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INSIGHT PAPER

What to Do When an Employee Reports or Exhibits Mental Health Problems:

Medical Information and Accommodation

This paper will address some of the many challenges employers face when managing the performance and/or absence of an employee with mental health problems in the workplace. Some of these challenges are similar to those presented by other employee disabilities, particularly addictions, but others are unique. A mentally ill employee's possible lack of insight into his/her condition (common to some but obviously not all mental illnesses) and the difficulty in diagnosing some mental illnesses often complicate matters for employers.

Our discussion will focus, as a result, on an employer's ability to obtain quality and informative medical information, including psychological assessments and the unique challenges employers face in establishing that they have reached the point of "undue hardship" in efforts to accommodate a mentally ill employee. We assume that conference participants have or will obtain from other presenters a good working knowledge of the principles of the duty to accommodate.

MEDICAL INFORMATION

As the participants in this conference likely already know and will hear many times during the conference, complete information about the nature and duration of the restrictions an employee's medical condition places on his/her ability to attend or

perform work is a necessary pre-condition to fulfilling an employer's duty to accommodate. Accommodation cannot occur in a vacuum.

In the seminal decision of *Central Okanagan School District No. 23 v. Renaud,*[1] the Supreme Court of Canada held that the search for accommodation is a "multi-party obligation", requiring not only the employer and the union, but also the employee, to assist in finding an appropriate accommodation.

Tribunals in Canada have recognized that, in order for efforts to accommodate to be genuine, employers must be in a position to understand the extent of an employee's illness or disability. Generally speaking, before the employer's duty to accommodate is engaged, an employee should demonstrate to his/her employer the need for accommodation and make a request to be accommodated[2]. One arbitrator explained the employee's duty in the following way[3]:

> The employer may bear the "primary duty" in a practical sense. If there is an accommodation to be made, in most cases it will be the employer which must make the greatest effort. But that does not relieve the employee from the responsibility to inform the employer that an accommodation is wanted. It does not spare the employee from the obligation to contribute to the process of identifying and arranging the accommodation if possible. Nor does it diminish the employee's duty to accept an accommodation if it is not perfect.

In addition to the duty to disclose one's disability, the Supreme Court of Canada has held that employees must provide relevant information to their employers (and unions if applicable), in order to facilitate the accommodation process. While the information will vary depending on the facts of the particular case, when information is legitimately required from an employee to advance the accommodation process, his or her failure to disclose that information may result in the dismissal of the discrimination grievance.

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[1] *Central Okanagan School District No. 23 v. Renaud* (1992), 95 D.L.R. (4th) 577 (S.C.C.).

[2] But note that some disabilities, such as mental illness or addiction, include as a symptom the individual's denial of illness or lack of sufficient self-awareness to identify the need for help or accommodation. In those cases, the employee's right to accommodation will not be subject to his/her self-identification, but rather the employer's reasonable awareness of that need.

[3] *Westmin Resources Limited and CAW-Canada, Local 3019*, [1998] BCCAAA No. 345 (Germaine) at para. 54.

Arbitrators and human rights tribunals alike have recognized that an employer's obligation to return a partially disabled employee to work is subject to the employer being reasonably satisfied that the employee is medically fit to perform the assigned work. This obligation requires the employee to provide sufficient medical evidence. For example, in *Belliveau v. Steel Co. of Canada*,[4] Mr. Peter Cumming of the Ontario Human Rights Commission stated:

> In my view, the primary responsibility in the instant unfortunate situation was upon Mr. Belliveau to clarify the medical situation. An employer has certain, limited means of acquiring the necessary information through an assessment, but a main input must be the cooperation of the employee and the relevant information the employee has at his disposal. There is a responsibility upon an employee to make available all relevant information within the employee's control.[5]

This principle of course applies equally to an employee suffering from mental health problems, particularly if those problems cause apprehension with the balance of the workforce. Mental illnesses like depression and anxiety disorders are increasing in frequency in Canada and can be extremely difficult for both employers and medical practitioners to identify and treat. These illnesses subjectively affect individual employees differently (*i.e.* individual employees may demonstrate different symptoms for the same underlying conditions) and they are at times objectively difficult to medically verify. This challenge can be compounded by the patient's potential lack of insight into the fact that they are unwell. Some forms of mental illness can even contribute to paranoia which causes employees to actively avoid disclosing any difficulty they may experience.

