# ADVICE TO UNIONS AND EMPLOYERS REGARDING ACCOMMODATION OF "INVISIBLE" DISABILITIES

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## Introduction

The accommodation of addiction, mental health or other "invisible" disabilities is a complex area of the law due to the nature of those types of disabilities and their interrelationship with disciplinary issues. This paper discusses the definition of "disability" in the context of an employer's obligation to refrain from conduct that is discriminatory on the basis of disability, as well as the nature of some specific types of disability which may be hidden from or less evident to employers and unions. Other topics covered in this paper include an employee's duty to seek accommodation and to provide medical information to the employer, and the employer's duty to investigate when it suspects that a disability may underpin an employee's performance issues. We then turn to an employer's duty to accommodate disabled employees and the intersection of that duty with an employer's right to discipline employees for misconduct. Finally, we explore a disabled employee's duty to facilitate the accommodation process by making reasonable efforts to recover, or where recovery is not possible, reasonable efforts to control the symptoms of his or her disability.

## What Is A Disability?

*"Disability" Defined*

Section 13 of the BC *Human Rights Code*, RSBC 1996, c. 210 (the "*Code*") prohibits discrimination in employment on the grounds of physical and mental disability. The *Code* does not define the term "disability", but the definitions contained in human rights legislation in other provinces are instructive. For example, the Alberta *Human Rights, Citizenship and Multiculturalism Act*, RSA 2000, c-H-14 defines mental and physical disability as follows:

> "mental disability" means any mental disorder, developmental disorder or learning disorder, regardless of the cause or duration of the disorder;
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> ...
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> "physical disability" means 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 epilepsy, paralysis, amputation, lack of physical co-ordination, blindness or visual impairment, deafness or hearing impediment, muteness or speech impediment, and physical reliance on a guide dog, wheelchair or other remedial appliance or device.

The Ontario human rights legislation contains a similar definition:

> "disability" means,
>
> (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,
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> (b) a condition of mental impairment or a developmental disability,
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> (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
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> (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*;
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> *Ontario Human Rights Code*, RSO 1990, c.H.19, s.10

The nature of a disability has been considered at length by the courts, human rights tribunals and labour arbitrators. The Supreme Court of Canada discussed the definition of "handicap" in *Quebec* v. *Montreal*, [2001] 1 S.C.R. 665, and concluded that a narrow definition should be avoided. The Court's discussion of disability provides an extremely broad context for the term, and includes within it perceived disabilities:

> The objectives of the [Quebec] Charter, namely the right to equality and protection against discrimination, cannot be achieved unless we recognize that discriminatory acts may be based as much on perception and myths and stereotypes as on the existence of actual functional limitations. ... I am, therefore, of the view that the Charter's objective of prohibiting discrimination requires that "handicap" be interpreted so as to recognize its subjective component. A "handicap", therefore, includes ailments which do not in fact give rise to any limitation or functional disability.
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> ...
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> It is important to note that a "handicap" may exist even without proof of physical limitations or the presence of an ailment. The "handicap" may be actual or perceived and, because the emphasis is on the effects of the distinction, exclusion or preference rather than the precise nature of the handicap, the cause and origin of the handicap are immaterial. Further, the Charter also prohibits discrimination

> based on the actual or perceived possibility that an individual may develop a handicap in the future.
>
> These guidelines are not without limits. Although I believe that health may constitute a "handicap" and thus be a prohibited ground of discrimination under s. 10 of the Charter, the same cannot be said of personal characteristics or "normal" ailments. There is not normally a negative bias against these kinds of characteristics or ailments, and they will generally not constitute a "handicap" for the purposes of s. 10. As the emphasis is on obstacles to full participation in society rather than on the condition or state of the individual, ailments (a cold, for example) or personal characteristics (such as eye colour) will necessarily be excluded from the scope of handicap, although they may be discriminatory for other reasons.
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> *Quebec* v. *Montreal, supra* at paras. 39-41 and 81-82

Clearly, these guidelines could encompass many actual or perceived disabilities, including so called "invisible" disabilities.

In British Columbia, the Human Rights Tribunal summarized how it would determine whether an individual suffered from a disability in *Morris* v. *BC Rail*, 2003 BCHRT 14 (Lyster):

> To summarize, in assessing whether an individual has a physical or mental disability within the meaning of s. 13 of the *Code,* the Tribunal must consider the individual's physical or mental impairment, if any; the functional limitations, if any, which result from that impairment; and the social, legislative or other response to that impairment and/or limitations. The focus is on this third aspect, which is to be assessed in light of the concepts of human dignity, respect and the right to equality. Proof of impairment and/or limitation, while relevant, will not be required in all cases.
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> *Morris, supra* at para. 214

*Addictions as Disabilities*

Several decisions have found that specific "invisible" conditions, such as depression or drug dependency, constitute disabilities under the *Human Rights Code*. For example, alcoholism was found to be a disability under the *Code* in *Handfield* v. *North Thompson School District No. 26*, [1995] B.C.C.H.R.D. No. 4 (Mahil):

> The evidence reveals that alcoholism is a chronic and devastating illness. It is a disease which stays with its victims for the duration of their lives. Although alcoholism affects a significant proportion of the population, it is not a "common" illness such as flu (*Ouimette*, supra). Finally, victims have no control over the

> development or continuation of the disease (although they do have control over its treatment and mastery).
>
> *Handfield, supra* at para. 140

In that case, the British Columbia Human Rights Tribunal also noted some of the specific characteristics of the disease of alcoholism and its treatment:

> ... While the evidence shows that compulsion and denial are fundamental aspects of the disease of alcoholism, it also reveals that alcoholism is a treatable illness, and that success of the treatment depends upon the commitment and effort of the person afflicted. It is true that alcoholics cannot be held responsible for the development of the disease; however, this is not to say that, once the disease has been diagnosed and a plan of treatment undertaken, alcoholics bear no responsibility for the success or failure of the treatment. This cannot be so since, as we have seen, alcoholism cannot be effectively treated without recognition and effort by the afflicted person.
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> *Handfield, supra* at para. 169

Drug addiction, and the perception of drug addiction, have also been recognized as prohibited grounds for discrimination. In *Alberta (Human Rights and Citizenship Commissioner, Director)* v. *Kellogg Brown & Root (Canada) Co.* (2006), 267 DLR ($4^{th}$) 639 ("*Kellogg Brown & Root, supra*"), the Alberta Court of Queen's Bench considered whether an employer had a duty to accommodate a person who had failed a pre-employment drug test, and whose probationary employment was terminated for that reason. The employer argued that it had no duty to accommodate because the complainant was not disabled. The complainant had admitted that he was a recreational user of cannabis, and was not addicted. The court held that the complainant had raised a *prima facie* case of discrimination. The employer's drug and alcohol policy, which required the denial of employment to prospective employees who tested positive for drug use, discriminated against drug dependent individuals and against recreational users. The court also noted that urinalysis could not measure impairment levels, when the drug was consumed, or discriminate between isolated or recreational use and abuse or dependence. Individuals could be denied employment based on behaviour that took place well before the individual contemplated employment with the employer. The court found that the purpose and effect of the policy was to screen individuals from the workforce based on a risk assessment that an individual who had a positive drug test had an increased chance of being impaired at work at some later date. The policy relied upon assumptions about persons who used drugs, and imposed an automatic, single and absolute sanction (the denial of employment) on persons who tested positive. Prospective employees were not assessed according to their individual abilities, but instead were assessed on the presumed characteristics of persons who use drugs. The employer's policy clearly discriminated against drug dependent individuals as they were denied employment because of their disability. In finding that the policy also discriminated against recreational drug users, the court cited the above passage from *Quebec* v. *Montreal, supra*. The court noted that the policy treated all individuals who tested positive for drug use as if they were drug dependent, and that the employer assumed that they would likely report for work impaired in the future.

Since the finding in *Kellogg Brown & Root, supra* the Ontario Superior Court dealt with a similar issue, but arrived at a different conclusion in *Weyerhaeuser Company Limited, carrying on business as Trus Joist v. Ontario Human Rights Commission and Chornyj* [2007] OJ No. 640 (Ont SC (DC)) ("*Weyerhaeuser, supra*").

In *Weyerhaeuser, supra* a prospective employee was offered a "safety sensitive" position. The offer of employment was conditional on a number of requirements being met by the employee, including passing a drug test. The employee consented to the test by signing a consent form. When he tested positive for marijuana, the offer of employment was withdrawn. The employee brought a complaint before the Human Rights Commission alleging that Weyerhaeuser's drug testing was discriminatory, and that its withdrawal of a job offer after a positive drug test was discrimination on the basis of disability.

The employer asserted that it withdrew its employment offer because of serious concerns about his honesty as an employee, as the employee had repeatedly denied using marijuana, but eventually changed his story and admitted to using it recreationally. The employer asked the Tribunal to dismiss the complaint without a hearing, alleging that there was no protection in the legislation for a right to lie, and that marijuana use without evidence of actual disability was not a protected ground of discrimination. This motion was dismissed by the Tribunal, who found it had jurisdiction to hear the complaint. The employer applied for judicial review.

The court accepted the employer's argument. Since the employee did not claim that he abused marijuana, or that he used it because he was suffering from an existing disability, there was no *prima facie* right that had been infringed.

In addition, the Tribunal erred in finding that the employee had a plausible claim of discrimination on the basis of perceived disability. Specifically, the evidence did not support a conclusion that the employer actually perceived the employee as being disabled; rather it perceived him to be dishonest. Further, the fact that the employer had a drug-testing policy was not *prima facie* discriminatory on the basis of perceived disability. Unlike in *Kellogg Brown & Root, supra*, under this policy a positive drug test did not automatically lead to dismissal or the revocation of employment offers. Rather, employees that failed the drug test could start work after providing a negative drug retest, and signing an agreement which stated that they may be terminated over the next five years for engaging in certain conduct involving alcohol or controlled substances at work. Accordingly, the employer did not subjectively perceive any person with a positive drug test to be disabled by drug dependency. Therefore, the Tribunal's refusal to dismiss the complaint was unreasonable, and was set aside.

