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Zarabi-Majd and the Duty to Accommodate

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Introduction

In *Zarabi-Majd*, released in January 2025, the Divisional Court weighed in on whether the Toronto Police Services ("**TPS**") Disciplinary Tribunal adequately accommodated a member with disabilities during the hearing process.[1] The Court concluded that the applicant, a police officer facing insubordination and discreditable conduct charges, had been offered adequate accommodations by the Hearing Officer, and emphasized that the process of finding reasonable accommodations must be collaborative between both parties.[2]

Zarabi-Majd gives us an opportunity to refresh and review the duty to accommodate in the context of self-regulating professions. In this article, we offer a brief case comment on *Zarabi-Majd* and discuss the duty to accommodate in the context of discipline hearings. We also offer a broader perspective on duty to accommodate issues that can arise in the context of registration. Under section 6 of the *Ontario Human Rights Code* (the "*Code*"), every person has a right to equal treatment with respect to membership in an "occupational association or self-governing profession" without discrimination, including based on disability.[3] While our focus is on the duty to accommodate as it applies to health professions colleges governed by the *Regulated Health Professions Act*,[4] every regulator should be knowledgeable about its duty to accommodate under the *Code* and what to do when the duty arises.

Discipline

i. Zarabi-Majd

The applicant in *Zarabi-Majd* was a police officer with the TPS. She went on medical leave in 2018 after being diagnosed with PTSD. While on leave, she posted comments on Twitter about experiences she had had as a member of the force. The force considered the applicant's online comments to be inflammatory and she disobeyed several orders to stop posting comments online.[5] The applicant was charged with several counts of insubordination and discreditable conduct under the *Police Services Act* (now the *Community Safety and Policing Act*).[6] A three-day discipline hearing was scheduled.

Several months before the discipline hearing was to proceed, the applicant brought two motions to adjourn *sine die*. Her position was that, as a result of her health condition, she was too sick to attend the hearing. The Hearing Officer denied both requests and found that while the applicant did suffer from PTSD, her health conditions did not prevent her from participating in the hearing.[7] The hearing proceeded without the applicant in attendance. She was found guilty of misconduct and was dismissed from the service. The applicant's appeal to the Ontario Civilian Police Commission was dismissed in April 2024. The applicant sought judicial review before the Divisional Court, which dismissed the application and upheld the adjournment rulings.[8]

One of the applicant's grounds of judicial review was that the Hearing Officer had breached the applicant's right to be accommodated at the hearing.[9] The parties did not dispute the fact that that the applicant had PTSD, but disagreed about whether that meant she was unable to participate in the hearing.[10] Prior to the hearing, the applicant took the position that the only reasonable

accommodation of her health condition was an indefinite adjournment. The Hearing Officer rejected that position and found that the applicant was using her health condition as an opportunity to "avoid being held accountable for her conduct."[11]

Before the Divisional Court, the applicant did not challenge the Hearing Officer's findings that she had a disability or that her disability did not prevent her from participating in the hearing. She also did not challenge the Commission's decision to uphold the adjournment rulings. Her position was that, having found that she had PTSD, the Hearing Officer failed to offer to provide her with other adequate forms of accommodation, such as granting an adjournment for a specific length of time or allowing her to respond to written questions instead of giving *viva voce* evidence.

The Divisional Court found that the Hearing Officer had reasonably accommodated the applicant.[12] First, the Court noted that the duty to accommodate is not triggered merely by the fact that a party before a discipline tribunal has a disability. Rather, the duty to accommodate will come into play when there is a finding that the party's ability to access the service of the tribunal will be adversely affected by that disability (*i.e.,* the core dispute between the parties in this case).[13] The Hearing Officer concluded that the applicant's disability did not prevent her from participating in the hearing and the applicant did not challenge that finding upon judicial review.[14] Nevertheless, after making that finding and dismissing the applicant's request for an indefinite adjournment, the Hearing Officer sought to initiate a process of finding suitable accommodations. The Hearing Officer wrote to the applicant to engage her in a discussion about what other accommodations might be appropriate, including by sending the following email:

There are many options we can explore to ensure Constable Zarabi-Majd's needs are met. For example, would she prefer to participate virtually or in person? Would she like a hybrid approach to this option, i.e., half virtual / half in person? If in person, would she prefer we utilize a tribunal room outside a Toronto Police Service facility? Does the start time of 0900hr need to be adjusted? Would she like me to adjust the tribunal hours to afternoons or evenings? Would she like us to build a schedule which indicates breaks per every hour or two? Would she prefer to see participating police officers in civilian attire as opposed to uniform? With respect to providing evidence, Constable Zarabi-Majd can achieve this through her representative, as she has done to date – or perhaps there is another idea in this regard I have not considered. These are just a few options that come to mind. It is certainly not an exhaustive list, but it should give you some idea as to the flexibility the tribunal has.[15]

