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The Tension Between Employee Privacy and Disclosure Obligations

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Presentation Outline

1) Sick Leaves and Medical Information
2) Third Party Requests for Information
3) Workplace Investigations Reports and Disclosure
4) Use of Evidence in Different Proceedings

Sick Leaves and Medical Information

- Sick leaves and sick benefit plans are meant to provide income protection for employees who are unable to work due to illness or injury
- In general, a reasonable amount of information may be required to establish entitlement to sick leave benefits or to substantiate an illness
- Only an employee can consent to the disclosure of their personal health information – consent cannot be obtained from a union on behalf of the employee
- Collective agreement provisions surrounding the extent of confidential information that an employer may be require in the “first instance” to substantiate a claim for sick leave should be strictly construed

-*TDSB v. CUPE Local 4400,* 2020 CanLII 103771 paras. 61-76; *Hamilton Health Sciences and ONA* (2007), 167 LAC (4th) 122

Sick Leaves and Medical Information

- For collective agreements that include the centrally bargained *medical certificate* at appendix C, school boards *may always* require employees to complete and submit the medical certificate to substantiate absences of five (5) consecutive days or longer.
  - *Toronto Catholic District School Board v. CUPE, Local 1328*, 2023 CanLII 19104.
- School boards are not estopped from asking for medical confirmation for an absence that is less than five (5) consecutive days, if they have reason to believe that the absence is not legitimate or an employee is abusing their sick leave benefits (i.e. suspicious pattern or excessive absenteeism)

- *TDSB v. CUPE Local 4400*, 2020 CanLII 103771 at paras. 81-83.

Sick Leaves and Medical Information

- For collective agreements without a negotiated *medical certificate* form, medical confirmation to substantiate an absence/illness must be reasonable in the circumstances and not overly intrusive. Requests for medical information must comply with language in the collective agreement and generally may include the following:
  - Confirmation of illness or injury;
  - Restrictions or limitation the employee may have; and
  - Confirmation of dates of absence and reasons therefore (without diagnosis).
- The information requested should ensure that the claim for illness is valid and support the employee's position that they are unable to perform the essential duties of their position or suitable modified work.

- *TDSB v. CUPE Local 4400*, 2020 CanLII 103771 at paras. 87-89.

Sick Leaves and Medical Information

- The longer the employee absence, the more reasonable it may be to require additional medical information, including information confirming treatment to substantiate the legitimacy of the absence (without details of the treatment plan). Lengthy claims for sick leave benefits must be assessed on a case-by-case basis.

- For longer absences, providing suitable modified work and accommodating restrictions may be appropriate. This must always be assessed on a case-by-case basis.

- *TDSB v. CUPE Local 4400*, 2020 CanLII 103771 at paras. 90 and 99.

Sick Leaves and Medical Information

- It is an appropriate practice for an employer to require proof of fitness to return to work in reasonable circumstances where they may be a concern with respect to employee health and safety. The right to insure an employee is fit to return to work comes from management rights and the duty to provide a safe workplace.
- Medical confirmation of an absence and limitations and restrictions may be required by the employer upon a return to work.
- The parties are expected to co-operate in an early and safe return to work, which may involve providing suitable modified work or accommodations. This is entrenched in human rights legislation (and the duty to accommodate) and the sick leave benefits plan.

Sick Leaves and Medical Information

- Generally, there is more information required by an employer and an employee will have to disclose more personal medical information when participating in the duty to accommodate process.

- Additional information is required to assess the suitability of any modified work and reasonable accommodation:

> The Sick Leave Plan contemplates that employees will be offered suitable modified work. Moreover, the language in the Collective Agreement provides the TDSB with the right to be provided with medical confirmation that includes the identification of any restrictions and limitations.
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> …
>
> It is within TDSB's right to request additional information related to the employee's restrictions and limitations to determine if she could be provided with some meaningful work.

- *TDSB v. CUPE Local 4400*, 2020 CanLII 103771 at paras. 113 and 120.

Third Party Requests for Information

Key Legislative Provisions

Municipal Freedom of Information and Protection of Privacy Act, R.S.O. 1990, CHAPTER M.56

Where disclosure permitted

s. 32 – An institution shall not disclose personal information in its custody or under its control except,

…

(c) For the purpose for which it was obtained or compiled or for a consistent purposes;

…

(e) where permitted or required by law or by a treaty, agreement or arrangement made under an Act or Act of Canada;

Third Party Requests for Information

Workplace Safety and Insurance Act, 1997, S.O. 1997, c. 16. Sched. A

Consent re functional abilities

s. 22 (5) When filing a claim, a worker must consent to the disclosure to his or her employer of information provided by a health professional under subsection 37(3) concerning the worker's functional abilities. The disclosure is for the sole purpose of facilitating the worker's return to work.

