect an employee's ability to perform his or her normal activities, including work, and asks for details about a return to work plan, including modified work or schedule. Between June 18 and August 26, the applicant submitted two MCD forms which did not contain any information or recommendations about accommodations to enable a return to work.

[24] The Hospital has an additional form, the Functional Abilities Form ("FAF"), which is intended to identify an employee's restrictions in order to assess appropriate accommodation in the workplace. In conversations between the applicant, his union official and Hospital representatives, the Hospital was told that the applicant intended to submit an FAF. However, none was ever received. Subsequently, the Hospital was advised by the applicant's union official that there had been a mistake and what the applicant intended to submit was a second MCD, which was sent to Cowan on August 26. In any event, the second MCD, as indicated above, did not contain any recommendations for modified work.

[25] This is consistent with the fact that throughout this period, the applicant's position was that he was completely unable to work. The evidence is that Cowan considered

whether modified work should be offered or suggested, but that the applicant maintained throughout that he was completely unable to work.

[26] The applicant's evidence supports this. He stated several times that he never requested accommodation in order to return to work because he believed that he was unable to do any work. The applicant testified that in the earlier time period, until he was diagnosed as having a hernia, he was not comfortable returning to work because he felt that he had an undiagnosed illness and wanted to investigate the causes of his symptoms. After August 26, the applicant believed that he was justified in remaining off work pending his hernia operation, which he expected would occur in about November. The applicant felt strongly that the MCD completed on that date (which he described as his "exoneration") supported his absence from the workplace until the operation. Unfortunately, as described below, Cowan did not hold the same view, and neither did the arbitrator.

[27] By August 26, the Hospital decided to take action on the applicant's absence from the workplace. It reviewed the information received from Cowan, and the advice from Cowan that the medical information provided did not support total disability. It reviewed documentation detailing Cowan's requests for medical information from the applicant, and its assessment of that information. The documentation also referred to Cowan's interactions with the applicant, and his position that he was totally unable to work throughout this period.

[28] On August 26, 2008, the Hospital sent the applicant a letter stating that he had failed to provide documentation supporting his continued absence from work. He was advised that if he failed to submit medical evidence supporting a total disability from work, by September 5, he would be considered absent without leave as per article 9.03 of the collective agreement, and his employment subject to termination.

[29] Ms. Prokopetz testified about the Hospital's decision to send the letter, stating that it was based on its understanding from Cowan that the applicant had not provided medical documentation substantiating a total disability, and the applicant's continuing

position that he was unable to perform any work. The August 26 MCD had not yet been considered by Cowan as of the time the Hospital reviewed the applicant's situation. It was received subsequently, and it did not change Cowan's decision.

[30] On September 2, 2008, there was a telephone conversation between the applicant and Mr. Karschti. In that conversation, Mr. Karschti advised the applicant that he needed to submit proper documentation to support his absence from work. There was discussion about an FAF. Notes of the conversation indicate that Mr. Karschti advised him to send the form to Cowan, and the applicant responded that he had sent something in the past week. As stated above, it appears that although Mr. Karschti was given to understand that the applicant had submitted an FAF, no FAF was ever provided, and the applicant was actually referring to the second MCD which he had sent to Cowan on or about August 26.

[31] The deadline of September 5 was extended by the Hospital to September 15. On September 10, the applicant called into his workplace, advising that he would not be attending at work as directed. The applicant was quite upset and felt that he was being unjustly treated.

[32] On September 15, the Hospital was advised that no additional medical information had been received supporting the applicant's absence from the workplace. It then decided to terminate the applicant's employment, and informed him of this by letter dated September 16. The letter stated, among other things, that the Hospital considered him "absent without leave as per article 9.03 of the CUPE Agreement."

[33] Over the next number of weeks, Cowan continued to communicate with the applicant about his claim for sick pay, requesting further documentation to support the claim. It never changed its decision that the applicant had not substantiated a total disability and ultimately, in late October, closed the file.

[34] The applicant grieved the denial of sick pay, resulting in an arbitration decision dated February 16, 2009. The arbitrator found that the applicant had not offered

sufficient supporting medical documentation to meet the definition of total disability. Among the findings of the arbitrator were:

- The applicant was not totally disabled during the period of June 18 to the end of his employment
- The applicant rejected any suggestion of modified work because of his belief that he was totally unable to work
- If the applicant had been offered modified work during this period, there is no evidence he would have been unable to return to work
- He was given a prescription for pain relief which he chose to ignore but which might have gone some way in relieving that pain
- His physician did not advise him to avoid work.