The nature of addiction was considered by Arbitrator Lanyon in a very recent decision from British Columbia:

> ... typically employees with substance dependence will, at some point in the progressive condition, demonstrate deterioration in ethical or moral behaviour. Health professionals will steal drugs from their place of work to feed their addictions. Alcoholics will, if exposed, often steal alcohol from their workplace

> ... an addict acts out of compulsion in regard to the drug of their choice and ... the compulsion operates notwithstanding that an addict is experiencing neither withdrawal nor intoxication.
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> *British Columbia* v. *British Columbia Government and Services Employees' Union (Gooding Grievance)*, [2007] BCCAAA No. 37 (QL) at paras. 88-89 (Lanyon)

*Stress, Anxiety and Mental Illness as Disabilities*

Some examples of previously recognized "invisible" disabilities include psychiatric disorders such as depression, bipolar disorder, schizophrenia, and also conditions such as "post-traumatic stress disorder"[1], panic and anxiety attacks brought on because the job involved too much stress for the worker[2], migraine headaches[3], kleptomania[4] and even low I.Q.[5]

As to whether an employer must accommodate "stress", the preliminary question must be whether stress is a disability under the *Human Rights Code*. Considering the analysis adopted in *Quebec* v. *Montreal, supra* as outlined above, it seems stress itself is likely not a disability, but stress may give rise to, or exacerbate, conditions that are disabilities. Stress is often transient, and common, and could be considered a "normal ailment". However, in some individuals stress may worsen mental health issues, such as depression, that clearly do give rise to a duty to accommodate. To determine into which of those two groups a particular case may fall requires the application of a certain amount of common sense: is the employee having chronic or extreme problems, beyond what would be a normal reaction to workplace stress? If so, an employer who is considering discipline for performance issues must make inquiries to determine whether the individual in question requires accommodation to alleviate stress.

## The Employee's Duty To Seek Accommodation / The Employer's Duty To Investigate

*An Employee's Duty to Seek Accommodation*

Beginning with an employee's duty to seek accommodation, the courts, human rights tribunals and labour arbitrators have generally recognized that before an employer can be liable for a failure to accommodate a disabled employee, the employer must have been aware of the employee's disability: *Health Employers Assn. of BC* v. *British Columbia Nurses Union*, 2006 BCCA 57 at para. 38, [2006] BCJ No. 262 (QL). In most cases, that issue is not present, as either the employee has advised the employer of his or her disability and need for accommodation, or the disability is obvious to the employer. However, in cases where the nature of an employee's disability and its effect on the employee's work performance are not obvious to an employer, decision makers have held that an employee has a responsibility to communicate to

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1 *WestJet Airlines* v. *Rocque* [2006] CLAD No. 382 (Ponak)
2 *Mellon* v. *Canada (Human Resources Development)* 2006 CHRT 3
3 *Desormeaux* v. *Ottawa-Carelton Regional Transit Commission*, 2005 FCA 311
4 *Canadian National Railway Co. and C.A.W. – Canada, Re* (1994), 43 LAC (4th) 120 (M. Picher)
5 *Labatt Breweries Alberta and Brewery Workers Local 250*, [2005] AGAA No. 23 (Sims)

the employer his or her need for accommodation: *Martin* v. *Carter Chevrolet Oldsmobile*, [2001] BCHRTD No. 39 (QL), 2001 BCHRT 37 at para. 28. As the Supreme Court of Canada has held, an employee has an obligation to bring to the attention of his or her employer the facts relating to the discrimination: *Central Okanagan School District No. 23* v. *Renaud*, [1992] 2 SCR 970 at paras. 43-44.

In a 1992 decision of the BC Council of Human Rights respecting the disability of alcoholism, the Council stated:

> Some disabilities may be evident to all; others may be evident only to those who have had previous experience with the disability; and others may not be evident at all. Even if the disability is evident, the employer or service-provider may have no idea how to accommodate the disability.
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> It does not seem useful to me to formulate a general rule regarding the responsibility of employees to bring details of their disabilities to their employer's attention because every case will depend on an analysis of the particular facts involved. In the circumstances of this complaint, though, I do not think that the Complainant can allege discrimination or failure to accommodate before she informed the Respondent of what she felt was required to accommodate her disability. The facts in this case point to a failure on the part of the Complainant to communicate with the Respondent rather than to any discriminatory actions on the part of the Respondent.
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> *Williams* v. *Elty Publications* (1994), 20 CHRR D/52, [1992] BCCHRD No. 25 at paras. 83-84 (QL) (Humphreys)

In that case, the complainant was an alcoholic who successfully discontinued her consumption of alcohol. The respondent employer was aware of that fact and of a stressful situation in the complainant's life (the break-up of her relationship), but not that she feared that she would begin to drink alcohol again. The employer terminated the complainant's employment following an argument between her and her supervisor. The BC Human Rights Council concluded that the complainant was dismissed for her conduct during the argument, and that the employer had no reason to link her behaviour with a mental or physical disability. The termination of the employee was therefore not discriminatory.

*An Employee's Duty to Provide Sufficient Medical Information to Facilitate Accommodation*

In addition to advising the employer of his or her need for accommodation for a physical or mental disability, an employee must also provide the employer with sufficient information to enable the employer to determine that a disability exists, and what nature of accommodation would be appropriate. An employer is entitled to such medical information as required by the terms of a collective agreement, as is permissible under privacy legislation, and as is reasonable in the circumstances of the particular case.

Employers and unions should consider not only *whether* the employer is entitled to medical information, but also *how much* and to *what* specific information the employer is entitled. Even where disclosure of some medical information is warranted and permissible, other information, such as the diagnosis, the symptoms of the illness, the details of the injury or other information of that nature, does not necessarily have to be disclosed. To the contrary, an employer is generally entitled only to that information which is necessary to accommodate the employee and maintain the employment relationship. Usually this amounts to entitlement to confirmation of a *bona fide* illness or injury; the identification of functional limitations; and the prognosis for a full recovery date. Parties should consider what medical information is required in each case, *why* that information in particular is required, what the information will be used for, and how the confidentiality of any information provided will be protected.

In the case of "invisible" medical conditions, and employee denial or intransigence with regard to identifying a medical condition, taking treatment or seeking accommodation, employers may feel compelled to require that an employee undergo an independent medical examination. Such a requirement of an employee who does not wish to undergo a medical examination presents a serious intrusion into the employee's privacy, and accordingly it must be warranted in all of the circumstances, and the confidentiality of the report results must be protected.

As a starting point, we refer to Arbitrator Larson's findings in *CAIMAW, Local 12* v. *Shell Canada Products Ltd.* (1990), 14 LAC ($4^{th}$) 75, where he found that "in the absence of an agreement or statutory authority, *an employer is not entitled to require an employee to submit to an examination by a doctor of the employer's choice*, or otherwise to compel the employee to disclose information about his own medical condition."

Certainly an employer should try to obtain the information it requires from the employee's doctor first, before requiring that an independent examination, or an examination by a doctor of the employer's choosing, be performed. In *Canadian Union of Brewery and General Workers* v. *Molson Breweries*, May 5, 2005 (Unreported), (Rayner), the Arbitrator found that a medical assessment required by the employer should be "done in the least intrusive way" and that "first seeking medical information through the grievor's own doctor or specialist and then seeking an independent assessment if the initial medical information is not sufficient is a much less intrusive approach than demanding that the grievor undergo a medical assessment by a specialist of the company's choosing from the very beginning."

In *Grover* v. *National Research Council of Canada,* [2005] CPSLRB No. 132, the Canada Public Service Labour Relations Board found that a "request for an independent medical examination to determine fitness to work should be considered only in exceptional and clear circumstances" and must be based on reasonable grounds to question [the grievor's] fitness to return to work." In assessing the circumstances in that case, the Board considered:

1) the grievor's existing medical certificate provided by his own doctor;

2) the grievor's fitness for work, his ability to fulfill his normal job duties;

3) whether there were any safety concerns which would warrant the examination being required; and

4) whether the employer had other options for obtaining further information from the grievor and chose not to pursue them before demanding a medical assessment by its own doctor.

The Board found that in that case, the employer was not entitled to require the grievor to undergo an examination by its doctor.

In *Greater Vancouver Regional District Employees' Union* v. *Greater Vancouver Regional District* [2007] BCCAA No. 12 ("*GVRD, supra*"), Arbitrator Dorsey found that the employer was wrong to put the grievor on leave without pay for refusing to undergo a psychological assessment recommended by a psychologist brought in by the employer to examine the grievor's workplace issues. Arbitrator Dorsey found that despite the grievor's demonstrated agitation at work, and the recommendation of the psychologist, a psychological assessment was not warranted in the circumstances and that the grievor should have been put on a paid leave and given an opportunity to cool off first.

In *CUPE Local 1253* v. *New Brunswick Department of Education,* June 9, 2006, unreported (Bruce), a contrary finding was made. In that case, it was found that the employer was within its rights to put an employee on unpaid leave when she refused to undergo a psychiatric assessment. The important difference on the facts between the *GVRD, supra* case and the *CUPE, supra* case is that in *CUPE, supra*, the grievor was a school bus driver, and the Arbitrator noted that the requirement for an examination was warranted given the "very high duty of care [the employer] has for the transportation of school children."

Aside from the nature of the work performed, and the nature of the information sought, another factor to be considered is the nature of the illness. In *Molson Breweries, supra*, it was noted that suspected psychiatric illness warranted more respect for the privacy of the employee than an illness of another nature. In rendering his reasons, Arbitrator Rayner noted that "psychiatric assessment is perhaps one of the most sensitive intrusions into a person's privacy."

In *Port Coquitlam (City) and CUPE, Local 498* (2005) 81 CLAS 118 (Munroe), an employee was dismissed for failing to comply with an employer requested independent medical exam. Although Arbitrator Munroe concluded that the employer's IME request was appropriate, as an IME was required to substantiate the employee's ongoing medical leave, he found that the employee's refusal to submit to the IME was the result of the employee's disability, one of the symptoms of which was a paranoid state which impaired her ability to consent to the IME. Arbitrator Munroe ordered that the employee be reinstated on the basis that she would consent to the IME the employer had requested.

In terms of the scope of the independent medical examination, and in particular, whether drug and alcohol testing may be required, arbitral jurisprudence has established that a balancing of interests analysis will be applied. Employee privacy, and the "sovereignty" of the individual over his or her own body, is generally the starting point, from which arbitrators then consider whether reasonable and probable grounds exist to suspect substance impairment or addiction, and whether there are less intrusive means of assessment available. Where the employee's work is "safety sensitive," the employer's entitlement to demand substance use testing is considerably increased, but where the work is non-safety sensitive, that entitlement is much more

circumscribed: *Canadian National Railway Co.* v. *CAW-Canada* (2000), 95 LAC (4th) 341 (Picher); *Imperial Oil* v. *CEP, Local 900*, December 11, 2006, unreported (Picher).