Confidentiality of report

s. 37 (4) Neither an employer nor an employer's representative shall disclose the information contained in the functional abilities form except to a person assisting the employer to return the worker to work under section 40 or 41.

Employer's access to records

s. 58 (1) if there is an issue in dispute, the Board shall, upon request, give a worker's employer access to such documents in the Board's file about the claim as the Board considers to be relevant to the issue and shall give the employer a copy of those documents.

Third Party Requests for Information

Employer's access to health records

s. 59 (1) Despite section 58, before giving the employer access to a report or opinion of a health care practitioner about a worker, the Board shall notify the worker or other claimant that the Board proposes to do so and shall give him or her an opportunity to object to the disclosure.

Occupational Health and Safety Act, R.S.O. 1990, c. O.1

Powers of Inspector

s. 54(1) An inspector may, for the purposes of carrying out his or her duties and powers under this Act and regulations,

(c) require the production of any drawings, specifications, licence, document, record or report, and inspect, examine and copy the same;

Workplace Investigation Reports and Disclosure

***Shannon Horner v. Stelco Inc. Lake Erie*, 2024 CanLII 16448 (CanLII) [*Stelco*]**

- An internal investigation was completed after an employee filed a complaint alleging workplace harassment.
- The investigation committee upheld the complaint of harassment and that corrective action had or would be taken and training would be provided to all employees.
- The complainant appealed to the MOL claiming that the employer's letter was deficient and failed to disclose the required information to a complainant under 32.0.7(1)(b) of the *OHSA*.

Duties re harassment

32.0.7 (1) To protect a worker from workplace harassment, an employer shall ensure that,

…

(b) the worker who has allegedly experienced workplace harassment and the alleged harasser, if he or she is a worker of the employer, are informed in writing of the results of the investigation and of any corrective action that has been taken or that will be taken as a result of the investigation;

Workplace Investigation Reports and Disclosure

Stelco at paras. 50 and 52:

> In the Board's view, the natural meaning which appears when section 32.0.7(1)(b) is simply read through imposes a greater disclosure obligation on Stelco than that which was disclosed to Ms. Horner in the October 12, 2022 closure letter. Simply put, to be "informed" of the "results" of a harassment investigation and "of any" corrective action that has or will be taken, one must be advised of the specific results arising from a complaint of harassment, and of the specific corrective measures taken by an employer to address findings of harassment.
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> …
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> Similarly, interpreting section 32.0.7(1)(b) of the Act to require disclosure of the results with respect to each of the named respondents and the specific corrective measures taken by Stelco is consistent with the purpose of the Act as a whole.

Workplace Investigation Reports and Disclosure

Stelco at paras. 53 and 54:

> However, the Board agrees with Stelco that section 32.0.7(1)(b) of the Act does not go as far as the applicant, the Union and the Director suggest. The Board does not accept that it requires an employer to provide a with a "report" setting out all of the factual "findings" reached during an investigation into a complaint of workplace harassment. Nor does it require an employer to disclose the specific acts of harassment that were found to have occurred.
>
> …
>
> I also accept the submission of Stelco and the Union that disclosure of the specific level of discipline that may be imposed by an employer as a result of a finding of workplace harassment is not required under section 32.0.7(1)(b) of the Act, as that information is confidential, and it is not apparent to the Board that its disclosure would advance the legislative purpose of protecting workers.

Use of Evidence in Different Proceedings

Ontario College of Teachers Act, 1996 S.O. 1996, c.12

Evidence on Civil Proceedings

s. 48 (3) No record of a proceeding under this Act and no document or thing prepared for or statement given at such a proceeding and no order or decision made in such a proceeding is admissible in any civil proceeding, other than a proceeding under this Act or an appeal or judicial review relating to a proceeding under this Act.

How this section has been interpreted in labour arbitrations:

> In light of s. 48(3) of the *OCTA*, *documents prepared for a College proceeding, statements given at a College proceeding, and any Order or decision made in a College proceeding are entirely out of bounds for the purposes of a labour arbitration.*

The District School Board of Niagara and Ontario Secondary School Teachers' Federation, 2015 CanLII 1541; see also ***TDSB v. ETFO*****,** 2023 CanLII 14026

Questions