[35] The applicant disagrees with the finding of the arbitrator that he was not totally disabled during the period in question, but does not dispute that it is binding on him. In essence, he believed he was in too much pain to work. He testified about his decision not to take the pain medication prescribed for him, and on which the arbitrator commented. He stated that he was "just not a medication person" and that he would prefer to simply let his body heal itself. He gave as an example the hernia surgery that he had following his termination, in November 2008. He states that he was in extreme pain following the surgery, but chose not to fill a prescription for pain medication. He stated that "unless I'm dying of cancer, I will not take pain medication... all it does is mask, it doesn't cure." He stated that "I was taken to task for that".

[36] The applicant does not dispute that he never asked for modified work, and never made the Hospital aware that he wished or was willing to return to work with accommodation. He also does not dispute that he would not have accepted an offer of modified work, because of his belief that he was totally unable to work. He expressed his views several times as "you can't get blood out of a stone." Nevertheless, he maintains that the Hospital should have offered him accommodation. He maintains that his dismissal was discriminatory because it was done at a time when he was unable to work due to a disability.

[37] The applicant has in the past returned to work from a medical leave, with restrictions, and been given accommodation in the workplace. He has participated in the Hospital's return to work process under which he identified restrictions, and the Hospital provided accommodations to enable him to return to work. In relation to his absence from work from June 18, 2008, onwards, he never communicated a desire to return to work or identify any restrictions that would require accommodation because he firmly believed that he was totally disabled. The applicant maintained that it was impossible for him to return to work until after his hernia surgery.

[38] At the hearing, the applicant raised an issue about "mental disability", suggesting that part of the reason for his inability to work during this time period was the psychological stress from his physical symptoms. He also suggested that the stress from the workplace itself could have caused his disability from June 18 forwards. There was no evidence, apart from the applicant's broad suggestions in this regard, to substantiate the claim that he suffered a mental impairment that could have provided an independent basis for his inability to work.

[39] The parties also gave evidence on some matters that I find unnecessary to detail here, as they did not ultimately have a bearing on my findings. These include the issue around the applicant's website, the applicant's return to work for the Hospital in April of 2009, and the experience of a Hospital manager with his extended sick leave.

DECISION

[40] In this case, the applicant's employment was terminated because he was absent from work without a "satisfactory reason", based on language in the collective agreement. The issue is whether it was discriminatory for the Hospital to take this action in the circumstances. Under the *Code*, it would be discriminatory for an employer to terminate the employment of an employee with a disability if the employee's needs could be accommodated without undue hardship. Therefore, in my view, the central question in this Application is whether the Hospital failed in its duty to accommodate a disability when it decided to terminate the applicant's employment.

[41] It should be noted that the Application does not claim that the Hospital failed in its duty to accommodate. The applicant's position was quite simply that it is a violation of the *Code* for the Hospital to dismiss him while he was disabled. In my view, however, the issues in this case cannot fairly be determined without reference to the duty to accommodate. In challenging his termination from employment, the applicant is implicitly suggesting that the Hospital should have taken other steps instead, given his medical condition. Therefore, at the hearing, I requested both parties to address the issue of accommodation.

[42] The Tribunal has had many occasions to consider an employer's duty to accommodate. The duty to accommodate has both procedural and substantive obligations: *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees' Union*, 1999 CanLII 652 (S.C.C.), [1999] 3 S.C.R. 3 ("*Meiorin*") at paras. 62-68. In the *Meiorin* decision, the Supreme Court of Canada emphasized that the procedural component requires an individualized investigation of accommodation measures and assessment of the employee's needs. The substantive aspect of the analysis considers the reasonableness of the accommodation offered or the respondent's reasons for not providing accommodation.

[43] In *Simpson v. Commissionaires (Great Lakes)*, 2009 HRTO 1362 (CanLII), the Tribunal stated that

> In order to trigger the duty to accommodate, it is sufficient that an employer be informed of the employee's disability-related needs and effects of the condition and how those needs and effects interact with the workplace duties and environment. As such, an employee does not necessarily have to disclose a detailed diagnosis of the disability in order for an employer to respond to a request for accommodation. This is not to detract from the well-established principle that accommodation is a collaborative process and the applicant should endeavour to provide as much information as possible to facilitate the search for accommodation.
>
> The test is whether the respondent knew or ought reasonably to have known that the applicant had a disability requiring accommodation... [paras. 35-36]

[44] The facts of this case are unusual. There was a stark difference of opinion between the Hospital and the applicant. On the one hand, the Hospital understood, based on information from Cowan, that the applicant was not totally disabled. More than that, because the applicant had never provided medical verification that he required a leave of absence until his surgery, or identified any restrictions that required accommodation on the job, it expected that the applicant should be able to return to regular duties. The Hospital therefore advised the applicant that without further information supporting a need for his continued absence, it expected him to return to his regular duties. On the other hand, the applicant was convinced that he was completely unable to work. Because of that, he never asked for modified work or identified any restrictions that would require accommodation. He also believed that he was entitled to remain on paid sick leave until the conclusion of his hernia surgery.

