

Case In Point

Arbitrator Orders Production of Sensitive Medical Documentation Further to Accommodation Request

Date: April 29, 2019

In *Carleton University and Carleton University Academic Staff Association* (March 29, 2019), Arbitrator Picher issued an interim award regarding the production of sensitive medical documents which were needed by the University employer to assess an accommodation request made by a faculty member (grievor). The request was to receive full pay with reduced teaching hours. The award is a helpful catalogue of the law of accommodation and best practices related to accommodation.

The Decision

At the outset, Arbitrator Picher stated that careful consideration must be given before departing from the general principle that medical information is confidential and not to be disclosed without the grievor's consent. She set out the factors to be considered where disclosure is contested, as articulated in *West Park Hospital v. O.N.A.* 1993 CarswellOnt 1283 at para. 20:

1. the information requested must be arguably relevant;
2. the requested information must be particularized so there is no dispute as to what is desired;
3. the Board of Arbitration should be satisfied that the information is not being requested as a "fishing expedition";
4. there must be a clear nexus between the information being requested and the positions in dispute at the hearing; and
5. the Board should be satisfied that disclosure will not cause undue prejudice.

Arbitrator Picher applied these factors and made the following findings:

- **arguably relevant:** the requested information was arguably relevant to the key issue in the grievance, e.g. "the determination of the nature of the workload allocation of duties that would constitute appropriate accommodation"
- **particularized request:** the request for medical information was structured in a way that was detailed and specific to what was necessary to the determination of the accommodation issue
- **fishing expedition:** the request was not a fishing expedition as "accommodation was the issue that lay at the heart of the grievance, along with a dispute over the understanding of the medical evidence that appropriately supports the accommodation"
- **clear nexus:** there was a clear connection between the medical information sought and the dispute between the parties as to whether the recommendation of the treating physician on workload distribution was appropriate
- **undue prejudice:** the prejudice to the grievor was not undue and was outweighed by the prejudice which would be caused to the University if it was unable to properly understand the objective medical foundation for the requested accommodation.

Arbitrator Picher agreed with the University that it should be permitted to review the disclosed medical information with its own external third party medical expert. She referred to and adopted the principles cited in *Complex Services Inc. v. O.P.S.E.U., Local 278* 2012 CarswellOnt 317, which states at para. 95 that the following otherwise confidential medical information will generally be required to be disclosed for accommodation purposes:

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 ... is permanent or temporary, and the prognosis in that respect ...;
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 his 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); and
5. the treatment, including medication (and possible side effects) which may impact on the employee's ability to perform his job, or interact with management, other employees, or "customers."

The Arbitrator stated that it was reasonable for the University to request an independent medical review of the medical documentation provided by the grievor and that it was unreasonable for the grievor to refuse to permit his confidential medical information to be used for that limited purpose. In so finding, she accepted the legitimacy of the observation of counsel for the University that the more medical information relating to the grievor's requested accommodation that could be appropriately obtained outside litigation process, the more the grievor's privacy may be protected.

The Order

The Arbitrator issued an order for the production of all "arguably relevant" documentation as requested by the University. She defined "arguably relevant" to include "the production of those clinical notes, records of examinations, tests, descriptions by the grievor, and the like" which formed the basis of the treating physician's conclusions and/or recommendations in the medical notes that had been voluntarily provided to the University.