MANAGEMENT COUNSEL
Employment and Labour Law Update

SHERRARD KUZZ LLP
Employment & Labour Lawyers

Accommodation is a Two-Way Street

Zack Lebane
416.217.2252
zlebane@sherrardkuzz.com

"John cannot attend work for medical reasons." Many employers have received a doctor's note like this. The question we often receive from employers is, "can we ask for more information?" The answer, most of the time, is *yes*.

The duty to accommodate is a two-way street

Under human rights legislation across Canada, an employer must accommodate an employee with a disability to the point of undue hardship. However, accommodation is a two-way street, and the employee must participate, meaningfully in the accommodation process. As the Supreme Court of Canada stated:

> The search for accommodation is a multi-party inquiry. Along with the employer and the union, there is also a duty on the complainant to assist in securing an appropriate accommodation.
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> …
>
> To facilitate the search for an accommodation, the complainant must do his or her part as well. Concomitant with a search for reasonable accommodation is a duty to facilitate the search for such an accommodation. Thus in determining whether the duty of accommodation has been fulfilled the conduct of the complainant must be considered.[1]

Practically, this means if an employee requests accommodation (including time off), they must provide sufficient medical and other relevant information to demonstrate they have a disability and require the accommodation requested.

Privacy considerations

How does an employee's right to privacy factor in? Recently, a British Columbia arbitrator upheld an employer's decision to dismiss an employee because she did not provide sufficient medical information to support a two-month absence from work.[2] Despite repeated requests for more, the medical documents only indicated she was "unable to work" and "unfit for duty." The arbitrator found

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the employee obstructed the accommodation process and held, "Of course, an employee may rely on their privacy rights to refuse to provide adequate information to their employer. However, they do so at their peril."[3]

Similarly, the Human Rights Tribunal of Ontario has held, "It was not sufficient, however, for the [employee] to have communicated to the [employer] merely that she had a disability. Rather, the [employee] had to inform the [employer] of her disability-related needs and how those needs interacted with her workplace duties."[4]

The Ontario Human Rights Commission ("OHRC") has also outlined the type of information an accommodation seeker is expected to provide, including:

- that they have a disability
- limitations or needs associated with the disability
- whether they can perform the essential duties of the job, with or without accommodation
- the type of accommodation(s) needed to allow them to fulfill the essential duties of the job
- regular updates about when they expect to return to work, if on leave.[5]

Finally, the OHRC noted that in some circumstances, an employer may need additional information, including the nature of the disability and, in rare situations, a diagnosis.

Unionized context

In a leading decision, Arbitrator Surdykowski identified information an employer may require in a unionized context:

- nature of the illness and how it manifests as a disability (may include diagnosis in the case of mental illness)
- whether the disability (if not the illness) is permanent or temporary, and the prognosis (i.e., anticipated improvement and time frame)
- restrictions or limitations (i.e., a detailed synopsis of what the employee can and cannot do in relation to the duties and responsibilities of their normal job duties, and possible alternative duties)
- basis for the medical conclusions (i.e., nature of illness and disability, prognosis, restrictions), including examinations or tests performed (but not necessarily test results or clinical notes)
- treatment, including medication (and possible side effects) which may impact the employee's ability to perform their job, or interact with management, other employees, or "customers."[6]

Employment standards twists and turns

Additional considerations arise if an employee is using their sick leave under employment standards legislation.

Ontario - An employer is entitled to ask for "evidence reasonable in the circumstances"[7] which includes: expected duration of absence (or, if the absence is completed, the date(s) of the absence addressed by the [medical] certificate); date the employee was seen by a health care professional; and whether the employee was examined in person by the health care professional issuing the certificate. Note: legislation is under consideration that would prohibit an employer from requesting evidence from a qualified health practitioner in support of *ESA* sick leave.[8] However, this would only apply to the three days of unpaid sick leave under the *ESA*.