Because mental illness does not typically manifest in outwardly visible symptoms, expert information is particularly important. Quality medical information may also be critical to employers who need to assess the risk, if any, that a mentally ill or unstable employee may present in the workplace even before a fulsome accommodation

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[4] *Belliveau v. Steel Co. of Canada* (1988), 9 C.H.R.R. D/5250.

[5] *Ibid*. at D/5255.

exercise commences. Accordingly, employers dealing with mental illness have a particular need for medical information to understand how to manage the workplace as well as the mentally ill employee.

For the purposes of this paper, “medical information” will refer to information pertaining to the health of an individual under treatment or care regardless of where the information was collected, used or disclosed. The concepts and principles addressed are generally equally applicable to non-union workplaces, but-for the absence of the employer’s obligation to deal with or otherwise include the union in accommodation efforts and/or its efforts to obtain information about an employee’s medical condition. We have focussed on the unionized environment only because it often presents more challenges inclusive of those faced by non-union employers.

The Information / Privacy Balance

The challenge employer’s face, of course, is the tension between the employer’s right to information and the disabled employee’s right to privacy. Employers must lay the legal foundation to establish their entitlement to request this information by referencing issues in the workplace that make the disclosure and use of this information necessary notwithstanding employee privacy rights. This can occur in a number of ways, such as:

- an employee puts her medical condition or ability at issue in the context of performance management;
- an employee exhibits odd or disturbing behaviour in the workplace; or
- an employee has excessive absenteeism not explained by other objectively verifiable reasons.

The bottom line is that an employer can require access to medical information if it is necessary to have the information to address real workplace issues like performance management or its duty to accommodate. Faced with such a situation, an employee may choose not to stand on privacy and refuse to provide information, but should

understand that the cost could be a suitable accommodation or even continued employment. For example, an employee returning from leave due to disability who refuses to go to his/her doctor to certify their fitness to return to work can be denied access to the workplace.

When assessing employer accommodation efforts, particularly in the case of mental health issues, adjudicators have considered whether the employer treated the underlying medical condition as an illness. Evidence of efforts to obtain and act upon medical information is a critical aspect of establishing this point.

In *Zaryski v. Loftsgard,*[6] the complainant, who suffered from clinical depression, was terminated from her employment. Soon after the complainant was hired, she began to display objective characteristics of depression at the workplace. For example, she had heated and irrational verbal disputes with co-workers, she walked off the job mid-shift and she often cried at work. After one episode, the complainant's husband informed the employer that she had seen a doctor. However, the complainant never informed her employer that she was suffering from a medical condition. Consequently, because of the disruption caused to the workplace, the employer terminated the complainant's employment. The Saskatchewan Human Rights Board of Inquiry held that the employer had failed in its duty to accommodate the complainant because it had failed to appreciate the fact that she was in a delicate "emotional state". In addition, the Board of Inquiry held that upon learning that the complainant had seen a doctor, there was an obligation on the employer to make inquiries with respect to her medical condition:

> Following his conversation with Ms. Zaryski's husband, Mr. Loftsgard was aware that Ms. Zaryski had been to see her physician and he had a responsibility to at least inquire as to whether that fact might impact upon his decision [to terminate her employment]. Notwithstanding that the complainant was less than helpful in fulfilling her duty to assist in obtaining an appropriate accommodation, I find that Mr. Loftsgard's actions in the circumstances were in breach of the [Saskatchewan *Human Rights*] *Code*.

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6 *Zaryski v. Loftsguard* (1995), 22 CHRR D/256 (Sask. Bd. of Inquiry).

This case confirms that, once an employer discovers that an employee may be suffering from a medical condition, it is under an obligation to obtain medical information in order to accommodate the employee to the point of undue hardship.

Before examining how employers can obtain medical information from their employees in order to accommodate them, the issue of privacy must be addressed because of its growing importance in Canadian law and its significance to personal health information.

Privacy Legislation

As noted above, employee privacy rights are the primary hurdle in an employer's efforts to obtain medical information. A complete review of privacy legislation across Canada is beyond the scope of this paper, but we will outline some of the basic principles applicable to this analysis in the following paragraphs. Privacy legislation in Canada has encoded the right of an individual to control the collection, use and disclosure of their own personal health information on the basis of consent.

Federally regulated employers are subject to the *Personal Information Protection and Electronic Documents Act*[7] ("*PIPEDA*"). *PIPEDA* is premised on "consent". Institutions seeking to obtain personal information, including medical information, will require the individual's consent for the collection, use and disclosure of that information.