Finally, where a medical evaluation is commissioned, the employer is burdened with protecting its confidentiality: *Molson Breweries, supra.*

From the above analysis, it is clear that whether an employer has the right to require an employee to undergo a medical exam by a doctor of its choosing depends on:

1. the collective agreement language;

2. the applicable privacy legislation;

3. whether the employer first sought to obtain the information it requires through less intrusive means and whether those less intrusive means yielded sufficient results;

4. the employee's ability to perform his or her normal duties;

5. the nature of the work, i.e. whether it raises safety concerns; and

6. the nature of the medical condition, i.e. whether it is a psychological illness or a physical injury.

Unions representing grievors who have been requested to undergo independent medical evaluations, or evaluations by doctors of the employer's own choosing, should consider the circumstances of the case, the collective agreement and the applicable legislation to determine whether the employer is entitled to require the examination, and if so, what information the employer is entitled to obtain as a result of the examination. Unions should also make sure that such examinations are conducted by physicians, rather than other health care practitioners, and should negotiate with the employer as to what the examination should entail, which results should be released, to whom the results should be released, the uses to which the results may be put, and how confidentiality of the results will be ensured.

In counselling members as to their rights and responsibilities, unions should be aware that while an employee generally may not be disciplined for refusing to undergo an independent medical exam, he or she may be held out of service, *Re Via Rail Canada Inc. and CAW (Spatling)* (2006), 106 LAC (4th) 110 (Hope), and he may be found to be in breach of his duty to cooperate in the accommodation process: *Mount Pearl (City) v. Newfoundland and Labrador (Workplace Health, Safety and Compensation Review Division)* [2006] NJ No. 350. (In *Mount Pearl, supra*, the Court found that as part of an employee's statutory duty under the Newfoundland *Workers Compensation Act* to participate and cooperate in his or her return to work, that the employee could be required to undergo an examination by the employer's doctor, and that refusing to do so may constitute a breach of the employee's duty to cooperate).

*An Employer's Duty to Investigate a Suspected Disability*

Although employees are generally expected to advise their employers of their need for accommodation, given the nature of addiction and other mental disabilities, employees may be reluctant or unable to initiate the accommodation process. The question of whether an invisible disability is present will often arise where an employee has not yet provided any medical information, but has exhibited unexplained performance issues. In these cases, the employer may have an obligation to make inquiries as to whether the employee is disabled. For example, in *Canada Safeway and UFCW, Local 401* (1992), 26 LAC (4th) 409, aff'd 83 WAC 306 (Alta CA), an employee who was terminated for performance issues was later determined to be mentally ill. The arbitrator overturned the dismissal, stating that a person with mental illness is unlikely to be willing to share that information with an employer, and cannot be held to the standard of a reasonable person. In addition, he found that the employer should have known that the grievor was mentally ill. His behaviour with coworkers was sufficiently bizarre that the employer had an obligation to make inquiries:

> [Safeway] should have realized Mr. Baum's behaviour was sufficiently bizarre to have alerted them to the possibility Mr. Baum was mentally ill and that the poor work choices he made may be attributable to his mental disability....
>
> We acknowledge that Messrs Mix and Riley are not psychologists or psychiatrists. However, Mr. Baum's behaviour was such that an observer need not be a psychologist or psychiatrist to realize that Mr. Baum was probably mentally disabled. A motorist need not be a mechanic to conclude that his or her car would benefit from a tune-up when it repeatedly stalls in traffic. Some things are so obvious that one does not need to be an expert to figure them out. This is one of them.
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> *Canada Safeway, supra* at pages 433-434

An employer is not required to be a psychiatrist, but where there are clear signs that an employee is suffering from an "invisible" disability, some inquiries must be made before any disciplinary action is taken.

In some cases, such as *Canada Safeway, supra* it will be obvious that an employer should consider whether an "invisible" disability is responsible for performance issues. However, in other cases an employer may not be certain whether a disability is behind the performance issue. In *Canadian Forest Products Ltd. and USWA, Local 1-424* (2005), 154 LAC (4th) 397 (Diebolt), aff'd BCLRB No. B235/2006 (Matacheskie), the grievor had been prone to violent outbursts that frightened other employees and created a safety issue. He was suspended and told he could not return to work until he had consulted with a physician and been certified as fit to return to work. Neither the grievor nor the union had ever raised the issue of a disability, but the employer wanted to check because there had been "talk" around the mill. His physician cleared him to return to work; following another outburst, he was terminated. The union argued that there was evidence he was disabled, and that his employer failed to accommodate him. The arbitrator found that the union had not established a disability and stated:

> As I understand the law and arbitral jurisprudence, in a case characterized by a union as either non-culpable or "hybrid", the union must prove on a balance of probabilities, or it must be conceded, that the employee suffers a disability and that this disability caused or contributed to the employee conduct which is the subject of complaint. Even then termination may be justified, if the employer did not know of the disability and ought not to have known of it: *Celgar Pulp, supra*, and the cases cited therein. On the other hand, if the employer ought to have known of or suspected a disability but failed to enquire, a union's post termination proof of disability causatively linked to the employee's conduct may well lead to arbitral reinstatement and an order for accommodation up to the point of undue hardship.
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> *Canadian Forest Products, supra* at page 419

Again, the relevant question was whether the employer knew or ought to have known. Failing to inquire, therefore, will not protect an employer if it can later be established that the employer should have inquired, and that a disability was present. For example, in *United Steelworkers of America, Local 5885* v. *Sealy Canada* [2006] BCCAAA No. 23 (Smith), the grievor was terminated for yelling and kicking a coworker, pushing a cart at another and punching the plant manager in the face. After the termination of the employee, the employer learned that the grievor potentially had a mental disability (bi-polar) that caused the aggressive conduct. The Arbitrator concluded that by not taking steps to accommodate grievor, the employer failed its duty.

Conversely, there have been cases that fault the employer for hastily making enquires and requests that are not supported by the facts. In *GVRD, supra*, the grievor had a tumultuous history with his employer and coworkers that resulted in significant workplace disruption, which included allegations of the grievor being moody, paranoid, intimidating, threatening and causing stress to those around him. In response, the employer retained a consultant to conduct a violence threat assessment. During the investigation the grievor was placed on indeterminate leave of absence with full pay and benefits pending the results of the investigation. The consultant recommended that the grievor undergo a psychiatric evaluation. This request was refused by the grievor and the employer ultimately responded by suspending payment to the grievor. The union argued that there were not reasonable and probable grounds for the employer's decision to require the psychiatric examination.

In his decision, Arbitrator Dorsey concluded that the employer failed to substantiate its allegations that led it to order a psychiatric evaluation as part of a violent threat assessment. In response to the argument that the employer was only following the recommendation of an expert third-party, Arbitrator Dorsey responded, at para. 299:

> An unsound recommendation from management consultants, even if experts, is not reasonable and probable grounds to compel Mr. Dove to undergo a psychiatric assessment.

Essentially, although the grievor was found to have behaved in an unfriendly, aloof manner, and to have glared at others in the workplace, there were no proven instances of physical aggression to require the psychiatric examination.

There must be reasonable grounds underlying a request for an employee to consent to medical evaluations. While employers must avoid making unnecessary, intrusive requests, on insufficient grounds, they must also be cautious not to ignore situations where a proactive inquiry is required. Generally, where the employer makes a reasonable request for medical information and the employee refuses, the proper course for the employer is to prohibit the employee from working pending the employee's consent, rather than imposing discipline, *Via Rail, supra.*

**The Employer's Duty To Accommodate**

*A Prima Facie Case of Discrimination Is a Prerequisite to a Duty to Accommodate*

An employer only has a duty to accommodate a disabled employee when a *prima facie* case of discrimination has been established: *Ontario Human Rights Commission and O'Malley* v. *Simpson Sears Ltd.*, [1985] 2 SCR 536. Discrimination has been described by the Supreme Court of Canada as:

> ... a distinction, whether intentional or not, but based on grounds relating to the personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individuals or group not imposed on others, or which withholds or limits access to opportunities, benefits and advantages available to other members of society.
>
> *Andrews* v. *Law Society of BC*, [1989] 1 SCR 143 at para. 37

For a union to establish a *prima facie* case of discrimination by an employer, it must prove that the employee was disabled or was perceived to be disabled, that the employee was subjected to adverse treatment and that his or her disability was a factor in that adverse treatment: *Health Employers Assn of British Columbia* v. *British Columbia Nurses' Union*, 2006 BCCA 57, [2006] BCJ No. 262 (QL) at para 38. For example, when an employee's disability prevents him or her from performing the usual duties of his or her job, it would be *prima facie* discriminatory for the employer to refuse to continue to employ him or her for that reason.

Once a union establishes that the employer's decision, policy or action was *prima facie* discriminatory, the burden of proof shifts to the employer to prove that its decision, policy or action constitutes a *bona fide* occupational requirement within the meaning of section 13(4) of the *Human Rights Code.* The Supreme Court of Canada established the following three part test to be applied in making that determination:

(1) Did the employer adopt the standard for a purpose rationally connected to the performance of the job?

(2) Did the employer adopt the particular standard in an honest and good faith belief that it was necessary to the fulfillment of that legitimate work-related purpose? and

(3) Is the standard reasonably necessary to the accomplishment of that legitimate work-related purpose? To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer.

*British Columbia (Public Service Employee Relations Commission)* v. *British Columbia Government and Service Employees' Union*, [1999] 3 SCR 3 ("*PSERC, supra*")

It is the third part of that test which encapsulates what has been called "the duty to accommodate".

*What Does an Employer's Duty to Accommodate Entail?*

The Supreme Court of Canada has established that the duty to accommodate requires an employer to take reasonable measures short of undue hardship to remove the discriminatory effect of the employer's rule or policy: *O'Malley* v. *Simpson Sears, supra*. By the use of the term "undue hardship", the court made it clear that

> ... more than mere negligible effort is required to satisfy the duty to accommodate. The ... term "undue" infers that some hardship is acceptable; it is only "undue" hardship that satisfies this test. The extent to which the discriminator must go to accommodate is limited by the words "reasonable" and "short of undue hardship". These are not independent criteria but are alternate ways of expressing the same concept. What constitutes reasonable measures is a question of fact and will vary with the circumstances of the case. ...
>
> *Renaud*, *supra* at para. 19

Some of the factors relevant to a determination of whether an employer has accommodated an employee to the point of undue hardship include the following:

> ... financial cost, disruption of a collective agreement, problems of morale of other employees, interchangeability of work force and facilities. The size of the employer's operation may influence the assessment of whether a given financial cost is undue or the ease with which the work force and facilities can be adapted

> to the circumstances. Where safety is at issue both the magnitude of the risk and the identity of those who bear it are relevant considerations....
>
> *Central Alberta Dairy Pool* v. *Alberta (Human Rights Commission)*, [1990] 2 SCR 489 at para. 62

That list is not exhaustive of the factors that may be relevant in any particular case.