[45] In essence, the position of the applicant is that the Hospital failed to accommodate his disability when it refused to allow him to remain on sick leave pending his surgery. Although the applicant did not frame his claim in terms of a breach of the duty to accommodate, I understand his position to be that a paid sick leave was the only reasonable response to his medical condition in the circumstances.

[46] The arbitrator effectively determined that this was not a reasonable form of accommodation. Reviewing all the medical evidence, the arbitrator concluded that the applicant was not totally disabled, and that there was no evidence that he would have been unable to work during the relevant period of time. Given the findings of the arbitrator, it cannot be said that the Hospital was in breach of its duty to accommodate in refusing to accept the applicant's position that he was entitled to remain on leave pending his surgery.

[47] This leads to the question of whether the applicant should have been offered modified work instead of a leave of absence. Because of the positions taken by the parties, the issue of what accommodations could have enabled the applicant to return to work pending his surgery was not argued before me. As indicated, the applicant was firm in his position that he was completely unable to work during the period from June

18 until after his hernia operation. It appears that his reasons centred largely on his abdominal pain, as well as the time he devoted to seeking a diagnosis for his abdominal pain. The applicant also testified about the stress that he felt arising out of not having a full understanding of his medical condition and the causes of his symptoms. A full investigation of whether and what accommodation was appropriate in the circumstances would have required an assessment of the applicant's condition as a whole, including whether it would be reasonable to expect him to manage his pain through medication, despite his aversion to such medication, in order to limit his restrictions.

[48] These may well be complex issues. At the end of the day, I do not need to consider whether the applicant could have been accommodated with modified work that would have enabled him to continue with his duties while awaiting his hernia surgery because that was never explored, and the applicant himself does not assert that he could or should have been so accommodated. As I have indicated, the only accommodation the applicant considered appropriate was a leave of absence pending his surgery.

[49] I must still consider whether in all the circumstances, the Hospital fulfilled the procedural component of the duty to accommodate in not taking further steps to investigate other possibilities for accommodation. Based on the information before it, and the position taken by the applicant, should the Hospital have done more before treating his absence from work as an unauthorized leave of absence?

[50] I am unable to conclude that the Hospital failed in its obligation to investigate accommodation measures. The circumstances before it were:

- The applicant was firm in his view that the only reasonable response to his medical condition was a continuing leave of absence from the workplace;
- The applicant did not provide medical documentation establishing that this was required;
- The applicant was advised that his medical documentation did not support his absence from the workplace;

- The applicant did not identify any modifications to the workplace necessary to enable to a return to work;
- Although the applicant advised that he was in pain, his medical documentation did not support a total inability to work on that basis;
- The applicant was advised that in the circumstances, he was expected to return to his regular duties;
- The applicant did not respond by providing medical evidence supporting his continued absence;
- The applicant did not propose any alternative accommodation measures or provide documentation supporting alternative accommodation measures.

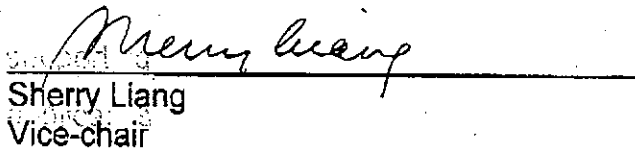
[51] The procedural component of the duty to accommodate required the Hospital to consider whether appropriate accommodation was possible before terminating the applicant's employment. The duty to accommodate is part of a collaborative process, in which the Hospital's actions and responsibilities must be understood in the context of the information before it and positions taken by the applicant. I find that in all the above circumstances, the Hospital fulfilled its duty. It requested medical documentation to support the applicant's desired accommodation, a leave from work. It advised the applicant that his medical documentation was insufficient and gave him a further opportunity to provide supporting documentation. The applicant was given an opportunity to identify restrictions necessary to enable a return to work and did not. The applicant did not propose any alternative accommodation measures. The applicant did not demonstrate that his leave of absence was a necessary accommodation of a *Code*-related need, and did not seek to engage the Hospital in a further discussion about alternative accommodation measures.

[52] Correspondence to his doctor in July 2008 noted that modified work could be available. Medical forms invited his doctors to address whether modified work was required. The applicant was aware, having been given modified work in the past, that he could request accommodation. Even after being warned of the consequences of refusing to return to work, however, he did not wish to explore any options that would allow him to return to work. Neither did he provide any medical documentation

supporting the necessity of remaining off work. While I have sympathy for the applicant's situation, I cannot find that the Hospital breached the *Code* in these circumstances.

[53] The Application is dismissed.

Dated at Toronto this 4th day of January, 2010.



Sherry Liang
Vice-chair

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