what a mental health disability or addiction disability should 'look like.' "[18]

> **Example:** An arbitrator ruled that an employer wrongly denied an employee eight days of sick leave pay because it discounted medical evidence stating that the employee was unfit for work due to anxiety and stress. Although accepting that the employer might have had doubts about the legitimacy of the absence because the employee was facing possible discipline regarding workplace disputes, the arbitrator held that, in the absence of any medical evidence disputing the doctor's opinion, the employer was required to pay the entitlement pursuant to the collective agreement and could not substitute its own judgment for that of the treating physician. The arbitrator emphasized that "whether an adjustment disorder, stress, anxiety or depression is severe enough to be debilitating or disabling so that the person is unfit for work is [a] medical judgment," and the employer was not entitled to simply ignore the medical judgment of the employee's doctor based on its observations and expectations about the employee's activities of daily living and course of treatment. Rather, it was incumbent on the employer to follow up with the doctor about its concerns.[19]

6.5 When is it appropriate to require employees to provide medical information to prove they are fit for duty or do not pose a health and safety risk?

Employers may require evidence of fitness in cases where they have "reasonable and probable grounds" to believe that employees are unfit for duty or pose a health and safety risk to themselves, other employees, or company property. This may be the case where the employee's behaviour is threatening, violent, or potentially violent, either verbally or physically. However, the caselaw indicates that the threshold for establishing reasonable and probable grounds is fairly high. The "mere

18 *Policy on preventing discrimination based on mental health disabilities and addictions,* note 8, above, p. 53.

19 *Power Workers' Union, CUPE Local 1000 v. Ontario Power Generation*, 2015 CanLII 22421 (ON LA) (Davie), Lancaster's *Disability and Accommodation*, eAlert No. 224.

possibility" that an employee may present a safety risk, or the fact that the employer has "doubts" about an employee's mental state, do not amount to "reasonable and probable grounds."[20]

The general rule, particularly where the absence is a short one, is that once a medical certificate has been produced stating that the employee is fit to work, the onus shifts to the employer to demonstrate the contrary, or to establish the need for further medical information. In exceptional circumstances, an employer may require that an employee's fitness to work be confirmed by an independent medical examination: see Section 6.6. The parties to a collective agreement may expressly set out the circumstances in which an independent medical examination (IME) may be requested.

> **Example:** An employee was required to provide a medical certificate confirming his fitness to work after several incidents in one day in which he overreacted and acted aggressively towards his co-worker and supervisor, shortly after returning to work from an extended absence. Characterizing the employee's behaviour as an "extreme reaction" and as "threatening or frightening and violent or potentially violent, not only verbally but also physically," and noting evidence that the altercation with the supervisor was significantly out of the norm for the employee, the arbitrator concluded that there was "a legitimate and reasonable basis for concern with respect to the [employee's] health and well-being and with respect to safety." [21]

20 *International Brotherhood of Electrical Workers, Local 636 v. Niagara Peninsula Energy Inc.*, 2012 CanLII 51862 (ON LA) (Dissanayake), Lancaster's *Discharge and Discipline*, eAlert No. 170.

21 *Canadian Union of Public Employees, Local 500 v. Winnipeg (City)*, 2015 CanLII 20490 (MB LA) (Harrison), Lancaster's *Municipal Employment*, eAlert No. 83.