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Employer Rights and Obligations in Connection with Employee Personal Medical Information

Carman J. Overholt, Q.C.
Senior Litigation Partner
Fraser Milner Casgrain LLP

Matthew Curtis
Associate
Fraser Milner Casgrain LLP

Introduction

Requesting medical information from an Employee raises innumerable legal issues related to privacy, human rights and workplace safety. Employers are legally responsible for maintaining a healthy and safe workplace while at the same time managing their business in accordance with human rights and privacy legislation. Managing a business involves dealing with Employees who are disabled and require some form of accommodation. Given the legal framework, Employers may be understandably apprehensive about requesting medical information from their Employees.

The developing body of court and arbitral jurisprudence has increased Employer obligations in the area of accommodation. As well, new legislation in some jurisdictions has increased Employers' potential liability for the unlawful conduct of their Employees. Thus Employee disclosure of personal medical information will increasingly be relevant and necessary.

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Employee Privacy

Privacy laws such as the *Personal Information Protection Act*, S.B.C. 2003, c. 63 [*PIPA*] protect a person's health information. *PIPA* governs the collection, use, and disclosure of Personal Information which is broadly defined as information about an identifiable individual in the private sector in British Columbia excluding those individuals working in federally regulated industries. *PIPA*'s federal counterpart is the *Personal Information Protection and Electronic Documents Act*, S.C. 2000 c. 5 [*PIPEDA*]. Both *PIPA* and *PIPEDA* operate on a reasonableness standard with regards to the collection, use, disclosure and safeguarding of Personal Information. Under *PIPA*, and subject to limited exceptions, organizations are prohibited from collecting, using or disclosing Personal Information without the informed and meaningful consent of the individual. *PIPA* does allow the reasonable collection, use, and disclosure of Employee Personal Information without consent when the information is collected, used, or disclosed solely for the purposes of establishing, managing or terminating an employment relationship between the organization and the individual. However, the Employer must notify the Employee of its intention to collect, use, or disclose this information before it can proceed without the future consent of the Employee.

Employee medical information is generally granted a high level of protection by the Courts and the Privacy Commissioner from the unreasonable collection, use and disclosure by the Employer. Proper consent must be obtained by the Employer in the appropriate circumstances and Employers must take steps under *PIPA* to safeguard Employee medical information and prevent it from being used for improper purposes. Comprehensive and secure data storage mechanisms should be implemented by the Employer to reduce the risk of any inadvertent disclosure of sensitive Employee medical information.

The common law and human rights legislation recognize that Employers have a legitimate right to request medical information from Employees in appropriate circumstances. For instance, the British Columbia Human Rights Tribunal has stated that there is nothing inherently discriminatory for an Employer to request a doctor's note from an Employee to substantiate a request for sick leave (*Stewart v. Brewers Distributor Ltd.*, [2009] B.C.H.R.T.D. No. 376, 2009 BCHRT 376 at para. 48).

In *Muir v. Teck Cominco Metals Ltd. Trail Operations*, [2007] B.C.H.R.T.D. No. 253, 2007 BCHRT 253, the British Columbia Human Rights Tribunal was confronted with a dispute between an Employee and an Employer over access and use of the Employee's personal medical information. The Employee had returned to work after sustaining a workplace injury and was placed in an accommodated position for seven years. The Workers Compensation Board collected medical information about the Employee and shared the information with the Employer and with the Employee's consent. Twelve years after the workplace accident, the Employer asked the Employee to undergo an independent medical examination and to assess whether the Employee could perform additional duties. The Employee alleged that that the Employer sent the Employee's personal medical information that it had obtained from the Workers Compensation Board and shared it with a medical doctor without the Employee's consent. The Employee did not comply with the Employer's request. However, upon realizing it may have not complied with *PIPA*, the Employer requested the return of the Employee's medical information from its doctor. It did not seek further medical information from the Employee.