Generally an employer will be responsible for initiating the search for accommodation once the employee has identified the need for accommodation.

> ... While the complainant may be in a position to make suggestions, the employer is in the best position to determine how the complainant can be accommodated without undue interference in the operation of the employer's business. ...
>
> *Renaud, supra* at para. 44

Where the employee has a clear physical set of restrictions, for example following a back injury, accommodation of disability may be a fairly straightforward process in which the employee's duties are modified such that he or she is able to perform them, or the employee may be assigned to a new position suitable to the employee's capabilities. However, the accommodation of individuals with addiction or other mental health disabilities may present a unique set of challenges. Employers must be flexible and creative to structure an appropriate accommodation in such cases. For example, in *Shuswap Lake General Hospital* v. *British Columbia Nurses Union (Lockie Grievance)*, [2002] BCAAA No. 21 (QL), the employer was ordered to institute an accommodation for a grievor who was diagnosed with bi-polar mood disorder which involved training the grievor's co-workers to detect changes in the grievor's behaviour which could indicate an episode of mania. In that case, the grievor, a nurse, had experienced several episodes of mania following her diagnosis of bi-polar mood disorder and had taken time off work for each episode. After the last episode, when the grievor's doctor certified her as fit to return to work, the employer refused to allow her to return unless she could provide assurance that she would not relapse, or that if she did, that the relapse could be accurately predicted. According to the evidence in the case, such assurance was not possible as bi-polar mood disorder is an incurable condition characterized by unpredictable relapses. A person with the condition experiences changes in mood from normality to mania to depression. The disorder can be treated and many individuals are able to manage the illness well with medication. However, even when patients are compliant with their medications there is no guarantee against relapse.

Arbitrator Gordon held that the union had raised a *prima facie* case of discrimination. The employer had refused to continue to employ the grievor because she could not assure it that she could accurately predict her future relapses (para. 138). The unpredictability of relapses was a characteristic of bi-polar mood disorder. The Arbitrator then considered whether the employer had established that the standard that a nurse diagnosed with that illness could only return to work if the nurse was well controlled, no risk to patient safety and did not require monitoring by her co-workers. In terms of the employer's concern about the risk to patient safety, Arbitrator Gordon held that in assessing what constitutes undue hardship, the standard was "serious risk" or "unacceptable risk" as opposed to "real risk" or "minimal risk": at para 112, citing *PSERC,*

*supra* and *British Columbia (Superintendent of Motor Vehicles)* v. *British Columbia (Council of Human Rights)*, [1999] 3 SCR 868. The employer's standard of no risk was an "uncompromisingly stringent standard", not a standard of reasonable safety (para. 141). The Arbitrator also rejected the employer's argument that returning the grievor to work would have a negative impact on her co-workers' morale. Arbitrator Gordon held that the concerns of the employees could be addressed by providing them with an educational workshop on bi-polar mood disorder and the detection of indicators of relapse, and by instructing them to ensure that the grievor is removed from work if her behaviour includes indicators of relapse (paras. 115, 164, and 165).

A notable recent case regarding mental illness in the workplace was the decision of the British Columbia Human Rights Tribunal in *Gordy* v. *Oak Bay Marine Management Ltd.*, 2004 BCHRT 225. This is the second decision of the Tribunal relating to Mr. Gordy's complaint against the Oak Bay Marine Group's decision not to continue to employ him as a fishing guide, for the new season, because of his mental disability. The Court of Appeal of British Columbia quashed the first Tribunal decision, which had found in favour of the complainant, and referred the matter back to the Tribunal with various directions and comments. The Tribunal again found in favour of the complainant. This second Tribunal decision provided a detailed procedural roadmap for how employers should assess accommodation issues.

Mr. Gordy worked for Oak Bay Marine as a seasonal remote waters guide. He suffered from bi-polar disorder. The central question for the Tribunal was whether Oak Bay Marine had established that its refusal to re-hire Mr. Gordy was reasonably necessary to accomplish its legitimate work-related goal of ensuring safety. To answer this question the Tribunal determined that an adjudicator must consider:

- whether the employer investigated alternative approaches that would not have a discriminatory effect;

- whether the employer correctly decided that there was no action that was less discriminatory that would still accomplish the employer's legitimate purpose; and

- what process was undertaken to investigate these matters.

The Tribunal pointed out that the onus was on the employer to prove that it was unable to accommodate the complainant short of undue hardship in order to establish its *bona fide* occupational requirement. The employer had to show that it applied a process of thought and analysis at the time the decision was made in order to prove that accommodation was impossible:

> The cited authorities establish the following principles: The duty to accommodate is a positive obligation. An employer has a duty to obtain all relevant information about the employee's disability, at least where it is readily available. This includes information about the employee's current medical condition, prognosis for recovery, ability to perform job duties, and capabilities for alternate work. The term 'undue hardship' requires respondents in human rights cases to seriously consider how complainants can be accommodated. A failure to give any thought

> or consideration to the issue of accommodation, including what, if any, steps could be taken, does not satisfy the duty.
>
> *Gordy, supra* at para. 84

To satisfy the elements of the *PSERC, supra* test, the Tribunal concluded that it must consider the procedure adopted by the employer to assess the issue of accommodation, as well as the substantive content of the accommodation or the reasons for not offering one. Both of these considerations must be made in context, i.e. in light of the circumstances of the particular employer.

As to Oak Bay Marine's process, the Tribunal concluded that the employer had an obligation to take steps to inform itself about Mr. Gordy's ability to safely return to work. It found no evidence that Oak Bay Marine consulted with anyone before refusing to allow Mr. Gordy to return to work. There was no evidence that Oak Bay Marine had any accurate information about Mr. Gordy's actual disability or the risk of Mr. Gordy having future bi-polar episodes and attacks.

With respect to the substance of accommodation the Tribunal determined that:

- The employer did not have sufficient evidence that the risk of returning Mr. Gordy to work would have amounted to undue hardship. Impressionistic evidence was not sufficient to establish this risk. The evidence that the employer did have from Mr. Gordy's doctors about his diagnosis and prognosis indicated that he was fit to return to work with some accommodation;

- The employer was not able to prove that accommodation would have amounted to undue hardship because there was no evidence that it turned its mind to any accommodation; and

- The employer was not able to prove that it would have amounted to undue hardship to place Mr. Gordy in some other position, or reconfigure some available position, because there was no evidence that anyone at Oak Bay Marine gave consideration to this possibility.

The Tribunal concluded that Oak Bay Marine took no steps to appropriately inform itself about his condition before refusing to re-hire Mr. Gordy. The employer should have taken steps to inform itself about Mr. Gordy's diagnosis and prognosis and consider possible methods of accommodation. The employer had not "met the legal burden on it to establish that it was, in fact, unsafe to return Mr. Gordy to work as a fishing guide and that it was impossible to accommodate him in any way."

This case is important reading for employers addressing their obligations to employees with workplace disabilities. Employers must make every effort to obtain accurate medical information about the employee's condition, and from that foundation carefully reflect on the availability of accommodation short of undue hardship. An adjudicator must not just consider the employer's answer to the problem. The adjudicator must see the process of consideration

applied to the answer in order to decide whether the employer discharged its duty to accommodate.

The decision is particularly compelling when one considers that Oak Bay Marine did what many employers or citizens would think was perfectly rational in the circumstances. Oak Bay Marine quite intuitively concluded that an individual who had exhibited erratic and potentially dangerous behaviour, whether the result of a disability or not, was simply not a candidate to guide tourists in dangerous waters off the coast of Vancouver Island. The BC Supreme Court and Court of Appeal clearly agreed with the inherent common sense of this decision. This was not an employer that decided to terminate an employee with a mental illness because it had a preconceived prejudice against such persons or was worried that they would "look bad" with a "crazy" employee around. The employer clearly responded to a common sense concern about the safety of both Mr. Gordy and clients.

However, that "common sense" or "intuitive" response does not satisfy a careful human rights adjudicator. The Tribunal has made crystal clear its position that employers must obtain expert medical evidence about disability, not make their own assumptions about the risks created by mental illness or how those risks can be managed. It is important to note that the employer was criticized for its failure to obtain any expert information about the situation. The Tribunal noted the lack of medical evidence, but also pointed to the lack of professional risk management information or assessment.

Arbitrator Burke followed the analysis established in *Gordy*, *supra*, in *Code Electric Products Ltd.* (2005), 80 CLAS 92. That case concerned another individual with bi-polar disorder who sought to return to work following an absence due to illness. The grievor's physician certified his fitness to return to work, but the employer insisted on further and better medical certification from the grievor's physician given the grievor's history and objective signs of continuing disability. Accordingly, the adjudicator was faced with an employer ready and willing to comply with its accommodation obligation, but inhibited in doing so by the grievor's unwillingness to provide full medical information.

The arbitrator ultimately held that the employer had acted reasonably and was not in violation of the collective agreement or its duty to accommodate. Arbitrator Burke found that the grievor's physician was clearly not familiar with his job duties when she certified his fitness to return to work. Accordingly, the employer's requirement for a workplace assessment in conjunction with ongoing therapy was a reasonable requirement.

Further, the arbitrator agreed that the employer was justified in requiring a risk assessment as a precondition to the grievor's return to work given the nature of his work in an industrial environment. We note that the employer offered evidence from an independent expert on bi-polar disorder about the risks that the symptoms of such a disorder could create for an ill worker in that environment. That evidence was essentially uncontradicted because the grievor's physician was unfamiliar with the worksite when she certified his fitness to return to work.

The arbitrator ordered that the grievor could return to work only under the conditions (supported by an independent expert and earlier case law) that the grievor would:

- continue to regularly attend his psychiatrist and immediately report indicators for relapse to them;
- continue to comply with his medical caregivers' testing, monitoring, treatment and medication recommendations;
- continue to regularly use his familial support team to monitor his indicators for relapse;
- authorize his psychiatrist to contact his manager, if he/she identifies indicators for decompensation (deterioration of mental health) or has a concern about the grievor's conditions;
- prepare a self-report of indicators of relapse and the need to increase medications and provide a copy of it to his manager or designate, if and when requested to do so;
- meet with supervisors or other administrative personnel to monitor his condition, if and when requested to do so;
- not report for work if he has a suspicion he is not well;
- agree to work predictable, routine shifts, and no night shifts;
- agree not to work excessive overtime;
- advise his co-workers about the indicators for relapse; and
- comply with any reasonable accommodative measures the grievor, his union representative and his manager negotiate for detecting early warning signs of decompensation in the workplace.

