

## CASE STUDY

### **Baber v. York Region District School Board**

#### **FACTS:**

##### *The Case*

The teacher was employed as a secondary school teacher from September 2004 until the school board terminated her employment in September 2009.

The teacher filed an Application under the *Human Rights Code*, alleging that the school board discriminated against her on the basis of disability. She alleged that the school board breached its duty to accommodate her by:

- requiring her to undergo a performance appraisal;
- failing to give her a teaching assignment as a teacher-librarian; and
- terminating her employment.

##### *The Background*

*January 2007 to November 2, 2008*

The teacher was diagnosed with anxiety disorder and depressive disorder in January 2007, and chronic lymphocytic leukemia in June 2007.

In August 2008 the teacher talked with her principal about her illness

- she asked for a schedule that allowed her to take her lunch period first thing in the morning.
- She also asked to be assigned to teach Grade computer programming instead of Grade 11 because she felt physically incapable of dealing with the several extra hours of work she felt would be required in teaching the grade 11 course.

The principal agree with both these requests.

In May 2008 the teacher had been advised by her supervisor that she would be required to undergo a performance appraisal as a result of concerns about her teaching performance. In October, 2008, the teacher asked that the performance appraisal until 2012. She indicated to her supervisor that she was seriously concerned about the effect the process would have on her health.

At that point in time the most recent medical information on file with the school board indicated that the teacher was capable of performing her full duties as a teacher.

The school board told the teacher that there were 3 options available that would allow her to be off work while she regained her health:

1. apply for long-term disability benefits with supporting medical documentation;
2. agree to letting the school board's registered nurse contact the teacher's doctor to clarify whether the teacher was able to work as a teacher; or
3. agree to undergo an independent medical evaluation to determine whether or not she was fit to work.

After suffering an acute anxiety attack on November 2, 2008 the teacher did not return to work.

*November 2, 2008 to September, 2009*

After her anxiety attack the teacher provided further medical information to the school division.

- Her family doctor said that she was fit to work and asked that the division allow her to be a teacher librarian, due to her increasing health issues.
- Her psychiatrist said that the teacher's health issues would be assisted by a transfer to a teacher-librarian position.

The teacher's union advised the teacher:

- that the medical evidence she had provided was probably not sufficient to entitle the teacher to the accommodation she had requested and
- urged her to obtain further medical evidence:
  - she could agree to one of the 3 options set out by the board; or
  - she could instead request a medical report directly from her own doctor. The union pointed out that if she obtained the required information from her own doctor it would give her the maximum control and would be the least invasive to her privacy.

The teacher then submitted further medical information:

- another report from her psychiatrist:
  - the report said that she could return to work "but with some accommodation".
  - the report did not identify the teacher's restrictions or the accommodations required
- a doctor's letter stating that she had Chronic Lymphocytic Leukemia and was not taking any medication.

The school board responded:

- that the medical information which had been provided by the teacher was still insufficient.
- she was not to return to work until she had chosen one of the three options proposed by the school board.
- it invited the teacher to suggest any other options she might have for providing the school board with the medical information it required

The union gave further advice to the teacher:

- it urged the teacher to request a medical report supporting her accommodation request directly from her doctor; and
- it enclosed a letter for the teacher to give to her psychiatrist which set out the type of information required

The teacher did not provide the requested information to the school division..

The school board then placed the teacher on a medical leave of absence without pay until August 1, 2009. It told her that if she did not provide sufficient medical documentation by that date it would result in the termination of her employment.

After trying to arrange a meeting with the teacher in August and again in September of 2009, the school board terminated her employment in September, 2009

### ***The Position of the Teacher***

The teacher continued to take the position that the medical documentation which she had already provided the school board was more than adequate to return her to work with the accommodations she was seeking.

### ***The Position of the School Division***

The school board maintained that the medical documentation received by the teacher was not sufficient because:

- it did not support the teacher's return to her regular duties (including participation in the performance appraisal process); and
- it did not specify what accommodations the teacher might require in order to return to work.

## **QUESTIONS FOR DISCUSSION**

**1. What worked in this case?**

**2. What didn't work?      Why didn't it work?**

**3. What might each party have been done to resolve the issues without the need for a hearing?**

**LEGAL ISSUES:**

1. *Did the school board err in not agreeing to postpone the performance appraisal?*
2. *Did the school board err in not assigning the teacher as a teacher librarian?*
3. *Was the medical information provided by the teacher sufficient for accommodation?*
4. *Were the three options for provision of medical information set out by the school board appropriate?*
5. *Did the school board err in terminating the employment of the teacher?*

***Please see the summary of the decision on the handout sheet.***

“Once the duty to accommodate has been triggered, the school board employer has an obligation to take the necessary steps to determine what kinds of modifications or accommodations might be required in order to allow the employee to participate fully in the workplace. The substantive duty requires the employer to make the modifications or provide the accommodation necessary in order to allow the employee to participate fully in the workplace, such as by modifying duties or hours or the workplace itself, as the case may be, up to the point of undue hardship.”

“However, the duty to accommodate places obligations on the employee seeking accommodation as well. An employee who seeks workplace accommodation has a duty to co-operate in the accommodation process by providing her employer with a reasonable amount of information about her physical and/or mental work restrictions and disability-related needs so that the employer can assess whether and how the employee's needs may be accommodated without undue hardship.”