The Tribunal acknowledged that the improper disclosure of the Employee's medical information may have constituted a breach of the *PIPA*, but the Tribunal accepted that the breach was not an issue that could be addressed through the *Human Rights Code*. The Employer had taken appropriate action and the Tribunal could not conclude that the discrimination based on a physical disability was a continuing issue that engaged the *Human Rights Code* in this case.

The refusal of an Employee to provide personal medical information does not engage privacy laws so as to compel the Employee to provide personal medical information. The Federal Court in *Canada (Attorney General) v. Grover*, [2007] F.C.J. No. 58, 2007 FC 28, aff'd [2008] F.C.J. No. 401, 2008 FCA 97 [*Grover*], held that an Employer did not have reasonable and probable grounds to request that its Employee attend a medical assessment by a physician other than the Employee's own personal physician based on a mere possibility that the Employee was ill or presented a safety risk. The Court recognized that the Employer has an important obligation to ensure a safe workplace and to know more about an Employee's medical information if there were reasonable and probable grounds to believe the Employee presented a risk to health or safety in the workplace. However, this had to be balanced with the Employee's privacy. Mr. Justice Shore wrote:

> *64 ...The foundational principle is that employees have a strong right to privacy with respect to their bodily integrity and a medical practitioner; therefore, a trespass is committed if an employee is examined against his or her will. Consequently, the employer cannot order an employee to submit to a medical examination by a doctor chosen by the employer unless there is some express contractual obligation or statutory authority.*

A significant number of arbitrators have also addressed this issue, which has led to a relatively well-developed body of arbitral jurisprudence. The basic principal is found in the unreported award of *Victoria Times-Colonist v. Victoria Newspaper Guild, Local 223* (February 12, 1986):

> *... there is nothing inherent in the employer-employee relationship which vests in an employer a discretionary right to compel employees to compromise their right to privacy through the disclosure of personal medical information .... An employer can only intrude upon the privacy of an employee if it has a legitimate purpose tied to the employer-employee relationship which justifies the intrusion.*

This concept has been developed by a string of arbitrators, as summarized by Arbitrator Burke in the January 2010 award of *ICBC v. Canadian Office and Professional Employees' Union Local 378*, [2010] B.C.C.A.A.A. No. 22. This recent award involved a union grievance about a form Employees were required to complete to receive short-term disability benefits. The union alleged that the form improperly sought medical information.

Based on a number of prior awards, Arbitrator Burke held that the goal of requesting medical information is to help management determine whether the illness or disability is *bona fide* and what impact it will have on the presence and attendance of the Employee. This right to access information must be balanced with the Employee's right to privacy. As a result, Employee medical information can only be requested when doing so is:

(a) "reasonably necessary" for the administration of sick leave benefits; and

(b) "consistent" with the collective agreement.

This latter requirement does not mean collecting the information need be explicitly authorized by the collective agreement; rather the Employer's entitlement to collect may arise from its right to administer sick leave provisions of the collective agreement.

Arbitrators have often considered other facts to determine the amount of information the Employer is entitled to request. The length of the Employee's absence, the complexity of the requested accommodation upon return to work, and suspicions of whether the illness or injury is *bona fide* may all vary the Employer's entitlement.

There is, however, an upper limit on the Employer's entitlement. Arbitral awards have established that Employers have no right to specific diagnoses of Employee medical conditions. Employers are at most entitled to information that divulges the extent to which the Employee can perform his or her job.

The employer's duty to accommodate

The law places an obligation on Employers to obtain sufficient medical information from Employees with a disability or a perceived disability where there is a duty to accommodate to the point of undue hardship. The timing of this duty to investigate is after an express request has been made by an Employee seeking accommodation. The Employer's duty to accommodate may also arise absent an express request if the Employer has constructive notice of the need for accommodation.

The Employer's obligation can extend to proactively requesting personal medical information where accommodation is necessary. The Employer cannot turn a blind-eye to the Employee's physical or mental fitness when it is evident that there is a problem. Indicia such as prolonged absences from work may trigger the duty to accommodate even if the Employer has no direct knowledge of the nature of the medical issue (see: *Conte v. Rogers Cablesystems Ltd.* (1999), 36 C.H.R.R. D/403).