In *Kellogg Brown & Root, supra*, the pre-employment drug testing case, the court, in determining that the employer's zero tolerance policy was not a *bona fide* occupational requirement, recognized that "prohibiting impairment at work was a valid and compelling safety and security concern" for the employer (para. 106). The employer operated an oil refinery, and the complainant's position was a safety sensitive position. However, the employer had made no attempt at accommodation, and it did not prove that accommodation short of undue hardship could not be made. The court suggested accommodative measures that could have been included in the policy in concert with urinalysis, including: advising prospective employees of the testing as early as possible; conducting psychological screening of persons who test positive; conditional (probationary) employment of persons who are assessed as low risk for substance abuse; and withdrawal of an offer of employment for persons who are assessed as a high risk for substance abuse until they voluntarily enter and successfully complete a recognized drug rehabilitation program. The Court's decision in the case is currently under appeal.

As the above decisions indicate, the appropriate accommodation in any given case will depend entirely on the facts. Employers must be flexible and imaginative in the search for

accommodative measures. Some examples of ways in which employers have been required to accommodate addicted employees include:

- adjusting a shift schedule so that the employee can attend treatment programs such as Alcoholics Anonymous;
- providing a leave of absence with or without weekly indemnity benefits;
- making arrangements for the employee's admission into a treatment program;
- repeatedly offering to help;
- providing counselling or other assistance;
- allowing an employee to claim time off as vacation time;
- providing an indefinite leave of absence during which the employee can participate in a treatment program;
- tolerating absenteeism;
- managing co-workers' morale problems caused by the burden of the disabled employee's absenteeism;
- bearing the cost of accommodation if the employee is reinstated;
- bearing the cost of monitoring the employee's compliance with terms and conditions;
- when the organization is of a sufficient size, reassigning the employee to a position consistent with the employee's training, skills, and experience;
- tolerating the illness over an extended period of time; and
- altering duties so that the employee is no longer in a "safety sensitive" position (e.g. does not have to drive a vehicle).

*The Intersection of the Employer's Right to Discipline with the Duty to Accommodate*

When a disabled employee engages in misconduct which, but for the disability, would clearly constitute just case for discipline, the issue of the employer's duty to accommodate becomes further complicated. The British Columbia Labour Relations Board, in *Fraser Lake Sawmills Ltd.*, BCLRB No. B390/2002, has given the labour relations community direction in such a case. Where the employee's disability is completely unrelated to the misconduct, the employer's discipline decision will be reviewed in accordance with the labour law principles set out in *Wm. Scott & Company Ltd.*, [1977] 1 Can. LRBR 1, BCLRB No. 46/76 (Weiler): *Fraser Lake Sawmills, supra* at para. 78. The employee's disability does not in that case protect the employee from discipline by the employer. On the other hand, in cases in which the employee's disability

is the sole cause of the employee's misconduct, the application of discipline is inappropriate, and the employer will owe the employee a duty to accommodate. As the Labour Relations Board stated in *Fraser Lake Sawmills, supra* at paras. 37-38:

> A basic premise of the culpable, non-culpable paradigm is that discipline has no place where there is no blameworthy conduct. The object of discipline is to bring inadequacies in work performance or conduct to an employee's attention so as to correct or prevent its recurrence. That object cannot be achieved, nor is it consistent with basic notions of justice, for discipline to be imposed when the conduct at issue is beyond or outside the control of the employee.
>
> In the context of issues involving addiction and workplace misconduct, a review of arbitration cases reveals a spectrum of facts and issues. At one end of the spectrum, the addiction compels or drives the grievor's behaviour to the extent of the grievor in effect having no control (at least control which should attract discipline) over his or her actions. At the other end of the spectrum there is addiction, but it is found to not have a casual link to the workplace misconduct.

The Labour Relations Board also determined that the nature of cases involving a hybrid of the above two situations would require a different approach:

> ... In the hybrid context, there is addiction which is directly related to or has a causal connection to workplace misconduct by the employee, but the addiction is not of such a nature so as to remove the grievor's control or exercise of choice in respect to the misconduct. In this hybrid context, there is thus a mix of causes, a mix of addiction driven conduct (i.e., non-culpable conduct) and voluntary conduct (i.e., culpable conduct).
>
> ...
>
> It is the hybrid fact context and particularly in cases involving dishonesty that the conceptual difficulty arises. In such circumstances, the addiction is relevant in that it has influenced the conduct of the employee, but has not dominated it to the extent that the employee's actions have been found to be totally non-voluntary. In other words, the employee has not completely lost control over conduct as a result of the addiction. To the extent that control has been lost, the conduct is non-culpable. The portion of the misconduct in which choice and control were present is culpable.
>
> *Fraser Lake Sawmills, supra* at para. 39, 79

The Labour Relations Board determined that in hybrid cases, it would often be appropriate for the employer's response to the disabled employee's misconduct to include a mix of non-culpable elements such as rehabilitative treatment, and culpable elements such as requirements of strict compliance with treatment plans: *Fraser Lake Sawmills, supra* at para. 94. In the context of an addiction disability, the Board stated the following reasons for that conclusion:

> ... The combination of addiction and misconduct often presents itself as a mix of culpable and non-culpable causes. The addiction must be recognized as an illness, and its special characteristics including the nature and effect of compulsion must be considered, and to that extent treated as non-culpable. However, addiction is also understood to be a treatable illness, and as such, while there is compulsion, the treatable nature of the addiction will require the recognition of some degree of responsibility by the employee in relation to the treatment of the addiction and the workplace misconduct itself.
>
> ... Arbitrators will need to consider such matters as the special nature of the disease of addiction in relation to the specific circumstances of the case, the compulsion associated with an addiction; the nature and seriousness of the misconduct; the impact beyond the individual grievor, including the risk posed to the employer and the impact on others in the workplace such as employees or the public; the need for deterrence; the employer's efforts to help the employee deal with the addiction; steps taken by the employee to deal with the disease; the grievor's employment record; and other relevant considerations; when determining appropriate remedial response. An addiction may be found to constitute an overriding factor in that exercise or the serious nature of the misconduct and the impact on others may be the dominant factor. In any event, all of the relevant factors and circumstances must be considered (and, of course, the factors discussed above are not an exhaustive list of the relevant factors and circumstances that may need to be considered by an arbitrator in the context of such cases).
>
> ... It is also now well recognized that because of the nature of the disease [addiction], an appropriate therapeutic response may itself require a measure of clear consequences aimed at forcing the employee to take responsibility for his or her treatment and actions (which would normally be associated with a culpable approach) as well as the rehabilitative component (which would normally be associated with a non-culpable approach). Also, a basic question to be answered by the arbitrator in dismissal cases, regardless of the approach used, will be whether the employment relationship remains viable.
>
> *Fraser Lake Sawmills, supra* at paras. 88, 90 and 91

The Board further determined that in addressing the non-culpable portion of a set of facts, an employer is required to meet its duty to accommodate: *Fraser Lake Sawmills, supra* at para. 104.

The Court of Appeal of British Columbia has recently considered the hybrid approach established by the Labour Relations Board: *Health Employers Assn of British Columbia* v. *British Columbia Nurses' Union*, 2006 BCCA 57, [2006] BCJ No. 262 (QL); *Kemess Mines Ltd.* v. *International Union of Operating Engineers, Local 115*, 2006 BCCA 58, [2006] BCJ No. 263. In those companion cases, the Court of Appeal held that the reference of the Labour Relations Board to the duty to accommodate in respect of the non-culpable aspects of an employee's conduct requires arbitrators in hybrid cases to engage in a full human rights analysis, including

an initial determination of whether a *prima facie* case of discrimination exists: *HEABC (Appeal Decision), supra* at para. 37, and *Kemess (Appeal Decision), supra* at para. 28. Without a *prima facie* case of discrimination, an employer does not owe an employee a duty to accommodate.

The Court of Appeal in *Kemess (Appeal Decision), supra* also held that in applying the hybrid analysis, arbitrators were to keep the culpable and non-culpable analyses separate, but that the remedy ordered could contain a mixture of culpable and non-culpable elements: at paras. 49-50

Discipline of Employees with Addictions

There have been a number of recent cases involving the discipline of employees suffering from addiction disabilities. In *Kemess Mines Ltd.* v. *International Union of Operating Engineers, Local 115 (Gardiner Grievance)*, [2005] BCCAAA No. 90 (Munroe), upheld 2006 BCCA 58, [2006] BCJ No. 263 (QL), the employer terminated the grievor's employment following the discovery that he had been smoking marijuana in his room at the mine site, contrary to the employer's "zero tolerance" policy respecting the possession and use of drug and alcohol on site. Although the employer had an employee and family assistance program available to its employees, the grievor had not availed himself of that service. Instead, every two weeks of his approximately six years of employment, during his home rest periods, he had planned and packed for his marijuana use for the following two weeks at the mine. The grievor was not aware at the time of his dismissal that he had an addiction disability, but became aware of that after the fact. Arbitrator Munroe determined that the grievor was addicted to marijuana and that the addiction contributed substantially to his misconduct in possessing and using marijuana at the work site contrary to the employer's policy. However, the Arbitrator also held that the grievor was not completely incapacitated from making choices, as the grievor believed that he would likely be caught and dismissed. The hybrid approach set down in *Fraser Lake Sawmills, supra* was thus applicable to the case.

With respect to the existence of a *prima facie* case of discrimination, there was no dispute that marijuana addiction was a disability within the meaning of the *Human Rights Code*. Neither was there a dispute that dismissal from employment constituted adverse treatment. However, the employer did not agree that the grievor's disability was a factor in its termination decision. Arbitrator Munroe rejected the employer's argument as he had already determined that the grievor's use of marijuana at the mine site was partly the result of the grievor's addiction. Further, the employer could not argue that it was completely unaware of the possibility that the grievor had an addiction disability, since the union raised that issue with the employer prior to the employer's decision to dismiss him from employment. The employer therefore had a duty to accommodate the grievor's disability. In respect of that duty, Arbitrator Munroe stated that

> ... The duty to accommodate was initially developed in circumstances not involving any blameworthy conduct by the complainant. A hybrid finding includes a finding of some culpability on the part of the complainant. It is therefore awkward in a hybrid case, even where a human rights analysis "in respect to the non-culpable portion of a set of facts" (Fraser Lake Sawmills) generates a conclusion that a duty to accommodate did indeed exist, to speak of

> the duty being satisfied or not. It is more satisfactory in the hybrid context, where a duty to accommodate is found to exist, to incorporate such duty into one's deliberations not as a factor requiring discrete remedial disposition, but rather as an employer duty which must importantly be taken into account, conditioned to an appropriate degree by the employee culpability that has been found to exist, as well as by the employer's interests generally.
>
> *Kemess Mines (Gardiner Grievance), supra* at para. 89

The Arbitrator concluded that the employer had not justified its decision to end the grievor's employment. He accepted the union's arguments that the fact that the employer had an employee assistance plan was of little assistance to the grievor since, given the nature of addiction, such programs could not help an addict in denial. The employer had also not provided any evidence that permitting the grievor to return to work would undermine the deterrent effect of the policy. Indeed, after the employer's decision to terminate the grievor's employment, it had stated that it was prepared to rehire him as a new employee without seniority after he had successfully completed a treatment program.