Under *PIPEDA*, "personal health information" is defined as information relating to an individual (living or deceased):

- Concerning the individual's physical or mental health;
- Concerning any health service provided to the individual;

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7 *Personal Information Protection and Electronic Documents Act,* S.C. 2000, c. 5.

- Concerning donations of body parts or substances or information derived from testing or examinations;

- That is collected in the course of providing health services to the individual; or

- That is collected incidentally to the provision of health services to the individual.

Consequently, organizations that fall under the scope of *PIPEDA* will have to ensure that they follow the statute in collecting, using and disclosing medical information in their possession.

Most provinces have legislation that regulates the flow of information within the public sector (e.g. Alberta's *Health Information Act*[8] and British Columbia's *Freedom of Information and Protection of Privacy Act*[9]). These provincial statutes protect individuals from the unauthorized collection, use and disclosure of personal medical information in the hands of public bodies. The latter BC legislation also addresses the right of a public sector employer to collect, use and disclose employee personal information.

This privacy legislation generally establishes the following principles:

(i) an employee's written consent must be obtained before the employer can seek access to the employee's health record;

(ii) medical information must be used for the limited purposes for which it was obtained; and

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8 *Health Information Act*, SA 1999, C H-4.8.
9 *Freedom of Information and Protection of Privacy Act* RSBC 1996, c. 165.

(iii) medical information cannot be disclosed except in a form that will protect the identity of the employee.

In addition, both BC[10] and Alberta[11] now have privacy legislation applicable to employers in the private sector. Both statutes require that employers collect, use and disclose employee personal information, including medical information, only to the extent that they are reasonably required to do so to manage their employment. Employers are also required to obtain employee consent for these activities, or at least notify employees of these activities depending on the circumstances. The bottom line is that this legislation essentially encodes the balancing act that adjudicators like labour arbitrators and human rights tribunals have applied to employers' rights to understand employee medical limitations and employees' rights to privacy.

Employers must, therefore, obtain an employee's consent to receive medical information about them. The consent must be informed and related to the particular query at issue. In *British Columbia Public School Employers' Assn.* v. *British Columbia Teachers' Federation*[12], the arbitrator held that an employer cannot require employees, as a condition of medical leave, to sign an authorization allowing a doctor engaged by the employer to initiate direct telephone contact with the employee's doctor. The school initiated a policy that required a teacher to authorize the release of their medical information to determine whether medical leave should be granted. As a condition of receiving sick leave benefits, the employee had signed a form authorizing her physician to release "any information" the municipal employer requested. The arbitrator held that there was nothing in the collective agreement to allow the employer to require teachers to sign an authorization permitting the employer's physician to contact the teacher's physician to discuss the teacher's medical condition. The wording on the form, and the direct contact by the employer with the employee's physician was found to be a violation of the collective agreement.

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[10] *Personal Information and Protection Act*, S.B.C. 2003, c. 63.

[11] *Personal Information Protection Act*, S.A. 2003, c. p-6.5.

[12] *British Columbia Public School Employers' Assn. v. British Columbia Teachers' Federations*, [2000] BCCAAA No. 219 (Munroe).

Direct physician contact by the employer was also the issue in *CAW, Local 2300 v. District of Kitimat*.[13] In this case, the employee sought to return to work after a month of disability leave. The employer telephoned the employee's doctor to confirm that the doctor understood the employee's duties. As a condition of receiving sick leave benefits the employee had signed a form authorizing her physician to release any information the municipality requested. Following *British Columbia Public School Employer's Assn.* v. *British Columbia Teachers' Federation*[14], the arbitrator allowed the grievance and ruled that the authorization form did not entitle the employer to unilaterally contact an employee's doctor for further information. The action was held to be inconsistent with the provisions of the collective agreement and an unreasonable exercise of management discretion. The collective agreement had its own provisions for dealing with employee absences, such that the employer should have asked the employee to provide proof of the employee's disability to the employer's satisfaction. Further, the arbitrator indicated that, although the employer was entitled to require employees to account for their absences, less intrusive means should be used, such as requiring a further physician's report.

Therefore, unless there is specific wording in the collective agreement, a blanket authorization granting access to medical information will be too broad and not likely to be upheld. An employee's authorization to his/her physician to complete a medical certificate limited to certain information relevant to the employee's job is more likely to be seen as reasonable.

