

CAOT Column: WORK ability for Canadians

Understanding legislation and case law – Evidence informed decision-making for Canadian occupational therapists in workplace-based practise

Margaret Collingwood*

Clinical Occupational Therapist, Human Resource Consulting Services, Eastern Health, St. John's, NL, Canada

1. Introduction

Clinical decisions should be evidence informed; that is, best practise requires a combination of evidence and clinical expertise. The discussion that follows posits that Equality and Human Rights legislation and subsequent jurisprudence is a body of knowledge occupational therapists should use to enhance evidence-informed decision making in workplace interventions, particularly in assisting with the legal obligations for the duty to accommodate. “Human Rights legislation applies to employers, unions, and employees in the public and private sector and it *may* take precedence over other legislation” [1, p. 827].

2. Occupational therapy

“Occupational therapy is the art and science of enabling engagement in everyday living through occupation; of enabling people to perform the occupations that foster health and well-being; and of enabling a just and inclusive society so that all people may participate

to their potential in the daily occupations of life” [13, p. 27]. Occupational therapists have a broad education that provides them with the skills and knowledge to work collaboratively with people of all ages and abilities that experience obstacles to participation.

Fundamental to the practise of occupational therapy is the importance of occupation to individuals. While occupations span the full spectrum of human engagement and include leisure, productivity and self care, the focus of this discussion will be the paid work occupations that contribute to economic sustenance. The workplace is an environment that presents a complex range of interacting factors that impact individual performance. Occupational therapists offer a unique perspective that considers the needs of the individual in the context of the physical, social, cultural and institutional work environment [3].

Townsend and Polatajko [15] outline the values and beliefs for enabling occupation. These include such elements as: occupation is an important determinant of health, well being and justice; occupation has therapeutic potential; every person is unique; the environment includes cultural, institutional, physical and social components that impact occupation; and justice concerns relate to meaningful choice and social inclusion so that all people may participate as fully as possible in society (p. 3). The occupational therapist must reaffirm

*Corresponding author. E-mail: margaret.collingwood@easternhealth.ca.

these fundamental values and beliefs in work-related practise. Understanding the legal foundations of the duty to accommodate and subsequent legal decisions will enhance some of the key occupation therapy enablement skills identified by Townsend et al. [15], including advocating, consulting, collaborating and specialising.

3. Disability

For occupational therapists to assert their underlying theoretical foundations, beliefs and values in the human entitlement to full participation, the discussion must start with disability. Both federal and provincial human rights legislation define disability. Lynk [9] points out that the courts, human rights tribunals and labour arbitration boards have outlined a wide variety of impairments that constitute the legal definition of disability. Some of these impairments include obesity, knee pain, depression and stress. The use of the term “impairment” connotes a biomedical framework for disability. The World Health Organization [17] in *Towards a Common Language for Function, Disability and Health (ICF)* introduces a “classification of health and health related domains to describe what a person with a *health* condition can do in a standard environment (level of capacity) as well as what they actually do in a standard environment (level of performance)” (p. 2). This is a progression toward health and functioning as socially-embedded constructs and away from the medicalizing of disability. The key element in this approach is a shift from “cause” to “impact”. This allows a broader definition of disability and places all health conditions on equal footing. This approach to health and function is more congruent with concepts of Equality and Human rights legislation. The principle of equality in employment presumes that equality means treating individuals the same through accommodating difference. This is the key to workplace participation for all.

The International Classification of Functioning, Disability and Health (ICF) definition encompasses impairment, activity limitation and participation restrictions. This shift is suggesting that the reliance on diagnosis and medical evidence alone can no longer define disability. Medical classification of diagnosis will not reflect the intended nature of disability and the duty to accommodate equality rights. The ICF definition of health and disability is a synthesis of several views of disability – biological, individual and social, and fur-

ther broadens the clinician’s perspective of disability and their role in the duty to accommodate. Polatajko et al. [13] compare the ICF with the Canadian Model of Occupational Performance and Engagement (CMOP-E). They note, “the ICF has goodness of fit with the CMOP-E. Both point to the importance of the interaction of person and environment to human functioning” (p. 36). Activity and participation define function within the ICF, whereas occupational performance and engagement are the terms used within occupational therapy models.