Arbitrator Munroe reinstated the grievor to employment with a ten month unpaid suspension. The grievor's return to active service was conditional on his completion of a four week residential treatment program, and his ability to remain fully abstinent from drugs and alcohol, his regular attendance at Narcotics Anonymous or Alcoholics Anonymous meetings and his written consent to random periodic searches of his room and personal belongings on the mine site for a 12 month period.

The Court of Appeal of British Columbia dismissed the employer's appeal of Arbitrator Munroe's decision: *Kemess Mines (Appeal Decision), supra*. As will be discussed below, the Court rejected the employer's arguments that the Arbitrator failed to consider the obligation on the grievor to facilitate the accommodation process.

In *British Columbia* v. *British Columbia Government and Services Employees' Union (Gooding Grievance)*, [2007] BCCAAA No. 37 (QL), Arbitrator Lanyon considered the termination of a grievor who had been a manager of a liquor distribution branch for 26 years. The grievor had a clean record of employment until the last few years of his employment in which his drinking increased markedly, and he began to steal liquor from the employer. When the employer confronted the grievor, he confessed and advised that he had a severe drinking problem for which he required help. He was suspended without pay and then, almost a month later, was dismissed. After the grievor's confession to the employer, he promptly entered a residential treatment program and attended weekly counselling sessions, and meetings of Alcoholics Anonymous. From that date forward he abstained from alcohol.

Arbitrator Lanyon held that alcoholism was a contributing factor in the grievor's theft of alcohol from the employer, and that he was acting at least in part in a non-voluntary manner in committing the thefts. However, the medical evidence supported the conclusion that the grievor was aware that his actions were wrong. On those factors, the Arbitrator determined that the hybrid approach was applicable to the case. With respect to the culpable aspects of the case, Arbitrator Lanyon considered the misconduct to be serious, given the frequency of the grievor's

thefts over an extended period of time. He concluded that absent a human rights analysis, discharge was the appropriate disciplinary response.

In conducting the human rights analysis required by the hybrid approach, Arbitrator Lanyon held that there was a *prima facie* case of discrimination. There was no dispute that the grievor was addicted to alcohol or that that addiction constituted a disability within the meaning of the *Human Rights Code*. The grievor had also been subjected to adverse treatment (dismissal), and the medical evidence supported a finding that his conduct was caused by his disability. The employer thus had a duty to accommodate the grievor. The dispute centered on whether the employer had met that obligation. Arbitrator Lanyon concluded that it had not. The Arbitrator considered that the grievor had confessed when confronted, and shortly thereafter entered a treatment program; that the grievor had maintained his sobriety since then; and that the employer was aware of that fact. The employer on the other hand had simply referred the grievor to the employee assistance program and then terminated his employment. It had not considered whether there might be other positions available for the grievor, or under what conditions he could have returned to work. The Arbitrator reinstated the grievor to employment, but given the culpable aspects of the case (premeditated thefts for an extended period of time and the grievor's understanding at the time that his actions were wrong) the Arbitrator held that the grievor should not be returned to his former position of store manager. He was instead to be reinstated to a bargaining unit position without any supervisory duties. The grievor was also denied back pay.

As is evident from the above cases, in fashioning remedies in hybrid cases involving addiction, arbitrators are careful to ensure that not only are grievors given the opportunity to obtain treatment, but that they are also required to take responsibility for their misconduct. Arbitrators have recognized that some form of disciplinary response is a necessary part of an appropriate treatment plan.

Discipline of Employees with Mental Illnesses

Once an employer has established that an employee has a disability such as mental illness, and it becomes clear that the employee cannot perform to the expected level as a result, what steps must the employer take? A dramatic illustration of this type of dilemma is found in *Vancouver Police Board and Teamsters Local 31* (2002), 112 LAC ($4^{th}$) 193 (Germaine). This case is very helpful in understanding how to deal with an employee whose illness has led to extremely serious performance issues.

The grievor was a fleet supervisor with the Vancouver Police. She suffered from undiagnosed bipolar disorder, and was self-medicating with alcohol and marijuana. She stole a gun from the employer, kept it hidden for four years, and then used it to attempt suicide. She resigned from her position, received treatment, and was medically cleared to return to work. The police board did not dispute that the grievor suffered from a disability, but argued that because she kept the gun hidden during a period when she was sometimes lucid, her behaviour constituted culpable misconduct and was grounds for dismissal. The police board also argued that her illness, and her consequent dependence on medication, made her return to work too risky. It attempted to find alternate employment for the grievor with the City of Vancouver, but was unable to do so. The

police board argued that those attempts were all that was required of them in accommodating her disability.

Arbitrator Germaine approached this case through the following steps:

1. a determination of whether the behaviour should be treated as culpable or non-culpable;
2. a consideration of whether there was just cause for dismissal; and
3. a consideration of whether the employer accommodated the employee to the point of undue hardship.

First, Arbitrator Germaine applied the analysis of culpable and non-culpable behaviour found in *Fraser Lake Sawmills, supra* and *Government of BC and BCGEU*, BCLRB No. B210/2002. While those two cases were specific to addictions, he stated their principle as: "a non-culpable analysis is applicable if the grievor suffered from a condition which 'significantly impaired his ability to choose to refrain from engaging in ... misconduct' (*Fraser Lake, supra*, para. 18)." He found that the grievor was disabled, and that her illness caused some of her behaviour. He cited *Brewers Distributor and Brewery, Winery and Distillery Workers Union* (1998), 76 LAC ($4^{th}$) 1 (Munroe), as well as *BCGEU, supra* as "authority for the proposition that elements of culpability may be present in behaviour which is nevertheless properly analyzed as non-culpable" (page 220). The Arbitrator then found that he was unable to segregate culpable from non-culpable behaviour: "I do not possess the expertise to determine when the grievor's capacity to make appropriate employment-related decisions was not impaired by the illness". No expert medical evidence was presented on bipolar disorder. Hence, he was unable to conclude that the grievor was lucid enough, at some point over the four years, to return the gun she had stolen. He rejected the employer's contention that her behaviour was culpable.

Second, with respect to just cause, Arbitrator Germaine considered two questions, from *Raven Lumber and Local 1-363* (1986), 23 LAC (3d) 357 (Munroe): had her illness affected her performance to the point that her actions were unacceptable; and is there a reasonable prospect the grievor will be well enough to perform her work in an acceptable manner? The answer to the first question was clearly affirmative. The answer to the second question was also affirmative. So long as she took her medication, the evidence was convincing that she could safely return to work. Therefore, there was no just cause for termination. Arbitrator Germaine commented, however, that even if her behaviour was culpable, her disability would be the most important factor to consider in answering the question of whether dismissal was excessive in the circumstances; because of her illness, she could not be entirely blamed, and the employer would have to show it had made all reasonable attempts to accommodate her. In other words: whether the conduct was considered culpable or non-culpable, the outcome would be the same. The fundamental importance of human rights law always leads to the question of accommodation where a disability is causally linked to the performance issue.

Therefore, the final consideration was whether the employer had fulfilled its duty to accommodate. Because the grievor's illness was an important factor in her termination, a *prima facie* case of discrimination was made out. The attempts to find her alternate employment did not meet the requirement of accommodation because the City was a separate employer. The crux of the employer's case was that the grievor's illness prevented her from meeting certain

standards, which were *bona fide* occupational requirements: maintaining the public trust, upholding standards of employee conduct; avoiding unreasonable risks; and protecting confidential information. Essentially, the police board argued that no job was immune from risks because all provided access to weapons and sensitive information. Therefore, returning her to work would present an undue hardship.

Arbitrator Germaine rejected this argument through consideration of the specifics of the grievor's actions; the job she had held; the procedures in place for securing weapons; and the grievor's medical history. While the employer had attempted to make a somewhat general argument, regarding risk and public trust and safety, it was unable to establish a specific and likely risk that would result from her return to work. The grievor's reinstatement was ordered, on the condition that she continue with medical treatment.

What lessons can be drawn from this case? First, medical evidence is an important aspect in an accommodation case, and especially in cases involving mental health issues where there may be a relationship between an employee's misconduct and his disability. Arbitrator Germaine found that he was unable to determine whether the grievor's behaviour was entirely attributable to her illness without expert medical evidence; clearly, an employer would be even less qualified to do so. The doctors in this case had all said the grievor was able to return to work. It was not open to her employer to decide, on no real evidence, that she was medically unfit to work in her old job.

Second, accommodation requires careful consideration of the specifics of the job and the individual. Platitudes about safety and risk are not acceptable alternatives. The employer had decided that an individual on medication, who had no history of failing to take it, and who had never endangered anybody other than herself, could not be trusted because her underlying condition was somehow regarded as dangerous and unpredictable. This is exactly the type of discrimination that human rights law is designed to prevent: the fear that employees with "invisible" disabilities are somehow threatening to the order of the workplace. Those fears cannot be allowed to prevent their full participation in productive work.

## The Employee's Duty To Reasonably Participate In The Accommodation Process

The law is clear that an employee who seeks accommodation for his or her disabilities has duties and responsibilities in the accommodation process. The Supreme Court of Canada discussed an employee's obligations in that regard in *Renaud*, *supra* at paras. 43-44:

> The search for accommodation is a multi-party inquiry. Along with the employer and the union, there is also a duty on the complainant to assist in securing an appropriate accommodation. ... To facilitate the search for an accommodation, the complainant must do his or her part as well. Concomitant with a search for reasonable accommodation is a duty to facilitate the search for such an accommodation. Thus in determining whether the duty to accommodate been fulfilled the conduct of the complainant must be considered.

> This does not mean that, in addition to bringing to the attention of the employer the facts relating to discrimination, the complainant has a duty to originate a solution. While the complainant may be in a position to make suggestions, the employer is in the best position to determine how the complainant can be accommodated without undue interference in the operation of the employer's business. When an employer has initiated a proposal that is reasonable and would, if implemented, fulfill the duty to accommodate, the complainant has a duty to facilitate the implementation of the proposal. If the failure to take reasonable steps on the part of the complainant causes the proposal to founder, the complaint will be dismissed. The other aspect of this duty is the obligation to accept reasonable accommodation. This is the aspect referred to by McIntyre, J. in O'Malley. The complainant cannot expect a perfect solution. If a proposal that would be reasonable in all the circumstances is turned down, the employer's duty is discharged.