The seminal British Columbia Court of Appeal case of *Oak Bay Marina Ltd. (c.o.b. Painter's Lodge) v. British Columbia (Human Rights Commission)*, [2002] B.C.J. No. 2029, 2002 BCCA 495, 5 B.C.L.R. (4th) 115, involved an issue of whether an Employer discriminated against an Employee who worked as a fishing guide. The Employer did not allow the guide to return to work after he had suffered from a mental illness. The Court held that the Tribunal had overlooked the Employee's mental condition which could have affected his ability to operate safely as a fishing guide. In concurring reasons for judgment, Madam Justice Saunders stated the following:

> *33 The Human Rights Code, R.S.B.C. 1996, c. 210 is, as my colleague observes, applicable to both public and private employers, large and small. Some employers have considerable internal resources and some have only the business and practical acumen acquired in a life time. Given the breadth of the legislation's application and its intimate effect upon the essential operations of the workplace, it is important, in my view, to acknowledge that the legislation does not require that issues be referred to professional experts, not always readily accessible in this vast province. Where, as here, a decision may be based upon personal observation and a general understanding of attendant risks, I would not preclude the decision maker from supporting its view of the risks with after-acquired knowledge, to the extent it may be able to do so. This necessarily means that mere failure to investigate is not, itself, a breach of the legislation, although clearly an employer who seeks more comprehensive knowledge when faced with a decision is less likely to base a decision upon unsupportable impressions.*

The British Columbia Human Rights Tribunal held in *Kerr v. Boehringer Ingelheim (Canada) Ltd.*, [2009] B.C.H.R.T.D. No. 196, 2009 BCHRT 196, aff'd [2010] B.C.J. No. 583, 2010 BCSC 427, that an Employer had a positive legal obligation to request medical information from an Employee who was having difficulty performing her duties due to a serious health condition. The Tribunal found that the Employer had failed to properly accommodate the Employee in light of her disability. The Employer's response was that it lacked sufficient medical information to assess the specific accommodation needs of the Employee and that there were safety issues in relation to the Employee's ability to operate a motor vehicle.

The Tribunal found that the Employer failed to take adequate steps to obtain the necessary medical

information to satisfy its duty to accommodate. The Tribunal held:

> *493 There is no question that an employee may need to provide medical information to the Employer in order for that employee to be accommodated. However, the Employer cannot just wait until that information is provided before taking any other steps as this would always place the burden on the employee.*

Due to the failure of the Employer to make inquiries and to accommodate the Employee, the Tribunal awarded damages for lost wages, bonuses and pension, and for injury to her dignity, feelings, and self-respect.

The type of medical information that can reasonably be required by an Employer was considered by an Alberta arbitration board in *Capital Health Authority (Royal Alexandra) v. United Nurses of Alberta, Local 33 (Schram Grievance)*, [2006] A.G.A.A. No. 60 at para. 70. The Board gave direction for future accommodation requests where medical information was needed as to what type of information could reasonably be required by the Employer:

- the nature of the illness;
- whether the illness is permanent or temporary and the estimated time frame for improvement to occur;
- restrictions and limitations;
- how the medical conclusions were reached; and
- any treatment or medication that might impact the accommodation or the Employee's ability to perform his or her job should be disclosed.

There is also a duty for an Employee to assist in the accommodation process by providing medical evidence to demonstrate the need to be accommodated. This recognizes that the Employer does not on its own always have sufficient medical information necessary to accommodate the disability.

In a recent human rights case from Ontario, a managerial Employee alleged she had been the subject of discrimination in how she was treated by her Employer. The Employee became ill in January 2006 and began an authorized leave for medical reasons. She claimed to have been ill and completely disabled from work until at least April 2007 when she claimed that she was constructively dismissed. The Employee submitted in a timely manner a short term disability claims form to a third party insurer. The Employee did not authorize her medical information to be shared between the insurer and her Employer. Thus, all requests for information went through the Employee. Significant delays for medical information ensued and the insurer was unable to provide the medical information it requested. The Employee depended on her family physician's medical analysis. An Independent Medical Exam was scheduled but never attended by the Employee.