Quebec - There is legislation before the National Assembly that would prohibit an employer from requiring a sick note for a leave of absence of three days or fewer.[9]

Nova Scotia - An employer may not require a medical note unless: the employee has missed more than five consecutive working days due to sickness or injury; or the employee has already had at least two non-consecutive absences of five or fewer days due to sickness or injury in the preceding 12-month period.[10]

Prince Edward Island – An employer may only request a medical certificate for paid sick leave of three or more consecutive days of absence.[11]

Newfoundland and Labrador, New Brunswick and Northwest Territories - an employer may request a medical certificate if the leave is more than three or four consecutive days.[12]

For more information and assistance, contact your Sherrard Kuzz LLP lawyer or info@sherrardkuzz.com.

[1] *Central Okanagan School District No 23 v Renaud.*
[2] *Fernie (City) v CUPE, Local 2093 (Ubell), Re,.*
[3] *Ibid* at para 92.
[4] *Baber v York Region District School Board* at para 104.
[5] https://www.ohrc.on.ca/en/policy-ableism-and-discrimination-based-disability/8-duty-accommodate at §8.7.
[6] *Complex Services Inc v Ontario Public Service Employees Union, Local 278* at para 95.
[7] *Employment Standards Act, 2000,* s 50(6).
[8] Bill 190, Working for Workers Five Act, 2024.
[9] Bill 68, An Act mainly to reduce the administrative burden of physicians.
[10] *Medical Certificates for Employee Absence Act, s 5.*
[11] *Employment Standards Act,* s 22.2(9).
[12] *Labour Standards Act,* s 43.11(2); *Employment Standards Act,* s 44.021(2); *Employment Standards Act,* s 29(3).

DID YOU KNOW?

Did you know British Columbia and Ontario have passed legislation providing a minimum wage and other entitlements to online/digital "platform workers," including those who transport passengers via an online platform. BC's legislation is in effect, and Ontario's will take effect July 1, 2025.

Daniel Averbach
416.603.6951
daverbach@sherarrdkuzz.com

Sarah MacKay Marton
416.217.2257
smarton@sherrardkuzz.com

An Independent Medical Examination Can be an Important Tool to Verify a Former Employee's Mitigation Efforts

In our August 2024 newsletter, Erin Kuzz discussed the importance of actively managing an employee on a medical leave of absence, including the type of information an employer can request during the medical management process.

In a decision released earlier this summer, the Ontario Superior Court of Justice addressed a similar issue - whether an employer can require a former employee to undergo an independent medical examination ("IME") to verify the employee's claim they cannot find a new job because of a medical condition. The court answered this question, *yes*.[1]

What happened?

Lyndon Marshall was dismissed, without cause, after 25 years of service as a courier with Mercantile Exchange Corporation ("Mercantile"). Marshall rejected Mercantile's severance package and started a wrongful dismissal action claiming 26 months' reasonable notice of termination.

In the nine months following his dismissal, not only did Marshall take no steps to find new employment, he claimed he would be unable to find any employment for the entirety of the 26 month notice period as his "mental condition" would "prevent him from mitigating his damages until he [was] cured."[2]

Mercantile argued that if Marshall was going to claim his medical condition prevented him from finding a new job, he should be required to submit to an IME to prove his medical condition. Marshall refused, which landed the two parties before a judge where Marshall argued that:

- Personal injury decisions were not applicable to this case
- There was an insufficient relationship between his medical condition and his wrongful dismissal claim, as his "mental health [was] not the basis for the damages" and was "ancillary"[3]
- Courts have accepted mental health issues, post-dismissal, as a "valid reason" for failure to mitigate
- The court should not allow Mercantile to use an IME as "a weapon for employers."

The court rejected all of Marshall's arguments.

The legal basis to ask for an IME

Under section 105(2) of the *Courts of Justice Act,* a court may order a party to submit to a physical or mental examination if a physical or mental condition is relevant to matters at issue. Historically, the court used this power in personal injury litigation.

