Medical Privacy: What's New

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Employers seeking information directly through the employee's physician need to have the consent of the employee to obtain the confidential medical information. Obviously, there are professional and legal obligations on a physician to not disclose any confidential information about a patient without explicit authorization. A physician who breaches patient-physician confidentiality may be answerable to the professional body governing physicians. But, an employer who surreptitiously seeks confidential information without the employee's consent will also be answerable to either a human rights tribunal or a labour arbitrator.

In *Ontario Public Service Employees Union v. Ontario (Ministry of Labour) (Spicer Grievance)*,[6] the grievor had an appointment to see his doctor in anticipation of receiving a medical clearance to return to work. The day before his appointment, an individual called the doctor's office to make inquiries about the grievor's medical appointments.

The physician's secretary checked the grievor's file and identified some of the appointments the grievor had either attended or were scheduled.

When the grievor attended to his appointment on the next day, the secretary mentioned that someone had called the previous day with inquiries about his appointments. The grievor was immediately alarmed and raised concerns about a breach of privacy. He met with his physician, who apologized for the communication of private information and also discussed this issue with the secretary. As a result of the incident, the grievor was not assessed by the physician for another week.

The arbitrator found that it was likely an individual from the grievor's office who made the phone call to the physician without the consent of the grievor. Vice-chair Fisher ordered the employer pay the grievor one week's wages and also ordered the employer to pay $2,500 for mental distress damages.

6 2013] O.G.S.B.A. No. 131 (Fisher).

He explained:

> *A health care provider presented with this authorization might feel free to supplement answers to the questions with any private medical information including information regarding course of treatment and diagnosis.*

The arbitrator ordered the employer to redraft the revised form so that it only authorized the health-care practitioner to disclose the information requested on the particular form.

2. **A question in the form required the health-care provider to disclose whether the employee has ever had a similar condition to the one precipitating the claim.**

The arbitrator's ruling

The arbitrator noted that the question did not deal with "diagnosis, symptoms, or the nature of any treatment." As such, it was not an inappropriate question for the disability-benefit form.

3. **A section in the form required disclosure of the anticipated length of the illness giving rise to the claim.**

The arbitrator's ruling

Arbitrator Jesin observed that the question was directed at the length of the illness, not the length of the absence.

He stated that the length of the illness could be misleading since an employee may be able to attend work while still suffering with the illness. He ruled that the employer could seek the length of the absence on the revised form, but it was not permitted to ask for the length of the illness.

4. **A section in the form required the health care provider to disclose whether a treatment plan has been prescribed, and if one has not been prescribed, to explain why.**

The arbitrator's ruling

Arbitrator Jesin observed that this section did not seek the specific details of the treatment plan or the illness. He said that there was nothing offensive about seeking confirmation that a treatment plan exists and a confirmation that it is being followed. He found favour with a decision by Arbitrator Surdykowski in *Hamilton Health Sciences*[10], where it was stated:

> *In the first instance for STD (short term disability) purposes ... an employer cannot require an employee to consent to the release of more than certification that she is absent and unable to work because she is ill or injured, the general nature of the illness or injury, that the employee has and is following a treatment plan (but not the plan itself) the expected return to work date, and what work the employee can or cannot do.*

[10] (2007), 16 L.A.C. (4th) 122 (Surdykowski).

The B.C. Human Rights Tribunal dismissed the complaint on the basis that the employee had failed to cooperate. The tribunal found that there were several instances where the applicant refused to share medical information with the city. As part of the duty to accommodate, the case law required the employee to cooperate in the accommodation process. The tribunal explained the standard of cooperation that was expected:

> *...all involved are required to work together to find a solution that adequately balances competing interests. The process requires the party best placed to make a proposal to advance one. The other party or parties must then respond with alternative suggestions and refinements as necessary and the exchange should continue until a satisfactory resolution is achieved or it is clear that no such resolution is possible. A spirit of co-operation is obviously beneficial to this process.*

In this particular case, the applicant had not fully cooperated in the accommodation process. The applicant had refused to disclose medical information or attend to an independent medical examination. Based on the city's efforts to accommodate the applicant, and the refusal to provide medical information throughout the accommodation process, the tribunal dismissed the human rights complaint.

