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CRAWFORD CHONDON & PARTNERS LLP

The Importance of Medical Information In the Duty to Accommodate

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Agenda

1. **What is the Duty to Accommodate?**
2. **What are the Employer's Duties?**
3. **What are the Employee's Duties?**
4. **What Medical Information is Required to Accommodate Disability?**
5. **Accommodating Long COVID**



The Duty To Accommodate

Ontario's *Human Rights Code* provides:

5 (1) Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, record of offences, marital status, family status or disability.

Sometimes “equal treatment” requires accommodation



The Duty To Accommodate

Accommodation is:

The Process of modifying the workplace or terms of employment to prevent a discriminatory outcome.

The Goal of Accommodation in employment is to allow the employee to perform the essential duties of their job with: dignity, individualization, and inclusion.



The Duty To Accommodate

An employee who needs accommodation is entitled to:

Accommodation that is reasonable in the circumstances

An employee who needs accommodation is not necessarily entitled to:

The perfect form of accommodation
Their preferred form of accommodation



The Parties To Accommodation

Accommodation is a Multi-Party Process

1. Employer: modifying workplace or work assignments
2. Employee: disclosing need for accommodation, and information in support of accommodation request
3. Union: facilitating accommodation and navigating collective agreement



Employers' Duties

1. *In some cases* Inquire into need for accommodation
2. Accept accommodation requests and medical information in good faith
3. Investigate alternative approaches to accommodation
4. Maintain confidentiality
5. Assess and disclose undue hardship



Employees' Duties

1. Disclose need for accommodation
2. **Provide reliable and objective information regarding restrictions and limitations, e.g. Doctor's Notes**
3. Cooperate in the accommodation process
4. Accept reasonable accommodation
5. Meet work standards once accommodation is in place



Providing Medical Information

Balancing Human Rights against Privacy Rights

- Need to provide up-to-date medical information from a qualified practitioner
- Request for accommodation needs to be supported
- Reliable information regarding the disability and how it affects the ability to work
- Information NOT related to accommodation should not be disclosed



Providing Medical Information

Substance of Medical Information

- Only what is needed to advance accommodation, including:
 1. Nature of the Disability
 2. Limitations and Restrictions
 3. Prognosis for Recovery
- Should NOT disclose a diagnosis



Independent Medical Examination (IME)

An employer can require an employee to submit to an IME

1. If the medical information is incomplete
2. If the medical information is inconsistent
3. If the medical information is unreliable



Consequences for Failing to Provide Medical Information

Failing to provide appropriate medical information is failing to cooperate in the accommodation process.

- Employee is not entitled to accommodation requested
- Poor performance or absenteeism is treated as culpable
- Employment may be terminated for just cause and without notice
 - For example, *Wan v Intek Communications Inc.*



Wan v Intek Communications Inc. [2022]

- Employee had a disability since 2012
- Employer sought medical information about current restrictions in 2018 and 2019
- Employee submitted to an IME in 2015
- Employee refused to provide up to date information in 2019, and refused to undergo another IME



Wan v Intek Communications Inc. [2022]

- Employee asserted his doctor's information was governing – but doctor's information was based only on examination from 2015 and self-reporting from Employee
- Employee was terminated for just cause
- Employee alleged unjust dismissal and discrimination
- Adjudicator agreed with Employer and termination was upheld



Accommodating Episodic Disabilities

Remember that accommodation is a process.

Employee

- Be proactive with providing information and requests for accommodation

Employer

- Be flexible with potential accommodations



Long COVID in the Law

1. Long COVID is a potential workplace hazard
2. Long COVID is legally a “disability”



Principles for Accommodating Long COVID

- Medical support must show that your restrictions and limitations are due to disability
 - *Van Der Zwan (Re)*, 2022 ABSRA 1152 (CanLII)
 - *Yeung (Re)*, 2022 ABSRA 964 (CanLII)



Examples of Accommodating Employees with Long COVID

Proper accommodation can look like:

- Employee to ensure proper vaccination and treatment plan
- Duties modified to avoid respiratory exertion
- Flexible work from home with proper accountability



Takeaways for Assessors

1. Employers have the legal obligation to accommodate
2. Employers need proper medical information to accommodate
3. Medical information is to be kept confidential
4. Only disclose what information is needed
 - Information regarding nature of disability, limitations, restrictions, prognosis for recovery, etc.
5. Consequences for an employee who refuses to provide info



Further Questions?

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