The applicant did not respond to this email, and after a follow-up took the position that the only reasonable accommodation would be the indefinite adjournment.[16] In its reasons for decision, the Divisional Court emphasized that the process of devising appropriate accommodations for a health-related disability must be collaborative and that the person seeking accommodation must participate in the process.[17] The accommodation-seeking person also has an obligation to accept reasonable accommodations that are offered.[18] The Court did not say directly whether a duty to accommodate was owed in the circumstances, given the Hearing Officer's unchallenged finding that the applicant's disability did not hinder her participation before the Tribunal. Nevertheless, the Court concluded that to the extent that the Tribunal did have a duty to accommodate, it had adequately discharged its obligation by proposing a variety of accommodations and remaining open to other suggestions from the applicant herself.[19] There had been no breach of the duty and the Commission's finding that the Hearing Officer had not breached that duty had been reasonable.[20]

Zarabi-Majd is noteworthy not only as the latest decision from the Divisional Court on the duty to accommodate before discipline tribunals, but also because of the Court's emphasis on the roles and responsibilities of the applicant seeking an accommodation. The Hearing Officer's email, reproduced in full in the decision, also provides regulators with a helpful example of a tribunal working nimbly to maximize the procedural flexibility available to it to accommodate a member with a disability.

Registration

In *Zarabi-Majd*, the duty to accommodate arose in a discipline proceeding. However, the duty to accommodate may arise in a variety of regulatory processes. For example, accommodation may arise at the very beginning of a person's engagement with a regulator, during registration.

It is long established that there is no right to become registered or to practice a profession.[21] An applicant seeking licensure holds the burden to show that they meet the requirements for registration into the profession they are seeking to enter. That said, regulators' duties under the *Code* include a duty to accommodate applicants with disabilities who are going through the registration process.

In *Maksoud v College of Physiotherapists of Ontario,* the Health Professions Review and Appeal Board ("**HPARB**") considered whether an applicant to the College of Physiotherapists of Ontario had been adequately accommodated during registration.[22] In the underlying decision, the College refused to issue the applicant an Independent Practice Certificate of Registration. The applicant had been diagnosed with bilateral, moderate sensorineural hearing loss. He had received accommodations for his second and third attempts at the practical Physiotherapy Competency Examination ("**PCE**") but had not passed. Before the HPARB, the applicant advanced three arguments: the requirement that he successfully complete the clinical PCE was discriminatory; the examination inherently placed hearing-disabled individuals at a disadvantage; and he had not received appropriate accommodation.[23]

The HPARB accepted the applicant's submissions that he had a *Code*-protected characteristic (*i.e.,* a disability) and had experienced an adverse impact in which his disability was a factor. It also found that the College had reasonably accommodated the applicant.[24] The HPARB concluded that the accommodations granted to the applicant during the clinical PCE had been reasonable. These included providing him with a digital timer for use at any station where a stethoscope was required and allowing him to carry additional batteries for his hearing aids in the event that the first set of batteries failed.[25]

After concluding that the College had not breached the *Code* in respect of accommodating the applicant, the HPARB went on to consider the applicant's submission that the registration requirement itself was discriminatory in respect of hearing-disabled individuals. The HPARB found that that the requirement to pass the clinical PCE was not discriminatory for two reasons: 1) it was justified in light of the College's public protection mandate, and 2) the applicant had been reasonably accommodated during the examination process.[26] In concluding that the clinical PCE requirement was justified, the HPARB relied by analogy on another HPARB decision in a nursing case, *Caliao*, in which the panel applied an adapted version of the Supreme Court of Canada test from *Meoirin* for whether an allegedly discriminatory workplace duty or rule is bona fide occupational requirement.[27] In its application of the adapted *Meoirin* test, the panel in *Caliao* reasoned that the registration requirement at issue in that case was justified because:

- The regulatory requirement (that an applicant pass a national nursing examination in three attempts) is rationally connected to membership in the nursing profession;
- There was no basis for expecting that the requirement was not adopted in good faith; and
- The requirement that applicants demonstrate baseline proficiency within three attempts at an examination is reasonably necessary to accomplish the purpose of public protection under the *Regulated Health Professions Act*, the *Health Professions Procedural Code*, and the *Nursing Act*.