As discussed, the Courts, the BC Human Rights Tribunal and labour arbitrators have applied that statement as requiring employees to advise their employers of their need for accommodation. In addition, decision makers have interpreted that statement to mean in the context of a physical or mental disability, that an employee must make reasonable efforts to recover from the disability, or where recovery is not possible to control the symptoms of the disability. If an employee either denies that he or she has a disability, or refuses to take reasonable steps in the accommodation process, the employer's duty to accommodate may end and the employer may be justified in ending the employment relationship. However, employees are not expected to be perfect in their efforts to facilitate the accommodation process. In cases of addiction or mental health conditions treated with medication, it is not unusual for that an employee to have a relapse. There are nonetheless limits to the number of relapses an employer must accommodate before undue hardship is reached. In any given case, the facts will determine whether an employee is entitled to another chance, or whether the employer's decision to dismiss the employee will be upheld.

In *Handfield, supra* the British Columbia Council of Human Rights denied the complaint of an alcoholic school superintendent who had been terminated from employment following a relapse of his alcoholism. The school district had become concerned about his health and performance, and had given him two choices: participate in an alcohol rehabilitation program at the school district's expense, or be dismissed from employment. The school district was also clear that it would only pay for his rehabilitation once. The complainant agreed to enrol in the rehabilitation. The total cost to the school district was approximately $40,000.00. After completing the program, the complainant returned to his regular work duties. A short time later, the complainant resumed his consumption of alcohol. The school district suspected he had reverted to drinking alcohol and held a meeting to discuss that topic and his performance in his duties. During the meeting, the complainant became angry, swore and made it clear that he did not want to discuss the concerns regarding his health. He denied that he had resumed drinking. The school district dismissed the complainant from employment at the end of the meeting. The Council of Human Rights concluded that the school district had terminated the complainant for his hostile and unprofessional conduct during the meeting and not because of disability. The Council held that the complainant's conduct had not been caused by symptoms related to his alcoholism.

Notwithstanding that the Council of Human Rights had held there was no *prima facie* discrimination in the case, it considered whether the school district would have met the duty to accommodate had discrimination existed. In so doing, the Council paid particular attention to the duty of the complainant to facilitate his accommodation:

> The evidence also reveals that one of the necessary phases of treating alcoholism is the prevention of any attempts by the person afflicted from evading responsibility for continued drinking. Indeed, if this were not the case, it would be impossible to adequately treat or accommodate alcoholics since they could then continue to drink without any sense of responsibility until the disease destroyed them. The basic principle underlying the notion of accommodation in the Act is that persons with disabilities should have the opportunity to seek employment and other self-actualizing activities where their disabilities do not affect their ability to do a job. In Renaud, Sopinka J. noted (at p. 983) that the case law of the Supreme Court of Canada "has approached the issue of accommodation in a ... purposive manner, attempting to provide equal access to the workforce to people who would otherwise encounter serious barriers to entry". This purpose would not be met unless there is a recognition that alcoholics ultimately bear some responsibility to seek rehabilitation. Without rehabilitation, the disease of alcoholism may very well impair a person's ability to do a job, especially one involving a great deal of responsible decision-making.
>
> It is not my intent to establish a blanket rule which justifies the termination of any alcoholic employee who "falls off the wagon". As Wilson J. observed in Central Alberta Dairy Pool, what constitutes adequate accommodation varies from case to case. I only wish to note here than an assessment of the Complainant's efforts to seek accommodation is at least as important as an assessment of the Respondent's efforts. If the Complainant suffered a relapse, it is necessary to consider all of the factors which led to that relapse.
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> *Handfield, supra* at paras. 170-171

The Council considered the complainant to have participated adequately in the rehabilitation program. However, he had failed to follow the advice of his counsellors following the completion of the program. He had decided not to attend Alcoholics Anonymous meetings, discontinued taking his medication, and resumed drinking alcohol. The Council considered that the complainant's actions were due to the "potency of the denial caused by the disease" of alcoholism (at para. 186). However, it held that the complainant's rehabilitation "foundered because of ...[his] failure to take reasonable steps to facilitate its success" (at para. 187).

The Council concluded that the School District had met the duty to accommodate given the considerable expense it had incurred for the complainant's rehabilitation program in comparison to its total annual budget. The Council also noted that it had been difficult to find a temporary replacement superintendent while the complainant was in the treatment program, and considered the "crucial administrative role played by the Superintendent in a School District".

The result in *Handfield, supra* indicates that although denial and relapse may be characteristics of alcoholism, employees must nonetheless make reasonable efforts to rehabilitate themselves. Furthermore, employees with unique duties in an employer's organization have fewer chances for rehabilitation than employees whose absence can easily be accommodated.

The employer in *Kemess (Gardiner Grievance), supra* appealed Arbitrator Munroe's decision that termination of the grievor's employment was unjustified: *Kemess (Appeal Decision), supra.* The Court of Appeal upheld the Arbitrator's decision. In so doing, the Court rejected the employer's argument that Arbitrator Munroe had failed to take into account the obligation on the grievor to facilitate the accommodation process. The Court pointed out that the Arbitrator had found that the grievor did not fully recognize that he had an addiction to marijuana until some time after his dismissal from employment. Medical evidence before the Arbitrator also indicated that unless an individual realizes that he or she has a compulsive disorder requiring treatment, it was unlikely that he or she would understand the need to participate in a treatment program. The Court held that the fact that the grievor had not voluntarily sought assistance through the employer's EAP did not extinguish the employer's duty to accommodate him (at para. 43). Finch, CJBC for the Court stated in that regard:

> An addicted employee does have a duty to facilitate accommodation through rehabilitation: see Handfield v. North Thompsoon School District No. 26, [1995] BCHHRD No. 4. In my view however, the scope of the employee's duty may vary depending on the relevant factors in the case, including whether the employee is in denial or unaware of his addiction/disability. I would not say that there can never be a duty on an undiagnosed employee to seek help voluntarily. And once the employee is aware of his addiction, there is no doubt that he must do all he can to facilitate the success of his rehabilitation and treatment. The facts of each situation must be assessed on a case by case basis.
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> *Kemess (Appeal Decision), supra* at para. 44

In that case, the grievor had not been given an opportunity for rehabilitation before he was terminated. The Court of Appeal upheld Arbitrator Munroe's decision to reinstate the grievor.

Arbitrator Jackson considered a case involving the termination of a drug addicted employee in *Health Employer's Assn. of British Columbia* v. *British Columbia Nurses' Union (Bergen Grievance)*, [2005] BCCAAA No. 183, overturned in *HEABC (Appeal Decision), supra.* In that case, the grievor was addicted to narcotic drugs. He had been terminated twice by a prior employer for stealing and using patients' medications. He was reinstated both times following grievance arbitration and the imposition of last chance agreements. He subsequently changed employers and had a relapse after 4 1/2 years of abstinence. The grievor began stealing narcotics from his new employer. When the employer became concerned and enquired about his health, he lied and denied that he had relapsed. On the employer's request, the grievor submitted a urine sample, which came back positive for narcotics.

The employer terminated his employment. Arbitrator Jackson determined that the case fell into the hybrid category described by the Labour Relations Board in *Fraser Lake Sawmills, supra.* She noted that the grievor suffered from a chronic disease with "compulsiveness as its

predominant characteristic"; a disease that is controllable except that "there are times when the disease may reassert itself for short periods" (at para. 28). The Arbitrator held that were it not for his addiction the grievor would not have taken the drugs and lied to the employer about it. She concluded that the grievor's actions were influenced to a significant extent by the compulsive nature of his disease. Arbitrator Jackson determined that given the culpable and non-culpable aspects of the grievor's misconduct, the employer had a duty to accommodate his disability. The Arbitrator concluded that the employer had not met that duty since it did not consider any other option but termination of the grievor's employment (at para. 42). She ordered the employer and the union to meet to consider whether a position could be made available to the grievor in which he did not have access to opioid drugs.

The employer successfully appealed Arbitrator Jackson's award to the Court of Appeal of British Columbia: *HEABC (Appeal Decision), supra.* As already described, the Court held that in performing the human rights analysis in hybrid cases, arbitrators must first determine whether a *prima facie* case of discrimination exists, and then, only if there has been discrimination, determine whether the employer has met the duty to accommodate that arose as a result of that discrimination. The Court held that the Arbitrator had erred in not doing so, but that based on her factual findings, it was clear that a *prima facie* case of discrimination did exist in the case. The Court also acceded to the employer's argument that the Arbitrator had not given sufficient consideration to the grievor's duty to facilitate the accommodation process, his two previous opportunities to rehabilitate his addiction, his relapse, and his failure to take the necessary steps to address that relapse (at para. 47). While the employer was not permitted to rely on the last chance agreements the grievor had made with his previous employer, it was entitled to expect that the grievor would maintain his recovery program. The Court found it to be "completely unrealistic" to accept the possibility that the employer would have employed the grievor without "a mutual understanding" that the grievor would do so. The employer had been aware of the grievor's past history when it hired him and had begun accommodating his addiction following commencement of his employment by holding monthly meetings with him. The Court concluded that the employer had not breached its duty to accommodate the grievor's disability.

The Court of Appeal determined on the facts of that case that two prior opportunities for rehabilitation were enough. The grievor was not entitled to a third, even though the last relapse was the first relapse involving the employer.

In a recent decision, Arbitrator Gordon has also considered an employee's duty to facilitate the accommodation process: *Canada Post Corp.* v. *Canadian Union of Postal Workers (Usman Grievance)*, [2007] CLAD No. 154. In that case, the grievor had been dismissed from employment following an extended unauthorized leave of absence from work. He claimed to have suffered injury in a car accident, when in fact he was absent due to what the Arbitrator described as a "drug binge". The grievor had also failed to respond to the employer's request for medical verification of his stated reasons for absence. The grievor had lied not only to the employer, but also to his doctors who had, subsequent to the termination of the grievor, provided a medical note stating that he had suffered a concussion. The grievor's absence was the latest incident in a long list of misconduct. The grievor had initially been a reliable employee, but had developed a pattern of late arrivals to work, no-shows and absences due to illness and other reasons. The employer had encouraged the grievor on a number of occasions to access the employee assistance program. The grievor eventually admitted to the employer that he believed

he had a drug addiction. Following that admission, the grievor contacted the EAP and received counselling services. He stopped using drugs for approximately two months and then had a relapse. He was absent from work without authorization on a number of occasions and received various levels of discipline: "... two reprimands, a two day suspension (service of which was waived based on the Grievor's admitted drug addiction and attendance at treatment programs), a warning of termination for major misconduct, and a further written warning about his failure to provide medical documentation substantiating his ongoing absence from work for substance abuse treatment purposes" (para. 98). The grievor did not grieve any of that prior discipline. Following the employer's discharge of the grievor, he abstained from drugs for approximately 3 months, but he did not seek any treatment until just two weeks before the arbitration hearing. Other than a note from the treatment program stating that the grievor was a client of the program, no medical evidence as to the grievor's addiction was presented at the hearing.