In *Re Halton (Municipality) and O.N.A.*[15]*,* the arbitrator commented on the issue of whether an employer was entitled to receive a blanket authorization for the release of medical information from an employee seeking sick-leave benefits:

> …it is our conclusion that the corporation is not entitled to ask, as a condition of granting sick-leave pay … for the routine disclosure of the nature of the disability, if that expression means the precise medical diagnosis of the employee's illness

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[13] *CAW, Local 2300 v. District of Kitimat*, 74. L.A.C. (4th) 351 (Kinzie).
[14] *Supra,* note 12.

> or injury. That is not to say … that there may not be specific circumstances in which the corporation is entitled to such information, subject to its undertaking to maintain the confidentiality of that information and its restriction to those members of the corporation's staff who reasonably require access to it.[16]

It is important to note that consent to obtain information cannot be taken as consent to further disclose information to other third parties. In a British Columbia decision[17], it was found to be a breach of provincial workers compensation legislation for a company to disclose medical records lawfully obtained from British Columbia's Worker's Compensation Board to a third party doctor retained by the company. The Board stated that:

> The essential difference between Dr. Hartzell and an employee of the Employer arises from the subject of control of the documents. Once the Employer disclosed the documents to Dr. Hartzell, it had relinquished control over them. There came into existence the potential for someone other than Dr. Hartzell to see the documents and violate the privacy principle which is the very foundation of s. 95 (of the Workers' Compensation Act (British Columbia)).[18]

Thus, both consent to obtain information from a third party and consent to disclose the contents of the medical report to third parties is needed. If consent is obtained, or the right to disclose exists, authorized personnel should be cautious and avoid the disclosure of unnecessary information.

There are a number of strategies that employers can apply to obtain consent, including requiring the employee to request and forward the medical information or authorize his/her physician to do so. We often assist clients in drafting correspondence to an employee's doctor listing questions about the employee's health (e.g. describing the nature and expected duration of the restrictions on employee abilities caused by their illness) that is then presented to the employee with a requirement that it be submitted to the physician and answers returned as a condition of some further workplace action,

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15 *Re Halton (Municipality) and O.N.A.* (1993), 32 L.A.C. (4th) 137.
16 *Ibid*. at 149.
17 *Re MacMillan Bloedel (Powell River Division) and C.E.P., Local 76*, (1997), 67 L.A.C. (4th) 443.

such as accommodation or forbearance from discipline etc. The following section further describes the nature of information typically required.

What do you need to know about your sick or disabled employee?

When an employee is or appears mentally ill, the employer must attempt to ascertain the extent of his/her condition, when the employee can return to work or normal duties, and whether and how the employee may be accommodated short of undue hardship. A medical health practitioner can answer these and related questions:

- Is the employee fit for work?
- Can the employee return to his/her regular job?
- What aspects of the job is the employee not fit to perform?
- What are the physical/psychological limitations to returning to work?
- What modifications can be made to assist the return to work?
- How long will the employee be off work?
- Should the employee be returned to work gradually, and how would that look?

Employers may also pose specific questions about conflicting medical reports (discussed further below). In these situations, employers may also consider requiring a independent medical examination, discussed further below.

Certification of Employee Fitness and Independent Medical Examinations

The general view is that when an employee returns to work after a period of illness or incapacity, the employer is entitled to request proper certification of fitness from the employee.[19] In fact, arbitrators have held that the employer has a right and a duty to satisfy itself that the employee is medically fit to return to work. For example, in

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[18] *Ibid*. at 447.
[19] *Leamington District Memorial Hospital and Service Employee's Union* (1992), 27 L.A.C. (4th) 10 (Palmer).

Proboard Ltd. and CEP, Loc. 49-0[20] Arbitrator Burkett held that when an employee returns from a lengthy illness or injury, there is a presumption that the employee is, *prima facie,* unfit to work. Consequently, as a precondition to any return to work, the "onus" is upon the employee to prove to the employer that he/she is fit to return to work and does not pose a health risk to him/herself or to others.

