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Shared Responsibility

The Accommodation Process and Disclosure of
Personal and Medical Information

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Aaron Rosenberg
Associate



Barbara Green
Partner



ROBINS APPLEBY
BARRISTERS + SOLICITORS

Robins Appleby LLP | 2600-120 Adelaide St. W., Toronto, ON M5H 1T1 | T. 416.868.1080 | F. 416.868.0306

www.robapp.com

Introduction

The process by which employees' disabilities are accommodated in the workplace has been described in a number of ways. The Supreme Court labelled the process a "multi-party inquiry",¹ while the Ontario Human Rights Commission has referred to it as a "shared responsibility".² These descriptions all refer to a common theme underlying the reciprocal responsibilities of stakeholders engaged in this process: the need to act reasonably and co-operatively. This article will explore this collaborative process with a focus on the legal minefield underlying disclosure of personal and medical information in facilitating requests for reasonable accommodation in the workplace.

The Duty to Accommodate in the Employment Context

Federal and provincial human rights legislation imposes upon employers a duty to accommodate employees with disabilities to the point of undue hardship. In Ontario, an employer's duty to accommodate is grounded in the Human Rights Code, which specifically imposes such duty under the ground of disability.³ According to the Ontario Human Rights Commission's *Policy and Guidelines on Disability and the Duty to Accommodate* (the "Guidelines"), the duty to accommodate requires an assessment and implementation of the "most appropriate accommodation" short of undue hardship.⁴

The Guidelines describe the "most appropriate accommodation" as "one that most respects the dignity of the individual with a disability, meets individual needs, best promotes integration and full participation, and ensures confidentiality."⁵ Accommodation is to be considered along a continuum "from those ways that are most respectful of privacy, autonomy, integration and other

¹ *Renaud v. Central Okanagan School District No. 23*, 1992 CarswellBC 257 at para 50.

² *Policy and Guidelines on Disability and the Duty to Accommodate*, Ontario Human Rights Commission, at page 18 [*Guidelines*].

³ *Human Rights Code*, R.S.O. 1990, c. H.19 at s. 17(2).

⁴ *Guidelines*, *supra* note 2 at page 14.

⁵ *Ibid.*

human values, to those that are least respectful of those values.”⁶ Short of undue hardship, the highest point in the continuum must be achieved.⁷ However, “if there is a choice between two accommodations which are equally responsive to the person’s needs in a dignified manner, then those responsible are entitled to select the one that is less expensive or that is less disruptive to the organization.”⁸

Accommodation and Disclosure

The challenges surrounding employee disclosure of personal and medical information in the accommodation context diverge at the intersection between the interests of the primary stakeholders engaged in the process: the employee and the employer. Employees seek to attain, in a confidential manner, accommodation that respects their dignity, meets their individual needs and promotes their integration and full participation in the workplace. Employers seek to accommodate the disabilities of their employees in a fair and reasonable manner in accordance with their legal obligations.

The issue of disclosure is of central concern in bridging these diverse, though not divergent, workplace interests through the accommodation process. As with any partnership, success is achieved in the accommodation context through effective cooperation and communication. In the absence of appropriate disclosure relating to disabilities, the interests of the stakeholders engaged simply cannot converge successfully to achieve the “most appropriate accommodation”. Therefore, it is in the best interest of all parties involved to maintain a clear understanding of the reciprocal legal rights and responsibilities surrounding employee disclosure of personal and medical information in the context of the accommodation process.

Stakeholder Roles and Disclosure in the Accommodation Process

⁶ *Ibid* at page 10.

⁷ *Quesnel v. London Educational Health Centre*, (1995) 28 CHRR D/474 at para 16.

⁸ *Guidelines*, *supra* note 2 at page 15.

The starting point for any discussion regarding the respective roles of stakeholders involved in the accommodation process is the Guidelines. The Guidelines set out the primary stakeholders' responsibilities as follows:⁹

The person with a disability is required to:

- advise the accommodation provider of the disability (although the accommodation provider does not generally have the right to know what the disability is);
- make her or his needs known to the best of his or her ability, preferably in writing, so that the person responsible for accommodation may make the requested accommodation;
- answer questions or provide information regarding relevant restrictions or limitations, including information from health care professionals, where appropriate and as needed;
- participate in discussions regarding possible accommodation solutions;
- co-operate with any experts whose assistance is required to manage the accommodation process or when information is required that is unavailable to the person with a disability;
- meet agreed-upon performance and job standards once accommodation is provided;
- work with the accommodation provider on an ongoing basis to manage the accommodation process; and
- discuss his or her disability only with persons who need to know. This may include the supervisor, a union representative or human rights staff.

⁹ *Ibid* at page 19.

