



The Duty to Accommodate – Brain Injuries

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The Right to be Free from Discrimination

- The *Ontario Human Rights Code* provides individuals with the right to free from discrimination and harassment with respect to services, occupancy and employment

Services (s. 1, OHRC)

“Every person has a right to equal treatment with respect to services, goods and facilities, without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, marital status, family status or disability.” [emphasis added]

The Right to be Free from Discrimination

The *Ontario Human Rights Code* (cont'd)

Employment

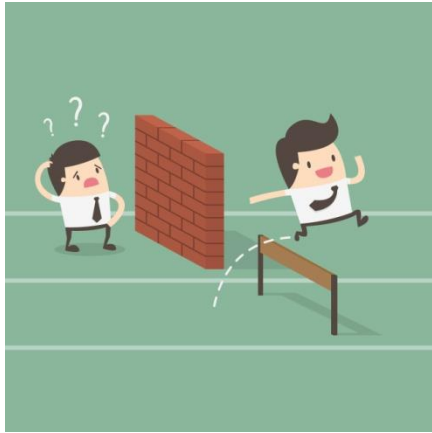
“Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, record of offences, marital status, family status or disability”. s.5(1)

Harassment in employment

“Every person who is an employee has a right to freedom from harassment in the workplace by the employer or agent of the employer or by another employee because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sexual orientation, gender identity, gender expression, age, record of offences, marital status, family status or disability” s.5(2)

What Does this Mean?

The problem is that “equal treatment” is not the answer for people who face challenges



The Duty to Accommodate

- The “duty to accommodate” – what is it?

Disability

“A right of a person under this Act is not infringed for the reason only that the person is incapable of performing or fulfilling the essential duties or requirements attending the exercise of the right because of disability. 17 (1)

Accommodation

“No tribunal or court shall find a person incapable unless it is satisfied that the needs of the person cannot be accommodated without undue hardship on the person responsible for accommodating those needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any”. 17 (2) [emphasis added]

The Duty to Accommodate

- The Code defines “a disability” as follows:
- (a) any degree of physical disability, infirmity, malformation or disfigurement that is caused by bodily injury, birth defect or illness and, without limiting the generality of the foregoing, includes diabetes mellitus, epilepsy, a brain injury, any degree of paralysis, amputation, lack of physical co-ordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment, or physical reliance on a guide dog or other animal or on a wheelchair or other remedial appliance or device,
- (b) a condition of mental impairment or a developmental disability,
- (c) a learning disability, or a dysfunction in one or more of the processes involved in understanding or using symbols or spoken language,
- (d) a mental disorder, or
- (e) an injury or disability for which benefits were claimed or received under the insurance plan established under the Workplace Safety and Insurance Act, 1997 [emphasis added]

The Duty to Accommodate in Employment

- the Duty to Accommodate must be considered in all aspects of employment when an individual has a disability within the meaning of the *Code*.
 - applies if you are looking for work or already employed by an employer;
 - applies when considering an individual's inability to perform certain functions at a satisfactory level or at all – your own job or another job;
 - may involve modifying the job or the work environment, flexibility with scheduling, making use of assistive communication devices, reworking or reassignment of tasks, etc., unless doing so causes undue hardship – difficult for employers to prove
 - applies when considering an individual's inability to attend work, sporadically, temporarily or permanently;
 - applies when engaging in a return to work (RTW) of an employee

Employers must Focus on the employee's "needs"

When is the obligation triggered?

- 1) When an employee requests accommodation; or
- 2) When the Employer reasonably becomes aware that an employee requires accommodation – mental disability



Limitations on the Duty to Accommodate

Human Rights Code:

- 17. (1) [It is not discrimination if] the person is incapable of performing or fulfilling the **essential duties** or requirements attending the exercise of the right because of disability.
- (2) No tribunal or court shall find a person incapable unless it is satisfied that the **needs** of the person cannot be accommodated without **undue hardship** on the person responsible for accommodating those needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any