The Ontario Human Rights Tribunal in *McMahon-Ayerst v. Revera Long Term Care Inc.*, [2009] O.H.R.T.D. No. 653, 2009 HRTO 645, dismissed the Employee's complaint because the Employee had failed to respond to the Employer's and the insurer's reasonable requests for medical information in a meaningful manner. Vice-Chair David Muir stated at para. 40 of his decision,

> *... However, the employer was also entitled to ask for medical information to support her claim to benefits and continued absence from work. The employer has an obligation to accommodate a person with a disability and can only do so if it has reliable information. Accordingly, employees will often be asked to provide further information.*

Similarly in British Columbia, the Human Rights Tribunal has rejected discrimination claims from Employees who have not cooperated with their Employer's requests for information to facilitate accommodation in the workplace. In *Kovacevic v. Pacific Palisades Hotel*, [2006] B.C.H.R.T.D. No. 108, the failure by an Employee to respond to numerous requests by her Employer to prepare a return-to-work plan led to the Employee's dismissal. The Tribunal concluded that even though the complainant had a disability, it was the complainant's failure to communicate with the Employer regarding her continued absence from work which led to her dismissal.

British Columbia arbitrators have made similar findings. For example in *Save-on Foods v. United Food and Commercial Workers' Union, Local 1518*, [2001] B.C.C.A.A.A. No. 156, an Employee's failure to disclose his medical condition precluded the creation of a duty to accommodate. In a similar context, the Arbitrator in

Kamloops/Thompson School District No. 73 v. BCTF, [2005] B.C.C.A.A.A. No. 39 concluded at para. 57:

> *The Grievor was entitled to keep her disability private. Where however, the Grievor requests accommodation because of that disability those rights must be balanced with the Employer's legitimate need for information in order to fulfill its duty under Human Rights legislation. As set out in Renaud, supra, part of the obligation of the employer [sic] to facilitate a search for accommodation includes a duty to bring to the attention of the employer the facts relating to the discrimination. That includes the nature of her illness and the resulting restrictions.*

Failure by an Employee to cooperate in the accommodation process may therefore lead to the termination of employment. Employment may be similarly terminated if the Employer argues that the Employee has abandoned the position, or alternatively that the contract of employment has been frustrated.

Disability and Frustration

Frustration occurs where the parties to a contract made no provision in the contract for the frustrating event and the performance of the contract becomes a thing radically different from that which was undertaken by the contract (*Naylor Group Inc. v. Ellis-Don Construction Ltd.*, [2001] S.C.J. No. 56, 2001 SCC 58, [2001] 2 S.C.R. 943).

In the employment context, the doctrine of frustration can apply where an Employee is unable to work because of a disabling illness. The question for the Court is whether the disability prevents the performance of the essential functions of the Employee's job for a period of time sufficient to say that, in a practical or business sense, the object of the employment has been frustrated (*Wightman Estate v. 2774046 Canada Inc.*, [2006] B.C.J. No. 2164, 2006 BCCA 424, 57 B.C.L.R. (4th) 79 at para. 21, [*Wightman*]).

In *Wightman*, a long-term Employee suffered from health problems and stopped working in February 2002. He was on long-term disability until his death in March 2004 but he was dismissed by his Employer without notice in December 2003 following a sale of the business. The Employer's defence was that the oral contract of employment had been frustrated by the Employee's serious, lengthy, and on-going sickness. The trial judge agreed with the Employer, and dismissed the claim of wrongful dismissal.

The British Columbia Court of Appeal in *Wightman* stated that the correct question to be asked was whether the parties provided that the employment contract would remain despite the sickness if it should occur. This required an examination of the employment contract in order to determine whether its terms were wide enough to accommodate the Employee's permanent disability without termination. The long-term disability insurance policy of the Employer contemplated a continuation of benefits if the Employee's employment ended because of injury or sickness. However the Court of Appeal disagreed with the appellant that the long-term disability plan meant that the contract of employment could not be terminated by reason of sickness. Speaking for the Court, Mr. Justice Smith stated that law should not have that effect. Furthermore, Smith J.A. stated that the *Human Rights Code* did not abrogate the common law duty of frustration as it applied to employment contracts. The appeal was dismissed.