The HPARB drew the same conclusions in *Maksoud* with respect to the clinical PCE.

Maksoud is consistent with the now longstanding approach to the duty to accommodate in registration for the regulated health professions. In *Trozzi*, the leading case from the Divisional Court on the duty to accommodate in the context of registration, the Court concluded that "accommodation up to the point of undue hardship" in the context of the *RHPA* colleges means "reasonable accommodation consistent with public protection in health care."[28] This standard is different than the standard for undue hardship under the *Human Rights Code*, and reflects the fact that health professions colleges must balance the duty to accommodate with their broader mandate to protect the public.[29] Registration is meant to ensure that individuals who become licensed are qualified, skilled and competent.[30] The adapted standard reflects the careful balancing that must be done between those two priorities.

Concluding Thoughts

Ultimately, the Divisional Court's decision in *Zarabi-Majd* reminds us that tribunals can and should take advantage of the procedural flexibility afforded to them when the need arises to accommodate a member with a disability before a discipline tribunal. Colleges and regulators can also apply this lesson in the context of registration, while ensuring that the end result is consistent with the statutory mandate of public protection in health care.

The information and comments herein are for the general information of the reader and are not intended as advice or opinion to be relied upon in relation to any particular circumstances. For particular application of the law to specific situations, the reader should seek professional advice.

[1] *Zarabi-Majd v Toronto Police Service,* 2025 ONSC 277 [***Zarabi-Majd***].

[2] *Zarabi-Majd, supra* at para. 18.

[3] *Human Rights Code,* RSO 1990, c H 19, s 6.

[4] *Regulated Health Professions Act, 1991,* SO 1991 c 18.

[5] *Zarabi-Majd, supra* at para. 2.

[6] *Police Services Act*, RSO 1990 c P 15 as repealed by *Community Safety and Policing Act, 2019*, SO 2019.

[7] *Zarabi-Majd, supra* at para. 4.

[8] *Zarabi-Majd, supra* at para. 11.

[9] *Zarabi-Majd, supra* at para. 7.

[10] *Zarabi-Majd, supra* at para. 10.

[11] *Zarabi-Majd, supra* at para. 10.

[12] *Zarabi-Majd, supra* at paras. 12 and 17.

[13] *Zarabi-Majd, supra* at para. 9.

[14] *Zarabi-Majd, supra* at para. 18.

[15] *Zarabi-Majd, supra* at para. 13.

[16] *Zarabi-Majd, supra* at paras. 15-16.

[17] *Zarabi-Majd, supra* at para. 18, citing *Simpson v Commissionaires (Great Lakes),* 2009 HRTO 1362 at paras. 35-36.

[18] *Zarabi-Majd, supra* at para. 18, citing *Central Okanagan School District No. 23 v Renaud*, [1992] 2 S.C.R. 970 at pp. 994-995.

[19] *Zarabi-Majd, supra* at para. 18.

[20] *Zarabi-Majd, supra* at para. 18.

[21] *K.k. v College of Physicians and Surgeons of Ontario*, 2018 CanLII 75372 (ON HPARB) at para. 50; *Chauhan v Health Professions Appeal and Review Board*, 2013 ONSC 1621.

[22] *Maksoud v College of Physiotherapists of Ontario*, 2023 CanLII 15019 (ON HPARB) [***Maksoud***].

[23] *Maksoud, supra,* at para. 122.

[24] *Maksoud, supra,* at para. 129.

[25] *Maksoud, supra,* at paras. 131-137.

[26] *Maksoud, supra,* at para. 129.

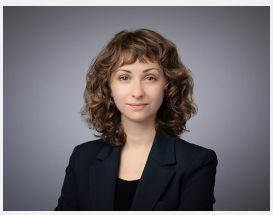
[27] *Maksoud, supra,* at para. 130, citing *Caliao v College of Nurses of Ontario*, 2011 CanLII 90733 at paras. 38-39 and *British Columbia (Public Service Employee Relations Commission) v BCGSEU* ("*Meoirin*"), [1999] 3 S.C.R. 3.

[28] *College of Nurses v. Trozzi,* 2011 ONSC 4614 at para. 42 [***Trozzi***].

[29] See *Trozzi, supra,* at paras. 36, 42.

[30] See e.g., *Health Professions Procedural Code,* schedule II to the *Regulated Health Professions Act, 1991,* SO 1991 c 18 at s. 2.1.

For more information or inquiries:



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