The employer is required to:

- accept the employee's request for accommodation in good faith, unless there are legitimate reasons for acting otherwise;
- obtain expert opinion or advice where needed;
- take an active role in ensuring that alternative approaches and possible accommodation solutions are investigated, and canvass various forms of possible accommodation and alternative solutions, as part of the duty to accommodate;
- keep a record of the accommodation request and action taken;
- maintain confidentiality;
- limit requests for information to those reasonably related to the nature of the limitation or restriction so as to be able to respond to the accommodation request;
- grant accommodation requests in a timely manner, to the point of undue hardship, even when the request for accommodation does not use any specific formal language; and
- bear the cost of any required medical information or documentation. For example, doctors' notes and letters setting out accommodation needs, should be paid for by the employer.

Case law has further clarified the duties of employees and employers in the accommodation context.¹⁰ In *Complex Services Inc. v. O.P.S.E.U., Local 278*,¹¹ a Niagara Falls casino employee brought a grievance as a result of her employer's failure to adequately accommodate her disability upon her return from a medical leave of absence. In turn, her employer brought a grievance alleging the employee's refusal to sufficiently substantiate her disability for the purposes of

¹⁰ It is important to note that case law has distinguished the Guidelines as being neither binding nor conclusive and thus, has diverged from the Guidelines in certain respects (please see *Complex*, as per below, at para 78). While human rights tribunals may accord a high degree of deference to the Guidelines, courts and arbitrators may likely be more swayed by case law on the matter.

¹¹ *Complex Services Inc. v. O.P.S.E.U., Local 278*, 2012 CarswellOnt 3177 [*Complex*].

accommodation. In dismissing the employee's grievance, the arbitration board delineated the duties and responsibilities of employees throughout the accommodation process as follows:

"...the employee has an obligation to ask for accommodation and to provide sufficient information, including necessary otherwise private confidential medical information, to establish the accommodation required, and to participate in and facilitate both the search for and implementation of accommodation - whether or not the accommodation available is "perfect" from the grievor's subjective perspective."¹²

The employer's duties and responsibilities throughout the accommodation process have been described as follows:

"Upon receiving a valid request for accommodation, an employer's responsibility in the accommodation process is to carry out a thorough search for an appropriate accommodation, which may involve requesting information or advice from the employee or others, and considering accommodation possibilities in consultation with other workplace parties. Additionally, an employer should decide on and provide an appropriate accommodation within a reasonable time."¹³

In most cases, an employer's duty to accommodate is triggered by an employee's request for accommodation on the basis of a disability. Generally, as acknowledged in the Guidelines, "the duty to accommodate a disability exists for needs that are known... [and employers] are not, as a rule, expected to accommodate disabilities of which they are unaware."¹⁴

Once an employee has communicated a request for accommodation, the onus is placed on the employee to establish the nature and extent of the disability and the accommodations required, which in most cases will require the disclosure of personal and medical information.¹⁵ At this point, disclosure becomes critical to the accommodation process, especially from the perspective of an employee, whose failure or refusal to substantiate the need for accommodation may stall or

¹² *Ibid* at para 88.

¹³ "The Duty to Accommodate in Employment", Kevin D. MacNeill (Aurora, Ont.: Canada Law Book), at page 13-2.

¹⁴ *Guidelines*, *supra* note 2 at page 15.

¹⁵ *Complex*, *supra* note 11 at para 94; *Bottiglia v. Catholic School Board*, 2015 HRTO 1178 (Ont. Human Rights Tribunal).

even conclude the accommodation process and may prove fatal to a future grievance or complaint.

While employees have an absolute right to keep their confidential medical information private, employers have a legitimate need for sufficient information to satisfy their accommodation obligations and employees can neither expect accommodation nor dictate the accommodation required if information necessary to establish such accommodation is withheld.¹⁶ In *Complex*, the arbitration board set out some of the consequences flowing from an employee's failure to furnish confidential medical information for the purposes of the accommodation process as follows:

"An employee's personal medical information is generally acknowledged to be private and confidential. However, it is well established (and should be obvious) that an employer is entitled to access sufficient such information for legitimate purposes... Of course, it remains the case that the employer is only entitled to the confidential information necessary for the legitimate purpose. Even then the employee can refuse to disclose her confidential medical or other information, although if she does she must accept the consequences of exercising that right of refusal. Refusing to allow access to necessary confidential medical information may justify the employer's refusal to allow the employee to continue or return to work, or stymie the accommodation process, result in the loss of disability benefits, or even lead to the loss of employment."¹⁷

Case law demonstrates the negative consequences flowing from an employee's failure or refusal to provide sufficient information to facilitate the accommodation process. Adjudicators have routinely dismissed grievances and complaints as a result of employees' failure or refusal to provide sufficient medical information to establish a need for accommodation or the specific accommodation requested.¹⁸ In 2012, a tribunal held that an employer had satisfied its duty to accommodate where an employee requested accommodation on the basis of a hand injury but refused to provide additional medical information or attend a medical appointment.¹⁹

¹⁶ *Complex*, *supra* note 11 at para 88

¹⁷ *Ibid* at paras 84 and 93.