The Court of Appeal acknowledged in *Wightman* that the law in British Columbia was unsettled as to whether the Employee's medical prognosis in a frustration case should be assessed as of the date of the dismissal, the date of the trial, or the date of dismissal but with the benefit of hindsight available at the time of trial. The parties in *Wightman* accepted that it was the Employee's prognosis on the date of the dismissal that was relevant. The Court of Appeal appears to have accepted that analysis while leaving the question on whether post-termination medical evidence could be used open for a future appeal.

Evidence of significant absences for medical reasons may permit the Employer to end the employment of a bargaining unit employee for non-culpable absenteeism but the evidence will need to demonstrate that the employee is permanently disabled and unlikely to perform his or her duties in the future.

Workers Compensation Issues

Case law supports requests for independent medical examinations of Employees in appropriate circumstances including where there are *bona fide* safety concerns raised about the ability of the Employee to perform the responsibilities of the position and possible

harm that could result to the Employee and co-workers. Sufficient medical information is needed to analyze the level of risk involved in connection with the performance of workplace responsibilities.

Under subs. 4.19(2) of the *Occupational Health and Safety Regulations*, B.C. Reg. 296/97 [*Regulations*], a worker must not be assigned to activities where a reported or observed impairment may create an undue risk to the worker or anyone else. The *Regulations* also create an obligation on the worker to notify the Employer of any impairment (either physical or mental) which may affect the worker's ability to safely perform assigned work.

In the arbitral context, *CUPE Local 4848 v. New Brunswick*, [2009] N.B.L.A.A. No. 12, recently re-affirmed the high threshold Employers must meet to be entitled to request independent medical examinations. In this case, the Employee was a paramedic who suffered from arthritis. After he dropped a patient-carrying stretcher, his Employer refused to allow him to return to work until he obtained an independent medical examination.

Arbitrator Bladon acknowledged the competition between the Employer's obligation to provide a safe work environment, as statutorily encoded in the *Occupational Health and Safety Act*, S.N.B. 1983, c. O-0.2, and the Employee's privacy interest in his medical records. Citing *Grover*, Arbitrator Bladon found that the Employer must have had "reasonable and probable grounds" to believe the Employee presented a threat to the health or safety of the workplace. He indicated that meeting this requirement may still not suffice, as *Grover* also said such examinations are drastic and will only be required where there are exceptional and clear circumstances, and where other options have first been canvassed. Arbitrator Bladon found such circumstances did not exist, and thus allowed the union's grievance.

As exemplified by this award, an Employer's obligation to provide a safe working environment can only justify a requirement for independent medical examinations in special situations. The question is whether foregoing further or independent medical information would create undue hardship, and both the magnitude of the risk and the identity of those who bear it are relevant in making such a determination.

Conclusion

Employers have an obligation to request personal medical information of Employees if there are reasonable and probable grounds to believe the Employee presents a risk to the health or safety in the workplace. The information must be collected, used, and disclosed in a manner that is in compliance with the applicable privacy laws that protect this sensitive information. Furthermore, an Employer may request personal medical information of an Employee in the course of satisfying the Employer's duty to accommodate an Employee who has a disability. The degree to which the information is sought depends on the circumstances in each case. An Employee also has a duty to cooperate in reasonable requests by the Employer for medical information for the accommodation process to be successful. If an Employee does not participate and unreasonably refuses to comply with the Employer's requests for medical information in a timely manner, the Employer may be able to argue that the termination of employment is lawful. Any request by an Employer for the personal medical information should be done in a respectful manner given the sensitivity of the information. The Employer should also ensure that the request is reasonable and necessary for the Employer to fulfill its obligations.