



DCLC NEWSLETTER

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Affidavits

The Durham Community Legal Clinic has two Commissioners for Taking Oaths on staff. Commissioning is done on a walk-in basis.

Come into the clinic before 4pm, Monday to Friday if you have a document that needs to be sworn in front of a commissioner. Such documents include: Adult Name Change, Affidavits for OSAP, Statutory Declarations for Lost Passports, Affidavits for Service, Statutory Declarations for travel, etc.

Notarizing is also available by appointment only.

Requesting Medical Information

An employer 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. Employees should be careful in deciding whether to, and what medical information to disclose to their employers.

Requiring medical verification from an employee requesting accommodation is a common practice. However, the type of medical evidence being requested, in light of the circumstance, determines whether the request is reasonable and legal.

All Employers have an obligation to accommodate employees who are either under disability, whether relating from a work injury or not, as well as individuals who have a medical condition where their daily tasks might not meet the exact qualifications of the job title.

First and foremost, while employers are able to ask for medical evidence to accommodate a disability or prolonged absence, employers are not allowed to require information about the diagnosis or treatment of the medical condition of the employee. Simply put, it's enough for them to know that there is something medically wrong with the employee but with regards to exactly what that is, remains confidential information.

Accommodation at the Workplace

Everyone has the right to equal treatment with respect to employment without discrimination on the basis of a prohibited ground under the *Ontario Human Rights Code*. These prohibited grounds include age, family status, disability, religion, sexual orientation, etc. To ensure equal treatment, employers have an obligation to accommodate employees who encounter barriers to employment because of a prohibited ground up to the point of undue hardship.

Accommodation enables a person with functional limitations to productively perform and participate in the workplace. So when does this duty to accommodate arise?

According to the Supreme Court of Canada, the duty to accommodate arises "when an employer seeks to apply a standard that is prejudicial to an employee on the basis of specific characteristics that are protected by human rights legislation."

The onus rests on the employee since the employee has the obligation to inform the employer of the need for accommodation. The duty to inform requires the employee to provide sufficient information to substantiate not only that the employee has limitations and restrictions but that the limitations and restrictions actually impact the employee's ability to perform work functions.

The case of *Simpson-Bowlyn v. Commissionaires (Great Lakes)*, examined the extent of the duty to inform making three important points:

- 1) "in order to trigger the duty to accommodate, it is sufficient that an employer be informed of the employee's disability related needs and effects of the condition and how those needs and effects interacts with the workplace duties and environment."
- 2) "an employee does not necessarily have to disclose a detailed diagnosis of the disability in order for an employer to respond to a request for accommodation."

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Disclaimer: This newsletter provides general legal information for the benefit of our readers. Although we strive to ensure the accuracy of the information as of the date of printing, laws may change, and/or the application of these laws may vary in individual circumstances. For assurance that our information, and your interpretation of it, is appropriate to your particular situation, please obtain legal advice.



Case Law Regarding ODSP Overpayments

The Superior Court of Justice made judgement on a new case, *Ontario Disability Support Program (ODSP) v. Surdivall, 2012 ONSC 1851*, regarding overpayments within the Ontario Disability Support Program.

This case was regarding a Director's appeal based on a decision that was made by the Social Benefits Tribunal (SBT) regarding an overpayment of \$3,050 from the Ontario Disability Support Program (ODSP) to an individual who they believed had obtained cheaper living accommodations and had not reported it to ODSP. When the respondent was questioned about his living arrangements, he explained that he did obtain a less expensive place to live, but at the time in question he did not report his new place of residence because he also had more expensive housing, in another location, to help his friend out.

When this matter reached the SBT the respondent was already 65 years of age and no longer on ODSP. The SBT upheld their decision, but reduced the amount of overpayment that the Director should retrieve from the respondent to 50% of the amount already owing, as well as receive their payments at \$10 per month. The member believed that if the Director was ordered to collect the entire amount it would cause undue hardship to the respondent, as he was no longer collecting ODSP.

This appeal was granted as the question is whether the Director should only be allowed to collect half of the debt owing and if the member of the SBT is out of their Jurisdiction making that type of order. Within the *Ontario Disability Support Program Act*, neither the SBT nor the Director has the authority to decide how much of an overpayment may be collected. The only discretion these individuals have is on methods of how to collect the overpayment.

In the conclusion of this case the Superior Court of Justice ruled that the Member erred in law by ordering the director to collect only half of the debt owing. The Divisional Court has gone even further than the Ministry asked, in finding that declaring an overpayment "uncollectable" is tantamount to a "write-off" and neither the SBT nor the Director has the power to do so.