The evidence is clear within both the legal and health fields that disability rights must be recognized as an individualized and contextual construct. As such, health professionals offering services within the workplace cannot rely solely on a biomedical model, as this will not hold up to scrutiny in the Canadian legal system. This understanding is pivotal to the provision of expertise to employers and gives grounds to the argument that occupational therapists should maintain a person-centred, holistic approach to workplace-based intervention for all parties requesting their expertise. This wider scope of disability is in keeping with the values and beliefs of occupational therapy practitioners and invites them to apply it in the assessment of persons and the duty to accommodate.

4. Duty to accommodate

Organizations are required to accommodate individuals with physical and mental health disabilities. The duty to accommodate in Canadian workplaces is a fundamental legal obligation for employers, unions and employees founded in the Canadian Charter of Human Rights and Freedoms, Human Rights legislation and rulings of the Supreme Court [1,10,11]. The Charter of Human Rights and Freedoms Section 15 states, “Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability”. Equality law in the employment context addresses the duty to accommodate and in particular the duty to accommodate individuals with physical and mental health disability. The Canadian Human Rights Act in Section 3. (1) includes disability as a prohibited ground of discrimination. It further defines disability in section 25 as “any previous or existing mental or physical disability and includes disfigurement and previous or

existing dependence on alcohol or a drug". Essentially, equality rights in the workplace enhance an individual's ability to participate fully.

The *Meiorin* case, British Columbia (Public Service Employee Relations Commission v. BCGSEU, [1999] 3 S.C.R. 3) is a key Supreme Court decision that clarified and affirmed the scope of the duty to accommodate for employers and hence the required knowledge and understanding to guide decisions for occupational therapists in workplace interventions. The *Meiorin* case will be used to illustrate the importance of understanding and applying Supreme Court rulings in evidence-informed decision making and the duty to accommodate for occupational therapists [5,9,12]. Essentially, accommodation is obliged if the employer can implement changes without undue hardship.

In the *Meiorin* case, the Supreme Court reaffirmed Human Rights legislation by affirming the duty to accommodate individuals who cannot meet an employment standard and clarified the nature of the evidence that is required to ascertain whether a standard, which may be discriminatory, is a bona fide occupational requirement (BFOR). Failure to accommodate in such a situation will not be considered discriminatory by law if the requirement is a BFOR. In para 54, Justice McLachlin outlines three questions – the three-step test – that the parties responsible for accommodation must ask themselves. This three step test is referred to as the Unified Approach. Most relevant to the practise of occupational therapy is step three: "that the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristic of the claimant without imposing undue hardship upon the employer". Briefly, there are six factors relevant to determining undue hardship: financial cost, safety, impact on collective agreement, problems of employee morale, size of employers operations and interchangeability of the workforce/facilities [9]. At para 64 of the *Meiorin* case, McLachlin stated that "apart from individual testing to determine whether the person has the aptitude or qualification that is necessary to perform the work, the possibility that there may be different ways to perform the job while still accomplishing the employer's legitimate work-related purpose should be considered" (British Columbia (Public Service Employee Relations Commission) v. BCGSEU, [1999] 3 S.C.R. 3). She elaborates in para 65 by providing questions employers should ask themselves in the accommodation pro-

cess. These questions should serve as guidelines for occupational therapists. They suggest innovation, thoroughly investigating alternate approaches, advocating for implementation of alternatives, and exploring alternate methods and standard/equipment re-design. Advocating, designing, building and collaborating are all key occupational therapy enablement skills [15]. "The essence of duty to accommodate is straightforward to state: employers and unions in Canada are required to make every reasonable effort, short of undue hardship, to accommodate an employee who comes under a protected ground of discrimination within human rights legislation" (Lynk, 2002, p. 58).

The Supreme Court of Canada decision demonstrates that it is incumbent on the clinician to apply all the skills of enablement to workplace interventions. This 1999 decision gives weight to using creativity, innovation and individualized methods in addressing the duty to accommodate in the workplace. In addition, the *Meiorin* case has led to a focus on process. Peters [12] notes, "the availability of a *process* for making individualized determinations will often be as important as the particular *result* reached" (p. 128). The therapist, with his/her unique skills and knowledge, is an inherent part of this process. Furthermore, in as much as employers and unions have engaged the expertise of the occupational therapist in this process, they are required to incorporate the court's intent into clinical decisions and expert consultations.

