Workwise

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Navigating the Two-Way Street of Workplace Accommodation

The phrase "accommodation is a two-way street" appears often arbitration and human rights decisions that discuss an employer's duty to accommodate its employees. That accommodation has been characterized this way means that the participation and co-operation of both parties is a necessary element in the accommodation process. While this phrase is often recited, given the many nuances and complexities that arise when an employee has requested accommodation for an illness or disability, employers are often uncertain about how far they can go to ask the employee to "do their part" by providing medical information and co-operate in the accommodation process. This article provides a summary of two recent decisions that address the obligations of employees to provide relevant medical information and to accept a reasonable accommodation offered by the employer.

What Medical Information Can Employers Reasonably Ask For?

It is reasonable to ask for medical information relating to the disability or illness that has given rise to the request for accommodation or the medical leave when there is a nexus between the information sought and the employer's ability to manage the workplace. In that regard, when requesting medical information, employers should focus not on the "what" in terms of the nature of the disability or illness, but more on the "how" in terms of how the disability affects the employee's ability to perform his duties; the nature of any accommodation that may be required, and the timeline for recovery and return to work and, where possible, the resumption of regular duties.

Asking for Medical Information Is Not Harassment

A recent decision of the Ontario Human Rights Tribunal confirms that it is not "harassment" when an employer requests this information, even if it does so repeatedly. In ***Cristiano v. Grand National Apparel Inc.***, the employee provided a medical note which merely indicted she was incapacitated. There was no detailed information about the length of the absence, or what type of accommodation may be necessary to facilitate her return to work.

In response, the employer provided the employee with a letter in which it requested the following information:

- A medical opinion as to whether she was completely disabled from performing the duties of her occupation
- If not completely disabled, what are the limitations on her ability to perform her duties
- The prognosis for recovery and an estimated timeline for a return to work, either with or without accommodation.

The letter emphasized that the purpose in eliciting this information was to provide the employer with the information it needed to hire a temporary replacement, and to fulfil its obligation to accommodate any disability the employee may have.

The employee advised she would be seeing a specialist within a month, after which time the employer followed up and asked once again for the medical information it had requested, and offered to pay any costs arising from the specialist's report. The employee refused to provide this information, claiming it was "personal and private," and once again provided the employer with a generic note from her family doctor stating she was "off work for medical reasons" and would be reassessed in one month's time, and would be off work until then.

The employer advised the employee she was required to provide this medical information, and advised that if it was not provided by her scheduled return date, she would be on an unauthorized leave of absence. The employee still did not provide the information requested by the employer. While the employee's employment was ultimately terminated on the basis of other misconduct, the Ontario Human Rights Tribunal confirmed in its decision that the employer's repeated requests for the medical information it needed in order to manage the employee's return to work and accommodation needs was not harassment:

> There are limits on what a respondent can require of its employees claiming a need for a medical leave. For example, in most instances an employer is not entitled to a diagnosis. But an employer is entitled to know enough to make some assessment of the *bona fides* of the leave request and sufficient information to determine what if any accommodations might be made to

return their employee to the workplace, and if that is not possible, some estimate of how long the employee is expected to be absent (at para. 20).

The above except provides helpful guidance for employers with respect to determining what type of medical information can reasonably be requested from an employee.

Refusal to Accept a Reasonable Accommodation May Justify Dismissal

Another important step down the "two way street" of accommodation is an employee's obligation to accept a reasonable accommodation that is offered by the employer. Where an employee refuses to do so, it may be appropriate to terminate his employment, which is precisely what happened in ***Star Choice Television Network Inc. v. Tatulea*** where an adjudicator appointed under the *Canada Labour Code* upheld the termination of an employee who did not cooperate, communicate or meet with his employer to discuss the reasonable accommodation that he had been repeatedly offered to facilitate his return to work.

Tatulea was terminated as a result of his failure to contact Star Choice to discuss his return to work after a medical leave. As such, Star Choice had no option but to conclude Mr. Tatulea had quit his job. Mr. Tatulea appealed his termination.

As the medical certificates Tatulea provided came from his family physician who did not specialize in back and neck injuries, Star Choice sent the employee to a back specialist. Based on the specialist's report, Start Choice developed an accommodation plan to facilitate his return to work. The program included physical and occupational therapy and reduced work hours. The employee only attended the program for one day. In the meantime, the employee's physician continued to provide medical certificates which stated the employee was unable to return to work, and extending the employee's leave.

Tatulea refused to participate in the program that the employer proposed, and he also refused engage in discussions with this employer about his return to work. As such, his employment was terminated. In upholding the termination, the adjudicator held that Star Choice had met its duty to investigate and offer accommodation measures, or "originate a solution", and that Mr. Tatulea had not met his duty to assist and cooperate with his employer.

The adjudicator concluded that Star Choice's termination of Mr. Tatulea did not violate the *Code*, and Mr. Tatulea did not have a valid reason not to cooperate, communicate, and meet with the Star Choice. The adjudicator held that Star Choice's suggested accommodation was reasonable. The ***Star Choice*** decision demonstrates that the refusal by the employee to cooperate in the accommodation process and to accept a reasonable accommodation may justify dismissal.