employees are required to disclose confidential medical information for accommodation purposes

A recent Ontario arbitral award is reshaping the way employers and employees must approach the legal duty to accommodate employees with disabilities in the workplace.

Entrenched in both federal and provincial human rights legislation, the duty to accommodate imposes a legal obligation on employers to accommodate employees with disabilities unless such accommodation would cause undue hardship on the part of the employer. In *Complex Services Inc v Ontario Public Service Employees Union*[1] ("*Complex Services*"), released earlier this year, a board of arbitration opined that the duty to accommodate also requires employees to disclose confidential medical information regarding their disability to employers in order to help facilitate the accommodation process.

In *Complex Services*, a casino employee brought a grievance against her employer for allegedly failing to properly accommodate her disability upon her return from a lengthy medical leave of absence. Although the employee sought numerous forms of accommodation as part of a proposed return to work plan, she failed to provide her employer with supporting medical documentation and ultimately refused to disclose the exact nature of her disability (though she did vaguely describe it

[1] 2012 CanLII 8645 (ON LA)

as a "mental illness"). The employee also refused to meet with an independent medical examiner for the legitimate specified purpose of accommodating her disability.

Following numerous failed attempts by the employer to clarify the nature of her disability and ascertain the associated limitations, the employee was placed on a second medical leave of absence until the employer could be sure that she was fit for employment and able to be safely accommodated. The employee subsequently brought her grievance seeking reinstatement and an order that her employer "create an accommodation and return to work policy and procedure."

In dismissing the grievance, the board of arbitration held that an employer must be able to satisfy itself that an employee who seeks a return to work following an illness or injury is able to do so safely and with the appropriate form of accommodation. The board explained that it is not possible for an employment accommodation to proceed properly unless the employer has at least some information respecting the nature of the disability – particularly in cases where the disability is a mental illness. Accordingly there is a positive duty on employees to provide medical information required by the employer in order to facilitate an accommodated return to work. Indeed no employer can be faulted if an employee fails or refuses to provide the information that is necessary to establish the form and extent of accommodation required in the circumstances.

Exactly what needs to be disclosed by the employee will depend on the facts of each case. Based on past case law, however, disclosure of the following information will generally be required for accommodation purposes:

1. the nature of the illness and how it manifests as a disability, together with any work-related restrictions;

2. whether the disability is permanent or temporary in addition to the anticipated time frame for improvement;

3. the restrictions or limitations that flow from the disability, particularly as they relate to the employee's duties and responsibilities;

4. the basis for the medical conclusions, including the examinations or tests performed (but not necessarily the test results or clinical notes made in that respect); and

5. the treatment, including medication (and possible side effects), which may impact the employee's ability to perform their job, or interact with management, other employees, and customers.

The board of arbitration also held that employees have an obligation to permit an independent medical review of their confidential medical information for the specified purpose of accommodating disabilities in the workplace. The board elaborated that employers must be allowed to review the employee's medical information with a medical specialist or expert in order to ensure that the disability is properly accommodated.

It is important to note that although personal medical information is generally considered private and confidential, an employee's right to privacy is not absolute. According to the board, an employee seeking accommodation cannot thwart her employer's attempts to provide such accommodation by keeping her confidential medical information entirely private. The board also commented that the emerging tort of "intrusion upon seclusion" (established in the recent Ontario Court of Appeal decision *Jones v Tsige*) in no way alters an employer's right to compel the disclosure of confidential information where such disclosure is required or permitted by law. However an employee is only required to disclose the least amount of confidential medical information that is necessary in order to enable appropriate accommodation.

The duty to accommodate is a reciprocal concept; the employer and employee must work together in order to establish appropriate accommodation. An employer is not obliged to accept an employee's subjective perspective as to what amounts to appropriate or "perfect" accommodation. Indeed no employee is

entitled to a superior accommodation arrangement "merely because that is what [the employee] wants or thinks is best."

The board did caution, however, that while an employer may legitimately refuse to allow an employee to continue or return to work (as well as deny the employee benefits) until the necessary confidential medical information or other relevant information is provided, an employer may not discipline an employee for failing to hold up the employee's end of the accommodation bargain.

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a cautionary note