At para 81 of the *Meiorin* case McLachlin states, "As this court has repeatedly held, the essence of equality is to be treated according to one's own merit, capabilities and circumstances. True equality requires that differences be accommodated" (British Columbia (Public Service Employee Relations Commission) v. BCGSEU, [1999] 3 S.C.R. 3). In response, occupational therapists are supported in maintaining the inherent approach of performing individual assessment and intervention within the client's work context. This decision demonstrates that the steps involved in evidence-informed decision making should go well beyond the paper exercise of "matching" the individual's assessed capabilities, e.g. functional capacity evaluation results, with the job description, and that individual testing alone is not sufficient to support the occupational therapist's analysis of the duty to accommodate. Again, the intent of the court's decisions in incorporating the principle of equality and the requirement that accommodation must be contextual and individualized is clear. Occupational therapy practitioners following the values and beliefs of enabling engagement would have a process that is congruent with the Court's intent.

In any evidence-based practise, a professional must remain current. This is true with the application of practice informed by case law. Interestingly, as this area of workplace based practise evolves, the challenges the clinician meets are mirrored in case law trends. Mental illness, for example, is fast becoming the leading cause of disability in the workplace [8]. Several facets of the duty to accommodate and mental health disability offer challenges to groups, unions, employers, employees and service providers such as occupational therapists. *The Shuswap Lake General Hospital v. British Columbia Nurses' Union* (Lockie Grievance), [2002] B.C.C.A.A. No. 21 addresses the issue of disability, bipolar illness, patient safety and accommodation [1, p. 859]. In this case the employer's position was that they had met the duty to accommodate a nurse with mental illness but could not provide employment secondary to safety concerns. The arbitrator outlines that the employer's standard should be for "reasonable safety" and "the employer must point to evidence establishing, on a balance of probability, that a serious or unacceptable risk to patient safety would arise from the grievor's continued employment as a nurse" (p. 865). Arbitrator Gordon asserts that the employer must "identify the risks and demonstrate why those risks cannot be reduced to an acceptable level through accommodative measures" (p. 865). Expert guidance on safety considerations of an employee's return to work, particularly in light of mental health illness, are more frequently being asked of the therapist. Current knowledge of case law such as the *Lockie* case provides guidance to the therapist of how far he/she must go and how much innovation is required to respond to the test of undue hardship and the element of safety, which may be particularly sensitive relative to a case involving an individual with mental health disability. Ongoing use of relevant jurisprudence in clinical decision making ensures that in providing expert knowledge to the organisation the occupational therapist is contributing to process and due diligence. For the employee, this expert knowledge facilitates full participation in the workplace.

5. Concluding remarks

Occupational therapists understand the value of enabling engagement. In the workplace these values are challenged. Therapists must inherently understand that their theoretical foundations are congruent with human rights and equity legislation. Having knowledge of relevant legislation, case law and arbitral decisions adds to

evidence and enhances the practitioner's role as facilitator, collaborator and advocate. Key Supreme Court decisions such as *Meiorin* can provide some necessary guidance to the occupational therapist; however, continuing competence through acquiring knowledge of newly emerging decisions is essential. When considering the importance of paid occupation to the individual's definition of self, maintenance of self worth and dignity, the therapist's role in exploring all avenues to maintain participation is critical.

It bears repeating that accommodation requires innovation, creativity, and an individualized approach, and as a result is time intensive and costly. A strong impetus for decision makers in the insurance industry is likely cost reduction and for employers is demonstrating due diligence in meeting the duty to accommodate. Strong et al. [14] note that occupational therapists require knowledge of the impact of injury/illness on function, measurement of work function, demands of occupations with workplace environments and skills in occupational analysis and workplace demand analysis. They state that necessary knowledge and skills should be included in occupational therapy curricula. Understanding of equality and human rights legislation and related case law is an essential body of knowledge for occupational therapists in work practice. Human rights values continue to penetrate the workplace mainly through jurisprudence (case law, tribunals and arbitral decisions).

The theoretical constructs of occupational therapy, equality and human rights legislation and subsequent case law are aligned. Occupational therapists must integrate this knowledge base into practise to maintain core competencies as scholarly practitioners, thereby enhancing fair and optimal client outcomes.

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