**1. Did the school board err in not agreeing to postpone the performance appraisal?**

The teacher presented absolutely no medical evidence in support of her contention that she was incapable of having a performance appraisal because of disability. The only evidence in this regard was the teacher's own assertion that she could not have an appraisal because she was ill and that it would "kill" her. However, the teacher did not explain what it was about her disabilities which made her incapable of having a performance appraisal.

The teacher's mere assertion that she was incapable of having an appraisal because of disability is not evidence of that fact. Nor is there any other evidence that the teacher's disability prevented her from participating in the process.

Even if one were to assume that the school board had a duty to accommodate the teacher the employer took reasonable steps to ascertain whether the teacher had a disability-related need not to undergo an appraisal, and thereby fulfilled the procedural aspect of any duty it would have had to accommodate the teacher. Any further action by the employer was not required because the teacher did not respond to the school board's reasonable request for medical information.

“The teacher failed to cooperate in the accommodation process when she refused to provide medical documentation to her employer confirming her needs. To the extent that the teacher might have had

a need for accommodation which was not met, it was because of her refusal to respond to the employer's reasonable request for information. “

## **2. Did the school board err in not agreeing to postpone the performance appraisal?**

“... the teacher's medical reports did not identify the teacher's physical or mental restrictions or the specific disability-related accommodations she required. It is not sufficient for a medical certificate to merely state that an employee would benefit from placement in a particular job. The medical practitioner's role in the accommodation process is not to identify the specific job in which an employee is to be accommodated but rather to identify the employee's disability-related needs and restrictions. It is then up to the employer, who has the ultimate responsibility for accommodation in the workplace, to take that basic information and to determine whether and how the teacher's disability-related needs might be accommodated up to the point of undue hardship.”

“Expert medical evidence is not always or automatically required in cases under the Code to prove disability-related needs. For example, an employee in a full leg cast, would not need to call medical evidence to prove that s/he was unable to climb ladders. In a case such as this, however, it is far from obvious what needs the teacher might have had because of her mental and physical disabilities and how those needs affected her ability to perform her regular duties. To succeed in her claim, the teacher needed to prove that the requirement that she perform her regular teaching assignment had an adverse impact on her because of her disability. The teacher's own evidence as to her disability-related needs was more in the nature of mere assertions and was not sufficiently "clear, cogent and compelling" to discharge her burden of proof.”

## **3. Was the medical information provided by the teacher sufficient for accommodation?**

“The school board was entitled to seek further information about the teacher's disability-related needs, at which point the teacher had a duty to cooperate in the accommodation process by providing her employer with medical documentation confirming those needs.

This the teacher did not do. The teacher knew that her employer was seeking further medical information about her ability to perform her full teaching duties, including participation in the appraisal process, and about the accommodations required to return the teacher to work. However, she chose not to provide such information. The teacher believed it was sufficient to provide the employer with notes from her doctors recommending that she be placed in a particular job.

However, this was an error on her part. The school board was not required to place the teacher in a job because her doctors wrote a number of notes recommending that it do so or because the teacher herself said she needed that job. The school board was entitled to further information about the teacher's specific restrictions and disability-related needs. By refusing to provide such information, the teacher failed to cooperate in the accommodation process.”

## **4. Were the three options for provision of medical information set out by the school board appropriate?**

“I am somewhat troubled by the fact that the school board told the teacher that she would not be permitted to return to work unless and until she agreed to one of the three options identified by the employer. In so doing, the school board purported to limit the options by which the teacher might provide her employer with information about her disability-related needs. An employer has the right to require employees seeking accommodation to respond to reasonable requests for information about their disability-related needs. In general, however, it does not have the right to limit the means by which such information will be provided.

In the circumstances of this case, however, I am not persuaded that this potential misstep by the school board made any difference to the teacher's situation.”

***What would have been appropriate?***

“...the teacher's trade union made the teacher aware that she could obtain and submit her own medical information to the employer. The teacher's trade union also informed the teacher that she had a duty to cooperate in the accommodation process by responding to the employer's reasonable requests for information and that the documentation she had provided was insufficient to entitle her to the accommodation requested. In spite of this, the teacher maintained that the medical documentation she had provided was adequate and refused to respond to the school board's need for further information.”

**5. Did the school board err in terminating the employment of the teacher?**

“The duty to accommodate does not give employees permission to refuse to provide their employers with information about their ability to work with or without restrictions where there is a legitimate question about that, as was the case here. Nor does the duty to accommodate require an employer to tolerate an employee's ongoing unsubstantiated absence from work. (One possible exception to this is where disability prevents the employee from responding to his/her employer's request for medical documentation. There is no suggestion of that in this case.)

The teacher in this case knew that her employer required additional medical documentation either substantiating her ongoing absence from work or facilitating her return to work with or without accommodation, failing which her employment would be terminated. She consistently refused to provide the necessary medical information. The school board did not breach its duty to accommodate the teacher when it terminated her employment for her refusal or failure in that regard.”

The allegations that the school board infringed the teacher's rights under the Code when it terminated her employment are dismissed accordingly.”