Following the submission of a medical certificate by the employee, if the employer is still not satisfied that the employee is fit to return to work, depending on the circumstances, the employer can exercise different options. Arbitrators generally agree that an employer must first ask the employee to provide additional medical evidence. This was the approach endorsed in *Thompson General Hospital and Thompson Nurses MONA, Local 6,*[21] where the arbitrator held:

> In summary, once an employee produces a medical certificate stating unequivocally that he is fit to return to work, the onus shifts onto the employer to establish that he is not fit to return to work. If the employer has reasonable grounds on the facts of the case to question the validity or the completeness of the opinion stated in the medical certificate, then it must explain clearly to its employee the reason the medical certificate is not acceptable and what specific information is requested so that the employee can return to its treating physician and obtain the proper information.

Independent medical examinations ("IME's") are clinical examinations performed by physicians who are not involved in the patient's care for the purpose of clarifying medical and functional issues. This is another alternative method that employers can use in certain circumstances to verify an employee's fitness. An IME is, of course, a more significant invasion of an employee's privacy which is why, as noted above, employers are typically expected to exhaust the less invasive route of obtaining medical information from an employee's own physician before an IME is requested or demanded. Typically IME's will be granted only where an agreement or statute specifically authorizes the requirement in advance, or whether there is a clear

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[20] *Proboard Ltd. and CEP, Loc. 49-0* (2001), 97 L.A.C. (4th) 271 (Burkett).
[21] *Thompson General Hospital and Thompson Nurses MONA, Local 6* (1991), 20 L.A.C. (4th) 129.

contradiction or lack of clarity within the existing medical information that can likely be solved only through the employee's submission to an IME.

Arbitrator Knopf summed up the arbitral principles with respect to IME's in *Brewers' Warehousing Co. Ltd. and United Brewers' Warehousing Workers Provincial Board, Loc. 311*[22] as follows:

> While that is not the case in this arbitration, a review of the arbitral authority in this area is helpful and establishes the general theory that an employer does not have an unqualified right to require medical examinations of his employees. The right can be established in the collective agreement or by statute. In addition, the right to require a medical examination may arise if an employer has reasonable and probable grounds for suspecting that, because of a medical condition, the employee is a source of danger to himself, other employees, or company property, or that the employee is unfit to perform his job. Indeed, this right can be viewed as a duty where there are reasonable and probable grounds to suspect danger.[23]

Similarly, in *Via Rail Canada Inc. and C.A.W.,*[24] Arbitrator Hope reviewed the jurisprudence on IME's and made the following observation with respect to the relevant arbitral principles:

> Thematic in the arbitral authorities is recognition that employers are required to ensure that employees are fit to perform their duties safely. That obligation arises in positive terms with respect to employees who are returning to work from an accident or illness. However, a similar obligation can arise in response to workplace conduct that calls into question the ability of the employee to perform his duties safely. The right to require a medical examination can include a right to require submission to an examination by a doctor appointed by the employer or by an independent doctor.[25]

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[22] *Brewers' Warehousing Co. Ltd. and United Brewers' Warehousing Workers Provincial Board, Loc. 311* (1982), 4 L.A.C. (3d) 257 (Knopf).
[23] *Ibid*. at p. 260.
[24] *Via Rail Canada Inc. and C.A.W. (Spatling)* (Re) (2002) 106 L.A.C. (4th) 110 (Hope).
[25] *Ibid*. at p. 128.

If the employee who is authorized by either his/her employment contract, collective agreement or statute refuses to submit to an independent medical examination, the employer cannot impose discipline on that employee. Rather, the arbitral jurisprudence suggests that the proper remedy is to refuse to return the employee to active employment. The same principle would allow an employer to refuse a particular accommodation in the face of conflicting medical information about its safety and an employee's refusal to submit to an IME to resolve the controversy.

For example, in *NAV Canada and C.A.T.C.A. (Medical Examinations)*,[26] all air traffic employees were statutorily required to submit to an IME from a government authorized doctor as a condition of work. In a policy grievance, the union alleged that this policy was extremely intrusive. Arbitrator Swan held that if an air traffic controller refused to submit to a statutorily required IME, the proper remedy would be for the employer to refuse to allow the employee to return to work, rather than impose discipline:

> In my view, in such circumstances, the Employer has authority under the management rights provision of the collective agreement, again provided that it has acted reasonably in exercising this discretion, to refuse to allow an employee to return to duty or to continue at duty. Such a decision may or may not, depending upon the circumstances, amount to an administrative suspension from duty. It may also result, in some circumstances, in a reduction in or cessation of salary. In each case, the collective agreement must be consulted to determine the rights of the individual employee affected.[27]

Often, an employer may not know that it has a duty to accommodate an employee until a sick or disabled employee has lost his/her employment for other reasons such as innocent absenteeism or poor work performance caused by his or her disability. If this occurs, the employer may not have any relevant medical information prior to a grievance/arbitration hearing. Consequently, if it appears as though a medical issue will be central to a grievance, in the interest of equity and fairness, arbitrators have held that they have the jurisdiction to order pre-hearing disclosure of relevant medical evidence.

