Physician With Privileges Unsuccessful In Allegations That Hospital Breached Ontario Human Rights Code

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Overview

In *Shaver v. Queensway Carleton Hospital* (2017 HRTO 685), an aggrieved physician alleged discrimination and reprisal with respect to employment because of age and disability contrary to the Ontario *Human Rights Code* (the "Code").

The physician made two specific allegations before the Human Rights Tribunal of Ontario (the "Tribunal"). He alleged that:

1. The hospital's "sunset clause" (or "on-call policy") requiring physicians to reduce their practice over a five-year period upon giving up on-call responsibilities, was discriminatory and amounted to a mandatory retirement policy; and
2. The hospital's mandatory report to the College of Physicians and Surgeons of Ontario ("CPSO") amounted to reprisal for asserting his rights under the Code.

Background

The physician, Dr. Shaver, held privileges at the hospital since the 1970s. Privileges are time-limited statutory rights to use hospital resources. Privileges are not guaranteed and only last one year. To maintain privileges, the hospital's Board must be satisfied that a physician has a demonstrated ability to provide patient care at an appropriate level of quality and efficiency.

In or about 2010, concerns were raised with respect to the physician's competency and the physician agreed to voluntarily restrict his hospital practice to very narrow permitted areas of practice. Further concerns came to light in 2011 with respect to the physician's competency. The physician and the hospital retained a joint expert to conduct an external review of the physician's practice. The expert concluded that the physician had exposed, and was likely to expose, patients to harm or injury, and that immediate action was required to protect patients. A full hearing was held before the hospital's Board and the Board further restricted the physician's privileges.

In 2014, in light of additional concerns, the physician voluntarily agreed to stop practicing in some of the limited permitted areas of practice, and eventually agreed to cease practicing at the hospital pending an external review. An expert was retained by the hospital to conduct an external review, which concluded that the physician was not competent in the remaining permitted areas of practice. The hospital made a mandatory report to the CPSO in January 2015, which coincided with the receipt of the physician's human rights application.

Rather than pursuing his statutory rights of appeal, the physician fully resigned his privileges in October 2015.

Tribunal's Decision

Following a hearing, the Tribunal dismissed the physician's application.

With respect to the sunset clause, the hospital took the position that the physician's allegations had no reasonable prospect of success. Firstly, the sunset clause did not amount to a mandatory retirement policy (as alleged by the physician). Physicians elect to reduce or give up their onerous on-call responsibilities on the condition that their access to hospital resources be gradually decreased over a period of time. Secondly, sunset clauses are common practice at hospitals and are a sound method of determining resource allocation. Thirdly, in this particular case, the physician had resigned prior to the sunset clause taking effect.

The Tribunal concluded that the sunset clause was applied to the physician, not because of his age or disability, but because he had ceased on-call responsibilities in 2010 and there appeared to be no prospect that he would be able to resume those responsibilities based on competency issues. As a result, the Tribunal found that the physician's allegation was not supported by the evidence.

With respect to the reprisal allegation, the Tribunal accepted the Chief of Staff's evidence that his report was not motivated by the receipt of the physician's human rights application but was rather in accordance with his obligations as Chief of Staff.

Objections Raised by the Hospital

The hospital made preliminary objections.

Firstly, the hospital took the position that the Tribunal had no jurisdiction over the application because the relationship between the physician and the hospital did not fall within the "employment" context under the Code given the statutory and regulatory framework that regulates the relationship between a physician and the hospital, as well as the numerous particularities of the relationship between a physician and the hospital.

Despite the hospital's position, the Tribunal's reasons do not address whether a physician with privileges at the hospital falls within the employment context under the Code. The Tribunal refused to set a precedent in this case and this question remains unanswered in Ontario.

Secondly, the hospital took the position that this application was an abuse of process. The hospital argued that the physician was inappropriately attempting to bring this matter before the Tribunal as opposed to pursuing his statutory rights of appeal.

Ultimately, the hospital's position was that this was a dispute about the physician's privileges, which the physician should not be allowed to bring before the Tribunal. The Tribunal's reasons do not address this point either. However, the Tribunal does indicate in its reasons that the physician can challenge restrictions on his privileges for issues of alleged incompetency to the hospital's Board and the Health Professions Appeal and Review Board, suggesting that the Tribunal will not interfere with issues relating to a physician's privileges.

What's Next?

Physicians are starting to bring applications before the Tribunal alleging discrimination in the employment context. The argument that the Tribunal has no jurisdiction over these types of applications (especially when the underlying issue is a privileges dispute) has been raised in previous applications. However, the Tribunal has refused to answer. Therefore, the question as to whether a physician with privileges at a hospital falls within the employment context under the Code has yet to be answered. Stay tuned!

By

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