Advocacy Centre for Tenants of Ontario

Legal Aid Ontario funds legal clinics in most regions of Ontario including "specialty" clinics which represent specific individuals with respect to their legal issues (e.g. seniors, people living with HIV /AIDS, youth) or specialty areas of law.

One such clinic is the Advocacy Centre for Tenants of Ontario located at 425 Adelaide Street West in Toronto (www.acto.ca).

ACTO provides funding for the Durham Community Legal Clinic to provide advice to tenants, tenant associations and other groups concerned about housing issues.

ACTO has been in existence since 2001 and provides training and education, community organizing, law reform, and justice in housing. ACTO also provides a Duty Counsel Program to eligible tenants appearing before the Landlord and Tenant Board on the day of their hearing.

New at the Landlord and Tenant Board

The Landlord and Tenant Board has released a new form-Request to Reschedule a Hearing. This form can be used by any party to an application or their representative in order to ask the Board to reschedule a hearing, as long as the other party agrees to the hearing being rescheduled. The form is available at all Landlord and Tenant Board offices as well as on their website at www.ltb.gov.on.ca under "Other Forms".

The Board's "Check Application Status" function is now available for most applicants. If you are a party to an application that was filed with the Board, you can enter the file number and postal code of the rental unit to find out the status of the application and information about the date and location of your hearing.

The "Check Application Status" is found under the "Online Services" section on the Landlord and Tenant Board website.

If you have any questions regarding these changes, call the Durham Community Legal Clinic at 905-728-7321.

Did you Know?

Improper Disposal of Assets

Both Ontario Works and Ontario Disability Support Program have rules and regulations governing the transfer of assets for inadequate consideration or for the purpose of qualifying for income support within the year preceding the date of application for social assistance.

In cases where there is a valid explanation or an exceptional circumstance, it may be determined that the transfer of assets was adequate. If assets have been knowingly transferred without proper consideration, then those transferred assets shall be taken into account as if the applicant still had them. If the applicant is determined to have received inadequate consideration for an asset, then he/she is ineligible or the income support is reduced.

Each case is assessed individually. If you have any questions or concerns dealing with this issue, contact the Durham Community Legal Clinic for clarification.

Preparing for an Appeal

The Durham Community Legal Clinic requires a **minimum** of three months to prepare for an appeal before the Social Benefits Tribunal. Many clients come to us when they have already received their notice of hearing and we are unable to be retained that late in the process. We will provide clients with a letter from our office and advise them to attend their hearing and request an adjournment and come back to the Clinic for representation. If you are referring clients to us please stress the importance that they attend our office for assistance as early in the appeal process as possible to avoid delaying their appeal any further.



(Continued from page 1)

- 3) *"The test is whether the employer knew or ought to reasonably to have known that the employee required accommodation."*

Reasonable and not Perfect Accommodation

The duty to accommodate, simply put, imposes reasonable and not perfect accommodation. This has been a well-established legal principle since the Supreme Court of Canada's decision in *Central Okanagan School District v. Renaud* (1992). In that case, the Court held that:

"Employees cannot expect a perfect solution. If a proposal for accommodation that is reasonable in all the circumstances is refused by the employee, the employer's duty to accommodate is discharged."

Medical Evidence

For an employee to request accommodation there does not necessarily need to be documented medical evidence provided to the employer in order to grant accommodation. A simple note from a licensed practitioner saying the employee needs to be accommodated in certain areas of their job is sufficient enough for the employer to provide accommodation. One caveat to this pertains to WSIB matters briefly discussed below.

A good example of this is from the case of *Honda Canada Inc v. Keays*. The employee worked at Honda Canada Inc. for 14 years and was suddenly diagnosed with Chronic Fatigue Syndrome and needed to have reduced activities due to this. The employee also had a lot of absences so the employer asked the employee to meet with the doctor associated with the company and the employee refused. With regards to his refusal the employer then terminated the relationship. The appellant was found liable to the employee for wrongful dismissal because the employee does not need to provide concrete medical evidence, through the employer's doctor, that he has a medical condition, his doctor's note should have been sufficient. Also, for discriminatory acts based on medical conditions contrary to the *Ontario Human Rights Code* (OHRC).

The *Workplace Safety and Insurance Act* (WSIA) is not only put in place to help the return to work from those who may have suffered injury or have a medical problem, but it is to keep and promote a healthy and safe environment. Employers who are unwilling to accommodate a worker's needs in order to carryout his/her job functions may not only be in violation of WSIA or the OHRC but other relevant labour codes.