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[26] *NAV Canada and C.A.T.C.A. (Medical Examinations) (Re)* (2001), 74 L.A.C. (4th) 163 (Swan).
[27] *Ibid*. at p. 182.

The rationale for pre-hearing production of medical records is that if one party intends to rely on the grievor's condition or mental state, the other party should be able to confirm the veracity of this evidence.

In Ontario, it has now been settled that arbitrators have the jurisdiction to order the pre-hearing production of documents because of subsection 48(12) of the *Labour Relations Act, 1995* (all other Canadian jurisdictions have similar provisions). This subsection empowers arbitrators to "require any party to produce documents or things that may be relevant to the matter and to do so before or during the hearing". Arbitrators in Ontario have held that this subsection can be extended to medical records. For example, in *Becker Milk Co. and Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees, Loc. 647,*[28] the grievor was dismissed by his employer for writing a threatening letter to the vice-president of the company. It soon became apparent to the parties that the grievor's mental state at the time of drafting the letter would be at issue. Consequently, in deciding whether or not to order pre-hearing production, Arbitrator Joyce exhaustively reviewed the jurisprudence to date and concluded that he did have the authority to order pre-hearing production of medical evidence. In so doing, Arbitrator Joyce articulated the following principles to govern such disclosure:

1. In ordering the disclosure of medical records, arbitrators must be sensitive to the fact that such records may include personal and confidential information. In exercising the required discretion, the individual's interest in the non-disclosure of personal and confidential medical information must be balanced with the policy considerations that suggest that disclosure is useful and necessary.

   Some medical information such as that relating to mental disorders, rightly or wrongly may tend to stigmatize the individuals. In such cases, a higher onus must be put on the requesting party to satisfy the arbitrator as to why this information is essential.

2. The information requested must be arguably relevant.

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[28] *Becker Milk Co. and Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees, Loc. 647* (1996), 53 L.A.C. (4th) 420 (Joyce).

3. The information requested must be particularized so there is no dispute as to what is desired.

4. The arbitrator must be satisfied that the information is not being requested as a “fishing expedition”.

5. There must be a clear nexus between the information being requested and the positions in dispute at the hearing.

6. The arbitrator must be satisfied that disclosure will not cause undue prejudice.

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9. An arbitrator has the authority under s. 48(12) of the *Labour Relations Act*, 1995, S.O. 1995, c. 1, Sch. A, to require the production of medical records, before or during a hearing.

10. An arbitrator carries responsibility to expedite the proceedings, to prevent the abuse of the arbitration process, and to provide a fair hearing. Where the union places the grievor’s mental condition in issue, an arbitrator carries the authority to order a person to submit to a medical or psychiatric examination.

11. Labour arbitration must provide a speedy and efficient resolution for the parties. Arbitration is intended to foster fairness, harmony and sensible labour relations. Anything which can assist in the preparation of cases, the refining of issues or which will facilitate settlement should be encouraged. As a general proposition, pre-hearing disclosure will assist with all these matters and should occur wherever possible.

12. If the positions taken by the parties on the merits of the case make it inevitable that certain evidence will be compellable during the course of the hearing, there is little to be gained by objecting to releasing that information prior to the hearing. More often than not a person’s interests can best be served by tactics designed to expedite a hearing.

13. Each party is entitled to know in advance the case it has to meet, so that it can prepare its evidence and submissions.[29]

In other provinces, arbitrators have relied on similar language in the applicable labour statute to order the pre-hearing production of medical records. For example, in the British Columbia award *Celgar Pulp Inc. and Pulp, Paper and Woodworkers of Canada, Local 1 (Landis),*[30] Arbitrator Hickling held that section 92(1)(c) of the British Columbia *Labour Relations Code* empowered arbitrators to order the pre-hearing production of documents:

> I am not sure that I have the power to direct that Mr. Parsons be given access to the doctors with a view to reviewing their files with them. However, I do have authority, I believe, under section 92(1)(c) to direct the pre-hearing production of documents.[31]

However, in subsequent cases, arbitrators in British Columbia have questioned their jurisdiction to bind third parties, such as doctors, who are not parties to the collective agreement or the arbitration proceeding, to produce medical records. For example, in *Nova Pole International Inc. and Marine Workers' & Boilermakers' Industrial Union, Local 1,*[32] Arbitrator Blasina held that, despite the employer's legitimate request for an order which would force the grievor's doctor to produce medical information, he did not have the jurisdiction under the *Labour Relations Code* to issue the order.