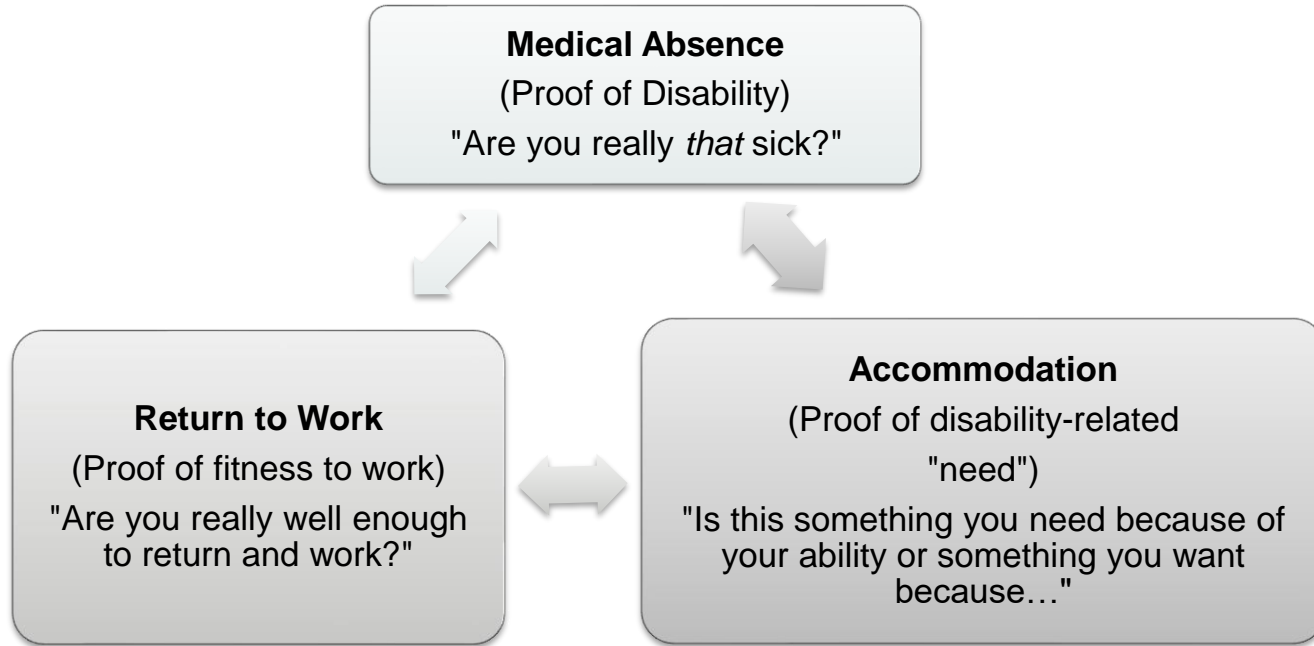
Focus on the employee's "needs" - verification

- The Employer may take reasonable steps to verify the asserted needs
- In cases involving disability, this will involve access to medical information

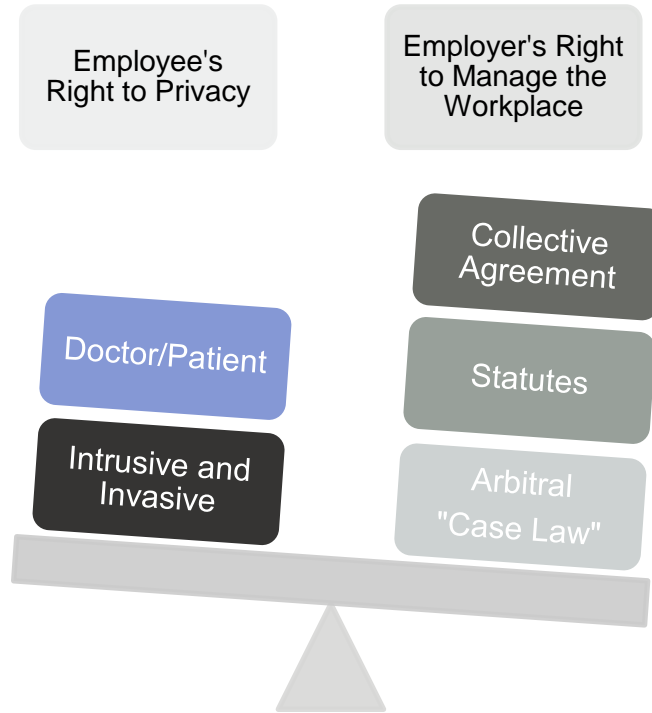


Access to Medical Information

Access to medical Information: The "when" and the "why"



Access to Medical Information



Heads Up! Durham

Denial of Access to Medical Information

Can an employer ask about the following?

Diagnosis

Prognosis

Treatment

Accessibility for Ontarians with Disabilities Act

- Integrated Accessibility Standards – Ontario Regulation 191/11 – sections 22 - 24
 - Every employer must notify its employees and the public about the availability of accommodation for applicants with disabilities in its recruitment processes;
 - During a recruitment process, an employer has to notify job applicants, when they are individually selected to participate in an assessment or selection process, that accommodations are available upon request in relation to the materials or processes to be used.
 - If a selected applicant requests an accommodation, the employer shall consult with the applicant and provide or arrange for the provision of a suitable accommodation in a manner that takes into account the applicant's accessibility needs due to disability.
 - Every employer must, when making offers of employment, notify the successful applicant of its policies for accommodating employees with disabilities

- Integrated Accessibility Standards – Ontario Regulation 191/11 - continued
 - where an employee with a disability requests it, every employer shall consult with the employee to provide or arrange for the provision of accessible formats and communication supports for information that is needed in order to perform the employee’s job; and (b) information that is generally available to employees in the workplace
 - Every employer shall provide individualized workplace emergency response information to employees who have a disability, if the disability is such that the individualized information is necessary and the employer is aware of the need for accommodation due to the employee’s disability.
 - Employers, other than employers that are small organizations, shall develop and have in place a written process for the development of documented individual accommodation plans for employees with disabilities;
 - an employer that uses performance management in respect of its employees must take into account the accessibility needs of employees with disabilities, as well as individual accommodation plans, when using its performance management process in respect of employees with disabilities