¹⁸ *McMahon-Ayerst v. Revera Long Term Care Inc.*, 2009 HRTO 645; *Re Dashwood Industries Ltd. and U.S.W., Loc. 1-500 (Ellis)* (2007), 161 L.A.C. (4th) 124 (Ont. Arb. Bd. – E. Newman); *Wheatley v. British Columbia (Emergency & Health Services Commission)*, 2009 CarswellBC 713.

¹⁹ *Ivancic v. Brunette Industries Ltd.*, 2012 BCHRT 248.

In some cases, such failure or refusal may justify an employee's termination. In *Halliday v. Michelin North America (Canada) Ltd.*, a Nova Scotia human rights board upheld an employee's termination, in part, on the basis that he had proffered "vague" and "confusing" information regarding his "generalized anxiety disorder".²⁰ Likewise, an Ontario arbitration board upheld the termination of an employee who had failed to provide sufficient medical information to establish that her diabetes prevented her from transitioning from a night shift to a day shift.²¹

Some adjudicators have denounced terminations or the use of disciplinary measures by employers in the face of employees' refusal to provide sufficient medical information or failure to facilitate the accommodation process. Where an employee refused to provide additional medical information to substantiate his accommodation request, an Ontario arbitrator held that, while the employee's refusal did not amount to insubordination warranting discipline or discharge, the employer was entitled to keep the employee on unpaid administrative leave pending his submission of additional medical information requested by the employer.²² Likewise, in *Shell Canada Products Ltd. v. C.A.I.M.A.W., Local 12*, a British Columbia arbitrator determined that a refusal to disclose personal medical information was not insubordination, rather, the employer's recourse was to refuse to permit the employee to work.²³

In *Complex*, after the employee failed to provide sufficient medical information, the employer placed the employee on a medical leave of absence until the employer could be certain that she was able to be safely and properly accommodated and was fit for employment. In dismissing the employee's grievance, the arbitration board confirmed employers' entitlement in certain

²⁰ *Halliday v. Michelin North America (Canada) Ltd.*, 2006 CarswellNS 509.

²¹ *Meridian Automotive Systems v. CAW-Canada*, 2005 CarswellOnt 8263.

²² *G & K Services Canada Inc. and UFCW, Local 206 (Individual Grievances), Re*, 2013 CarswellOnt 8450 at para 115 and 118.

²³ *Shell Canada Products Ltd. v. C.A.I.M.A.W., Local 12*, (1990), 14 L.A.C. (4th) 75 (B.C. Arb.).

circumstances to delay an employee's return to work until such employee fulfills its obligations in accordance with the accommodation process.²⁴

While an employer certainly may take an employee at his or her word, there are instances where there is a reasonable and *bona fide* basis for an employer to question the legitimacy of an employee's request for accommodation or the adequacy of the information provided. Since the medical information that is provided by an employee to establish that he or she has a disability that requires accommodation may not be, and more often than not will not be, sufficient for accommodation purposes, typically an employer's duty to request additional or supplemental medical information will arise. Unless, in consideration of the information provided, an employer finds that an employee's request for accommodation is clearly not *bona fide* from the outset,²⁵ where the information provided by an employee is unclear or inadequate, a duty will be imposed upon an employer to make further inquiries and to seek out additional or supplemental information to facilitate the accommodation process.

In one case, a pregnant employee of a company that manufactured lead-based products provided a medical note setting out that she could not be exposed to lead where, in the circumstances, it was clear that minimal exposure to lead was acceptable. Under the circumstances, as a result of the unclear nature of the medical information provided by the employee, an Ontario arbitrator held that the employer had a duty to seek clarification in respect of acceptable levels of lead exposure.²⁶ An Ontario arbitrator confirmed this principle as follows:

"An employer also is entitled to reasonably complete information about the cause of an employee's illness in order to decide whether he or she is not likely to suffer health problems in another setting. To the extent that the medical certificate provided by an employee is inadequate for these purposes, an employer is within its rights to make further inquiries.

²⁴ *Complex*, *supra* note 11 at para 86.

²⁵ *Galati v. Highland Farms Inc.*, 2012 HRT0 2235.

²⁶ *Dominion Colour Corp. v. Teamsters Chemical, Energy & Allied Workers, Local 1880*, 1999 CarswellOnt 5422.