Arbitrator Gordon considered whether the hybrid approach was applicable in the case. In so doing she also commented on the lack of medical evidence and stated that the assessment of the causation of the grievor's conduct would have been assisted by evidence respecting his addiction and its relationship to his behaviour (at para. 87). The Arbitrator held that the parties had effectively accepted that the hybrid approach was appropriate in the case, as the employer had adopted a hybrid response to the grievor's pattern of misconduct and the union had not grieved any of the prior disciplinary sanctions. Arbitrator Gordon then analysed the culpable elements of the grievor's conduct and concluded that the employer had just cause to discipline him. He had been dishonest about the reasons for his absence from work. There was no medical evidence to support a finding that the grievor's addiction compelled him to lie to the employer and his doctors. Nor was there medical evidence to support a finding that the grievor was so incapacitated by his addiction that he could not have contacted the employer at some point during his lengthy absence to report that he had relapsed. On a number occasions during that period he had sufficient control to drive himself to the hospital with the intention of seeking help, but had not entered the hospital.

With respect to the non-culpable factors in the case, Arbitrator Gordon stated that to establish a *prima facie* case of discrimination, there must be evidence to prove that the grievor's conduct was caused by the symptoms of his disability. The Arbitrator again noted the absence of any such medical evidence. Arbitrator Gordon also held that even if the employer's termination decision was *prima facie* discriminatory, she would have held that the employer met the resulting duty to accommodate because the grievor had not

> ... proved that his concomitant duty to facilitate the accommodation process ha[d] been sufficiently satisfied. Where, as here, an employer has given an addicted employee an accommodative opportunity for rehabilitation, the employee has a corresponding duty to take reasonable steps to obtain treatment, recover and facilitate the successful implementation of the accommodation process: *Bergen.*
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> *Canada Post, supra* at para. 103

The Arbitrator considered the following accommodative measures of the employer to have been satisfactory: the immediate offer of personal support and assistance; access to the EAP; the waiver of the requirement to serve a two-day suspension; the approval of a leave of absence to

enable the grievor to attend counselling; the approval of sick leave credit usage even though the grievor was not entitled to do so; the extension of another chance to avoid termination; the approval of a leave of absence to enable the grievor to participate in further rehabilitation and the approval to borrow sick leave credits for that purpose; the extension of the deadline for receipt of the documentation for that leave of absence; and the approval of another lengthy absence for rehabilitation purposes (at para 107).

Given the grievor's repeated relapses, Arbitrator Gordon held that the employer had no reasonable basis to conclude that he could rehabilitate himself so that he would be likely to attend work regularly, and fulfill his employment obligations in the foreseeable future. The Arbitrator again noted the absence of any medical evidence to clarify the nature of the grievor's addiction or his progress in treatment (at paras. 109, 112, and 116). Arbitrator Gordon held that the employer would have suffered undue hardship if it were required to reinstate the grievor even on terms and conditions. The grievor's unplanned absences had a significant detrimental impact on his department's efficiency and productivity. The grievance was denied.

The *Canada Post, supra* decision clearly indicates that an employee will have a limited number of opportunities for rehabilitation before an employer's duty to accommodate will end. An employer will not be required to endure an employee's relapses indefinitely. The decision also shows the importance of medical evidence to support a union's claim that an employee's misconduct was caused by his or her addiction or other mental health disability. Without such evidence, arbitrators may be reluctant to find that an employer owes an employee a duty to accommodate at all.

## The Union's Duty To Reasonably Facilitate The Accommodation Process

Unions are also required to participate in the accommodation process and to potentially settle for less than an ideal resolution. In *Renaud*, *supra*, the Supreme Court of Canada stated at para. 37, a union may be a party to discrimination:

> ...if the union impedes the reasonable efforts of an employer to accommodate. In this situation it will be known that some condition of employment is operating in a manner that discriminates on religious grounds against an employee and the employer is seeking to remove or alleviate the discriminatory effect. If reasonable accommodation is only possible with the union's co-operation and the union blocks the employer's efforts to remove or alleviate the discriminatory effect, it becomes a party to the discrimination. In these circumstances, the union, while not initially a party to the discriminatory conduct and having no initial duty to accommodate, incurs a duty not to contribute to the continuation of discrimination. It cannot behave as if it were a bystander asserting that the employee's plight is strictly a matter for the employer to solve. I agree with the majority in Office and Professional Employees International Union, Local 267 at p. 13 that "Discrimination in the work place is everybody's business".

Clearly this obligation applies to unions in the context of "invisible" disabilities. In *Zettel Manufacturing Ltd. and CAW-Canada, Loc. 1524 (Hauss)* (2005), 140 LAC (4th) 377 (Reilly), the arbitrator concluded at p. 388:

> The duty to accommodate also places obligations upon Unions as well as Employers; as I have stated, the scope of the duty of the Employer is one of undue hardship, this same obligation and scope of accommodation is also placed upon the Union. The Union's members are not permitted to harass or tease the Grievor under any circumstances because of his mental disability, the Union's Plant leadership and the Stewards, as well as the Employer, are responsible to ensure that this type of insensitive conduct never happens again; this is a legal responsibility and must be adhered to at all times.

However, this responsibility was clarified at p. 492:

> It must also be officially laid down that any lack of perceptiveness or lack of strictness shown by or attributable to the bargaining agent for failure to rectify the inappropriate behaviour of its members (towards the Grievor) in the past, cannot be laid at the door of the Local or National body of the Union, or their Representatives and or their Officers. Thus, the admonishment is directed towards the Stewards and leadership at Plant level, as it existed and was constituted at the relevant times.

Further, the union was directed to "lodge and pursue the grievor's human rights complaints in a more clearly defined and manifest form than in the past and in a more perceptive manner much earlier in the future" (p. 392).

In addition, unions have been required to amend and relax rights under the collective agreement in order to accommodate disabled employees. However, similar to the employer's undue hardship test, a union may not have to accommodate a request where it would cause undue hardship on the union by compromising the interests and collective agreement rights of other union members, *MacMillan Bloedel* (1998), 75 LAC (4th) 34 (MacIntyre).

## Summary

As is evident from the above analysis, the accommodation of disabled employees is a multiparty process which can be quite complex in cases involving disabilities which are "invisible", such as addiction and other mental health disabilities. The definition of "disability" covers a spectrum of medical conditions, and includes perceived functional limitations which do not in fact exist. Alcoholism and drug addiction have been recognized as chronic and devastating disabilities, which are often characterized by denial, deterioration of ethical or moral behaviour, and by relapse. "Stress", on the other hand, is unlikely to be considered a disability, but may be a factor in the development or worsening of a disability such as depression.

An employee who wishes an employer to accommodate his or her disability will usually be held to an obligation of informing the employer of his or her need for accommodation. Before an employer has a duty to accommodate a disabled employee, it must have been aware of the disability or of facts giving rise to a duty to investigate the existence of a disability. An employee seeking accommodation also has a duty to provide an employer with sufficient information to verify that the employee is disabled, and to determine the nature of an appropriate accommodation. An employee may in some circumstances be required to undergo an independent medical examination at the employer's request. However, the employee's right to privacy must be balanced with the employer's right to information. The employer's initial request for information should not be to seek an independent medical exam. The specific information to which an employer is entitled will depend on the collective agreement language in issue, the applicable privacy legislation, the nature of the employee's medical condition, the employer's previous attempts at obtaining information, the employee's ability to perform his or her normal duties, the nature of the work, and any safety concerns arising in the case. Employees who refuse an employer's reasonable request for an independent medical exam may not be disciplined, but may be denied return to service.

Notwithstanding an employee's duty to provide an employer with reasonable medical information in the accommodation process, given the nature of some disabilities such as addiction and other mental health disabilities, employees may be reluctant or unable to disclose their disabilities to their employers. In some circumstances, an employer will have a duty to investigate whether a disability may be causing an employee's unexplained or unusual performance issues. A failure by the employer to enquire will not excuse an employer's failure to accommodate, if it is later established that a disability was present, and the employer had sufficient information to have suspected that a disability was behind the employee's poor performance.

An employer only has a duty to accommodate once it is clear that a *prima facie* case of discrimination exists; in other words, where the employee was disabled or perceived to be disabled, the employee was subjected to adverse treatment, and his or her disability was a factor in that adverse treatment. The duty to accommodate requires an employer to take reasonable accommodative measures short of undue hardship. Some hardship to the employer is acceptable. Generally, it is the employer's obligation to search for an appropriate accommodation in a particular case. In cases involving "invisible" disabilities such as, addiction or other mental health issues, an employer must be particularly flexible and creative to structure an appropriate accommodation. The involvement of the disabled employee's co-workers may also be required for the accommodation to work.

The intersection of disciplinary issues in an accommodation case adds a further complication. In cases where the employee's misconduct can be said to have a causal connection to his or her misconduct, but the employee still had control over his or her actions, arbitrators will be required to take a hybrid just cause / human rights approach. With respect to the human rights portion of the analysis, arbitrators will be required to first determine whether the employer has *prima facie* discriminated against the employee, and if so whether the employer has met its duty to accommodate the employee. Remedies ordered by the arbitrator may include both culpable and non-culpable elements. In addiction cases in which reinstatement is granted, it is particularly

important for the rehabilitation of the employee that the employee be required to take responsibility for his or her actions through the imposition of some other form of culpable response, such as the denial of back pay.

An employee has a duty to facilitate the accommodation process by taking reasonable steps to recover from his or her disability, or if recovery is not possible, to control the symptoms of his or her disability. An employee's failure to do so may end the employer's obligation to accommodate him or her. While relapse may be a characteristic of some disabilities such as addiction, an employee is not entitled to unlimited opportunities for rehabilitation. The number of relapses an employer must accommodate will depend on the facts of each case. Indeed, as this paper indicates, the entire accommodation process is highly fact dependent.

Finally, a union also has a duty to facilitate the accommodation of a disabled employee. This may require the relaxation of collective agreement rights. However, a union may reject accommodative measures that would cause it undue hardship by significantly compromising the interests and collective agreement rights of other union members.