One small caveat regarding accommodation and release of medical information pertains to WSIB matters. An employer or their representative can **only** obtain a copy of relevant claim file information from a worker's WSIB file when they are objecting to a WSIB decision or if they choose to participate in your appeal. The file may contain relevant medical information pertaining to the condition and causation issues relating to the nature of the occupation.

Under sections 57, 58 and 59 of WSIA, both the employee and your employer have an interest in your claim with similar rights to receive fair and equal treatment. When either party objects to a decision, both employee and employer can obtain a copy of the relevant claim file documents to assist them in the appeal process.

One Final Note on Medical Information

Privacy laws such as the Personal Information Protection and Electronic Documents Act, 2000 c. 5 ("PIPEDA") protect a person's health information.

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 PIPEDA to safeguard employee medical information and prevent it from being used for improper purposes.

Ultimately, in deciding to release medical information, one should keep in mind the relevance of the request to the information being requested. If the reason for the medical information is simply to get a prolonged leave of absence, it is sufficient to have a doctor indicate how long an employee is to be in treatment. The diagnosis and prognosis is irrelevant. The em-

Changes to the Special Diet Allowance Program

Effective January 30, 2012, Ontario has changed the Special Diet Allowance program to include people who have lost significant weight due to Muscular Dystrophy, Huntington Disease, and/or Parkinson Disease.

This change effects people receiving assistance from Ontario Disability Support Program or Ontario Works who have lost more than 5% of their body weight as a result of these conditions. Eligibility is verified through an assessment by a medical professional. The allowance will help pay for the cost of any special dietary needs they have as a result of these conditions.

Eligible recipients can request an Application for a Special Diet Allowance form from their local Ontario Disability Support Program Office.

If you have any questions about Special Diet Allowances, contact the Durham Community Legal Clinic.



Criminal Injuries Compensation Board

If you have been a victim of a crime of violence within the past two years and suffered injury, you can apply to the Criminal Injuries Compensation Board regardless of whether or not the alleged offender was charged or convicted. Contact the Durham Community Legal Clinic for more information concerning the procedure to apply to the Board.

OUR STAFF

Deborah Hastings, *Executive Director*

Lawrence Conmigo, *Staff Lawyer*

Cathy Duignan, *Community Legal Worker*

Stefanie Famme, *Community Legal Worker*

Emily Robb, *Tenant Duty Legal Worker*

Lisa Petit, *Support Staff*

Colleen Twyman, *Support Staff*

Jeannine Spurrell, *Office Manager*

Steve Pellegrino, *Articling Student*

Matthew Ferguson, *Student*

Brittany Smith, *Student*

Changes for Hearings at the Landlord and Tenant Board

The Landlord and Tenant Board has implemented a new scheduling protocol that will improve access to justice for landlords and tenants.

Effective immediately, the Board will begin scheduling L1 (Application for Arrear and Eviction) and L9 (Application for Arrears only) applications on specific days in each regional office. Grouping L1 and L9 applications on designated days will ultimately lead to a reduced time to hearing for all applications as the Board will be able to schedule and hear applications more efficiently. The Board expects the new scheduling protocols will reduce the number of adjournments and delays and will result in more focussed and effective hearings.

The Board recognizes that there may be circumstances where, because of scheduling conflicts, there may be requests to schedule L1/L9 applications on non-designated hearing days. The Board will set aside a limited number of hearing times for L1-L9 applications on other days. Selecting one of these times, however, may result in a longer wait for a hearing.

Board of Directors

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Durham Mental Health Services

Kelly Weeks,

Canadian Mental Health Association

Kayli Riann

Brain Injury Association of Durham Region

Terasa Hill

Self-employed

Information for Newcomers

If you are a new immigrant and are looking for information about Durham Region you can go online to:

www.durhamimmigration.ca

There you will find information regarding your community, working, living, learning, settling and doing business in Durham Region. There are links to a variety of agencies that can assist you with your needs within the community. It is also a great resource if you are looking for job postings or community events.

Free Brochures and Self Help Kits Available

We offer a wide selection of helpful brochures that cover many areas of law. All brochures are free to the public. Our brochures range in topics including Social Assistance, Landlord and Tenant, Family Law, Employment Law, Youth Justice and many more!

We also have several self-help kits and forms for several areas of law and free seminars to agencies on different topics to help educate individuals about various areas of law.

The Clinic staff is available to provide presentations and legal talks on the types of law and services offered at the Clinic.

Contact the Legal Clinic for more information at 905-728-7321 or come in and see us at 419 King Street West, Unit 3512, Oshawa, Ontario, L1J 2K5.