Arbitrators have consistently held that a disciplinary response is not appropriate when an employee refuses to provide medical information. The refusal to provide the medical information is not just cause for discipline.

A recent case illustrating this point is *G & K Services Canada Inc*[12]. In that case, the grievor was dismissed for failing to provide his physician with a letter from the employer that requested detailed medical information about the grievor's need for accommodation. Arbitrator Diane Gee accepted that the employer was trying to find accommodation options other than granting time off every summer for the grievor. Thus, it was appropriately seeking medical information. Arbitrator Gee also stated that the union and the grievor were required to cooperate in the accommodation process including providing medical information that was necessary to assist with the employer's search for accommodation. The arbitrator explained:

> *The grievor was not entitled to essentially force the Employer to accommodate him by granting him time off work by refusing to consent to the release of medical information necessary to identify accommodation options within the workplace until such time as he was able to return to work. The grievor was wrong when he took the position that he would not provide the Employer with any confidential medical information if such might lead the Employer to knowing his diagnosis. The grievor was not entitled to frustrate and undermine the accommodation process in this way. Employees are entitled to accommodation, they are not entitled to the accommodation of their choosing.*

[12] 2013 CanLII 34202 (ON LA) (Gee).

> *them and Mr. Hynes refused to do either. Moreover, in this case, despite repeated warnings from the Employer that he had to attend at work, the Grievor refused to comply.*

The arbitrator also rejected the grievor's medical explanation for his absences. The doctor's diagnosis was only based on one visit. The doctor did not testify in the proceeding and, in any event, he was not properly qualified as an expert in the field of psychological disorders.

The arbitrator stated:

> *I am prepared to accept Mr. Hynes was upset (apparently for being expected to follow instructions) but that is far different from establishing a justifiable medical basis for his behaviour in leaving work on October 6 and then refusing to attend subsequent shift assignments over the following four weeks.*

The arbitrator found that there had been no remorse or acknowledgment of wrongdoing. The dismissal for insubordination was upheld.[14]

Recent direction from arbitrators

Medical privacy involves more than just employer requests for medical information. Employers can also be overly intrusive in setting out conditions of employment or expectations that an employee returning to work must satisfy. It is helpful to examine what conditions arbitrators have imposed or recommended as setting the boundaries of what might be reasonable in certain circumstances.

In *Clean Harbors Canada Inc. v. Teamsters, Local Union No. 419 (L.R. Grievance)*[15], the arbitrator reinstated the grievor because the employer had not accommodated the grievor to the point of undue hardship.

The arbitrator reinstated the grievor with a number of significant conditions, including the requirement that he remain under the care of an addiction specialist, that he enroll in an after-care program for addiction, that he be treated for depression, that he abstain from alcohol or drugs and that he submit to testing if the employer has reasonable and probable grounds that the grievor is under the influence of alcohol or drugs. There were also attendance standards imposed as part of the reinstatement.

Arbitrator Knopf provided a helpful list of accommodation options that the employer ought to have considered.

[14] See also *Chang v. Federal Express Canada Ltd.*, [2013] C.L.A.D. No. 209 (Cooper) where similar issues were raised.

[15] (2013), 234 L.A.C. (4th) 115 (Knopf).

The arbitrator ordered the union to produce the grievor's physician's clinical notes, diagnostic testing or specialist reports relied on by the grievor's physician in the preparation of his reports and a list of all the specialists, physicians or service providers who have been involved in the care and treatment of the grievor while in his doctor's care.

In some cases, extensive production of medical information may be ordered by an arbitrator.

While each case will be decided on an individual basis, the conditions imposed by arbitrators certainly touch on the privacy rights of an employee. However, arbitrators have recognized that the employee has a duty to cooperate and facilitate the accommodation. Thus, there will be instances where certain conditions can be imposed by the employer (or the arbitrator) that must be satisfied for the employee to continue working.