

UNDUE HARDSHIP IN *M.H. V. COLLEGE OF NURSES OF ONTARIO*: SETTING LIMITS ON THE DUTY TO ACCOMMODATE

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Regulatory colleges must review accommodation requests from individuals with disabilities within the context of their public protection mandate. The *Ontario Human Rights Code* (Code) requires that they accommodate applicants and members with disabilities up to the point of undue hardship. Undue hardship is a term of art that refers to the limits on the duty to accommodate. It involves a consideration of costs, health and safety issues, and, for regulatory colleges in particular, of whether the accommodation would jeopardize their ability to meet their public protection mandate.¹

Although these principles are well known, they can be difficult to operationalize in practice. Regulatory colleges often struggle to determine how far they must (or may) go to accommodate applicants and members with disabilities.

The recent decision of *M.H. v. College of Nurses of Ontario*² provides regulatory colleges with guidance with respect to the limits of their duty to accommodate individuals with disabilities.

Summary of *M.H. v. College of Nurses of Ontario*

In *M.H. v. College of Nurses of Ontario*, the Health Professions Appeal and Review Board (Board) considered an appeal by the member, MH, of a decision of the College's Registration Committee (Committee) to refuse to issue him a Certificate of Registration as a Registered Nurse (RN) in the general class.

MH had originally applied for a Certificate of Registration as a RN in the general class with the College in December 2000. His application was granted in January 2001. In late 2003, the College discovered that MH had two prior convictions for assault and possession of an unregistered firearm that he had failed to declare on his December 2000 application. As a result, his Certificate of Registration was revoked in late 2003.

During that same time period in late 2003, the College received and investigated four reports relating to MH's nursing practice and professional conduct. Specifically, the reports alleged suspected incidents of improper practices relating to narcotics, including questionable withdrawals, misappropriation, and inadequate management and documentation.

In May 2010, MH applied again for a Certificate of Registration as a RN in the general class. In his application, MH explained that his criminal charges were related to stressful events in his personal life and to substance abuse issues from which he suffered at that time. He admitted to having diverted significant amounts of narcotics through narcotic waste and manipulation of narcotic record tracking and to performing nursing while impaired. MH

¹ Courts defer to the expertise of regulatory colleges (and their committees) in determining what is required to fulfill this public protection mandate. See for example, *College of Nurses of Ontario v. Trozzi*, 2011 ONSC 4614 at para. 30.

² *M.H. v. College of Nurses of Ontario*, 2014 CanLII 57012 (ON HPARB).

explained that after his Certificate of Registration was revoked, he was treated for substance abuse through AA meetings. He stated that at the time of application, he had been sober for two years, three months and one day. He did not submit any medical evidence with respect to his suitability to practise.

MH's application was referred by the Registrar to the Committee. On October 25, 2012, the Committee decided to exempt him from the requirement that he not be found guilty of a criminal offence. However, it made no determination as to whether his health condition would affect his ability to practise nursing safely. The Committee therefore asked MH to attend a medical assessment with an independent addictions specialist selected and paid for by the College to determine how his prior substance abuse might impact his ability to practise. The specialist met with MH and released a report opining that he was incapacitated and would relapse if he returned to work. The specialist recommended that prior to returning to practice, MH attend the Homewood Health Centre 35-day in-patient treatment program and a 9-month after-care program. The specialist also recommended additional terms on MH's registration should he return to practice, including that MH participate in a health professions support group indefinitely.

Based in large part on the specialist's report, on April 23, 2013, the Committee directed the Registrar to refuse to issue MH a Certificate of Registration.

In appealing this decision to the Board, MH stated that there was sufficient evidence for the College to issue him a Certificate of Registration with terms such as ongoing monitoring. MH criticized the specialist's report, arguing that it was incomplete and biased. However, he did not provide his own expert evidence to counter the report. MH also complained about the delay in processing his application, stating it was procedurally unfair as it effectively rendered his evidence of recent practice stale. MH further argued that the College was required to issue him a Certificate of Registration pursuant to its duty to accommodate his disability to the point of undue hardship.

In confirming the Committee's decision, the Board held that MH had not met his onus of proving that he satisfied the conditions of registration. It noted that the specialist's report was persuasive and MH did not file any expert evidence

to counter the report. It dismissed MH's complaint about procedural unfairness, noting that even if such a complaint was warranted, it would not be in itself sufficient to warrant the granting of a Certificate of Registration.

The Board rejected MH's human rights argument, finding that he could not be accommodated without the imposition of undue hardship. It stated at para. 61:

The Board is satisfied, based upon the evidence before it, that the Applicant's desire to be registered with the College cannot be accommodated without undue hardship upon the College and the public interest that the College is mandated to protect. Specifically, the Board is satisfied based on the evidence before it, that there are no terms and conditions, such as monitoring as suggested by the Applicant, which could be imposed at this time to permit him to return to practise safely. The evidence of Dr. C. is that the Applicant requires further treatment before his safe return to work, even with terms, conditions and limitations because he was not treated appropriately and is almost guaranteed to relapse. Even though the Applicant believes he is ready to return to nursing on terms such as monitoring, in the absence of any medical information to support the Applicant's readiness to return to nursing in a safe manner (with terms such as monitoring), the Board finds the evidence of Dr. C. to be persuasive.

Lessons Learned

The Board's decision in *M.H. v. College of Nurses of Ontario* confirms that regulatory colleges may refuse accommodation requests that undermine their public protection mandate.

Registration requirements with respect to the ability of applicants to practise safely go to the heart of this public protection mandate. In assessing whether an individual has a disability that affects his or her ability to practise in a safe manner, regulatory colleges are entitled to rely on the opinion of an independent expert, particularly where there is no expert evidence to the contrary.

Regulatory colleges are not required to register an individual who suffers from a disability that affects his or her ability to practise in a safe manner.

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