However, an employer is not entitled to reject a transfer application for want of information without telling the applicant what more is required.”²⁷

An employer’s duty to assess and inquire with respect to an employee’s request for accommodation is ongoing and continues upon receipt of additional or supplemental information. In one case, an employer continued to reject medical notes provided by an employee requesting certain work shifts. In overturning the employee’s termination, the arbitrator held that, while the employer made sincere efforts to accommodate the employee, it had an obligation to seek specific clarification where it was not satisfied with the information provided by the employee.²⁸ In another case, the Alberta Court of Queen’s Bench held that an employer failed to satisfy its duty of accommodation by failing to make the necessary further inquiries to assess an employee’s accommodation request.²⁹

The Nature and Extent of Disclosure

While an employer is entitled to access sufficient medical information so as to satisfy their responsibilities in the accommodation process, this right is clearly not unlimited. An employer is entitled to only the least such information necessary for legitimate purposes, including to be assured that the employee is able to continue or return to work, or to provide necessary appropriate accommodation.³⁰ However, exactly what is required will depend on the circumstances and adjudicators have continued to grapple with the nature and extent of the obligation to disclose personal and medical information.

In *Complex*, the arbitration board provided much-needed clarity regarding the nature and extent of an employee’s disclosure obligation, stating as follows:

“The cases demonstrate that the following otherwise confidential medical information will generally be required for accommodation purposes:

²⁷ *Toronto (Metropolitan) v. C.U.P.E., Local 43*, 1991 CarswellOnt 6476.

²⁸ *Frito-Lay Canada v. U.S.W.A., Local 461*, 2007 CarswellOnt 7910.

²⁹ *Alberta (Human Rights & Citizenship Commission) v. Federated Co-operatives Ltd.*, 2005 CarswellAlta 1156.

³⁰ *Complex*, *supra* note 11 at para 84.

1. The nature of the illness and how it manifests as a disability (which may include diagnosis, particularly in cases of mental illness).
2. Whether the disability (if not the illness) is permanent or temporary, and the prognosis in that respect (i.e. the extent to which improvement is anticipated, and the time frame for same).
3. The restrictions or limitations that flow from the disability (i.e. a detailed synopsis of what the employee can and cannot do in relation to the duties and responsibilities of her normal job duties, and possible alternative duties).
4. The basis for the medical conclusions (i.e. nature of illness and disability, prognosis, restrictions), including the examinations or tests performed (but not necessarily the test results or clinical notes in that respect).
5. The treatment, including medication (and possible side effects) which may impact on the employee's ability to perform her job, or interact with management, other employees, or "customers".³¹

In *Capital Health Authority v. U.N.A., Local 33*, a case preceding *Complex*, an Alberta arbitration board considered the breadth of employees' disclosure obligation and dismissed the employee's grievance on the basis of a failure to provide sufficient information to establish what illness or injury was causing the symptoms, whether the medical problems were temporary or permanent, the proposed treatment or the nexus between the requested accommodation and the symptoms.³²

As mentioned above, in some cases "a reasonable and *bona fide* basis to question the legitimacy of a person's request for accommodation or the adequacy of the information provided" arises.³³ In such cases, an employer may request that the employee undergo an independent medical examination ("IME") by an independent medical examiner to determine the cause, extent, treatment and limitations with respect to the disability in question. The Guidelines state that no one can be forced to submit to an independent medical examination.³⁴ However, while an IME is a resource of last resort, adjudicators have clarified that there are instances in which such examination is necessary and

³¹ *Ibid* at para 95.

³² *Capital Health Authority v. U.N.A., Local 33*, 2006 CarswellAlta 1409 at para 63.

³³ *Guidelines*, *supra* note 2 at page 21.

³⁴ *Ibid*.

appropriate.³⁵ In one case, a human rights tribunal found an employer justified in requesting that an employee undergo an IME due to the inadequacy of the medical information proffered by the employee.³⁶ While employees cannot be required to submit to an IME, a refusal to do so may stall or even conclude the accommodation process and may prove fatal to a future grievance or complaint. As noted in *Complex*, “an employee who exercises her right to refuse to the incontestably intrusive IME when one is objectively justified may find herself unable to continue or return to the work.”³⁷

Conclusion

The disclosure of employees’ personal and medical information continues to play a central role in the workplace accommodation process. In most cases, without such disclosure, the interests of the stakeholders engaged simply cannot converge successfully to achieve the ideal outcome: the “most appropriate accommodation”. Nevertheless, in order to facilitate the appropriate accommodation of disabilities in the workplace, employers and employees will be required to work co-operatively in an open and honest manner that respects the role and extent of employee disclosure, as well as the broader reciprocal rights and interests underlying the shared responsibility that is the workplace accommodation process.

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³⁵ *Complex*, *supra* note 11 at para 118.

³⁶ *Sluzar v. Burnaby (City)*, 2010 BCHRT 19.

³⁷ *Complex*, *supra* note 11 at para 118.