Courts have also generally accepted that stress from termination may hinder an individual's mitigation efforts for *some* period of time. However, the longest period accepted was 12 months – not the 26 months claimed by Marshall.

In an effort to strike the right balance between Marshall and Mercantile, the court decided "it would be unfair to allow [Marshall] to make [his] assertion without having it tested."[5] This was especially so because Marshall had put his mental condition into question during the proceedings:[6]

> [15] It strikes me that in the circumstances of this case, **if the plaintiff takes the position that he is unable to mitigate after 12 months have passed, he should be required to submit to an independent medical examination. That strikes me as a fair balance between giving an employer the right to test allegations of inability to mitigate without allowing employers to abuse independent medical examinations as a tactic to dissuade plaintiffs from legitimately relying on medical issues that prevent them from mitigating damages.**
>
> [16] None of that is to say that the plaintiff is not suffering from a condition that prevents him from mitigating. It is merely to say that if someone takes a position as unusual as the plaintiff is taking, they should be prepared to subject themselves to an independent medical examination in order to test the assertions they are making.
>
> **[emphasis added]**

Takeaway for employers

The duty to mitigate is a critical component of any wrongful dismissal case. A dismissed employee must make reasonable attempts to secure alternative employment to reduce their loss. If an employee secures alternative employment during the reasonable notice period, the employer is entitled to credit those earnings against the employee's claim. If the employee fails to make reasonable attempts, their claim may be reduced by a court. If an employee alleges they cannot mitigate due to a medical condition, an employer should be prepared to use all the tools at its disposal to challenge this assertion, where appropriate. An IME can be an important tool in this tool-box.

To learn more and for assistance, contact your Sherrard Kuzz LLP lawyer or our firm at info@sherrardkuzz.com.

[1] *Marshall v Mercantile Exchange Corporation* [*Mercantile*].
[2] *Ibid* at para 4
[3] *Mercantile, supra* note 1 at para 6.
[4] *Courts of Justice Act,* s 105(2).
[5] *Mercantile, supra* note 1 at para 9.
[6] *Mercantile, supra* note 1 at para 11.

HReview
Seminar Series

Please join us at our next HReview Breakfast Seminar:

2024 Year in Review ...

And what to expect in 2025

2024 ushered in many changes to the employment and labour landscape in Ontario and across Canada. Join us as we discuss how these changes impact employers. Topics include:

1. **Legislative Update**
   - Changes to the Ontario *Employment Standards Act* under the *Working for Workers Four Act*
   - Changes to the federal *Canada Labour Code* regarding rules for termination
   - Cross-Canada update on key employment-related legislative amendments including pay equity and pay transparency legislation
2. **Labour Law Update**
   - Bill C-58 amendments to the *Canada Labour Code* regarding replacement workers and maintenance of activities during a work stoppage
   - Constitutional law decisions in the labour relations context
3. **Workplace Safety and Insurance Update**
   - Recent changes to rates and benefits
   - Update regarding communicable disease, traumatic and chronic mental stress claims
   - How Canadian workers' compensation boards are responding to the changing nature of work
   - New classification for temporary help agencies to come into effect on January 1, 2025
4. **Looking forward to 2025**
   - Changes to the Ontario *Employment Standards Act* under the *Working for Workers Five Act*
   - Potential changes to privacy obligations under the *Digital Charter Implementation Act*
   - Employment related class action lawsuits

DATE: **December 4, 2024, 9:00 a.m. – 10:30 a.m.**
WEBINAR: **Via Zoom** (registrants will receive a link the day before the webinar)
COST: Complimentary
REGISTER: **Here by Wednesday November 27, 2024**

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SHERRARD KUZZ LLP
Employment & Labour Lawyers

250 Yonge Street, Suite 3300
Toronto, Ontario, Canada M5B 2L7
Tel 416.603.0700
Fax 416.603.6035
24 HOUR 416.420.0738
www.sherrardkuzz.com
@SherrardKuzz