Another British Columbia arbitrator addressed his jurisdiction to order production of medical information about an individual who filed a harassment complaint against an employee in *Community Social Service Employers' Assn. v. Health Sciences Assn. of British Columbia (Clarke Grievance)*[33]*.* Arbitrator Lanyon reviewed and agreed with Arbitrator Blasina's reasoning in *Nova Pole* to the effect that arbitrators in British Columbia do not have the jurisdiction to force pre-hearing production from third parties

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[29] *Ibid*. at pp. 428-30.

[30] *Celgar Pulp Inc. and Pulp, Paper and Woodworkers of Canada Loc. 1 (Landis)* (1999), 85 L.A.C. (4th) 436 (Hickling).

[31] *Ibid*. at p. 441.

[32] *Nova Pole International Inc. and Marine Workers' & Boilermakers' Industrial Union, Local 1* (2001), 100 L.A.C. (4th) 289 (Blasina).

[33] *Community Social Service Employers' Assn. v. Health Sciences Assn. of British Columbia (Clarke Grievance)* (2002), 109 L.A.C. (4th) 289 (Lanyon).

to an arbitration hearing. However, in contrast with Arbitrator Blasina's reasoning, Arbitrator Lanyon held that the *Labour Relations Code* did give him the authority to summons witnesses and documents, which would ultimately result in the production of the information, but not in a manner that permitted adequate pre-hearing preparation by both parties:

> This has led to the common practice of producing documents in the possession of third parties in what is referred to as either the "easy way" or the "hard way". Recognizing the uncertainty of the jurisdiction to order the prehearing disclosure of documents, parties are usually given the choice of producing the documents (once found to be relevant) prior to the hearing, or to have them produced as a result of a subpoena at the hearing, and then granting an adjournment. Most everyone chooses to produce the documents, thus avoiding delays and costs.[34]

Consequently, Arbitrator Lanyon held that if the doctor did not produce the documents at issue voluntarily, he would issue a subpoena to force the production of the documents and then grant an adjournment if necessary, to permit opposing counsel time to review the documents and prepare questions for examination.

In summary, even in the absence of jurisdiction to order pre-hearing production of medical documents, arbitrators in most Canadian jurisdictions do have the authority to subpoena both witnesses and the documents in those witnesses' possession or control. Therefore, doctors and medical records can be subpoenaed to a hearing.

Obtaining an Order for Medical or Psychiatric Evaluation

As reviewed above, there are circumstances in which it is appropriate to compel an individual to undergo an IME. This will often occur in the course of litigation about the individual's fitness to return to work, entitlement to further accommodation, or entitlement to benefits.

In particular, arbitrators have held that even in the absence of statutory authority or the provisions of a collective agreement, the requirement that the parties receive a fair

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[34] *Ibid*. at para. 101.

hearing may justify an order that an employee undergo a medical examination by the employer's physician. Arbitrators have generally held that such an order is warranted when the health of the grievor is at issue and the union has addressed, or proposes to address, that issue by calling a medical expert who has examined the grievor to give opinion testimony. In those circumstances, arbitrators have concluded that the fair conduct of the hearing requires that the employer's medical expert witness or advisor likewise have an opportunity to examine the grievor before formulating his or her opinion.

For example, in *Canada Post Corp. and C.U.P.W. (620-95-00166),*[35] Arbitrator Burkett held that the requirement for a fair hearing justified his jurisdiction to order a medical examination when the grievor put his mental health at issue:

> In all these cases the learned arbitrators found that where the grievor had put into question the issue of his/her mental health, they had the jurisdiction, in the interests of a full and fair hearing, to direct that the grievor submit to an examination by a psychiatrist of the employer's choosing.[36]

Arbitrator Burkett then held:

> The unfairness that must be addressed stems from the nature of the evidence pertaining to the grievor's mental health. If one side has access to experts who have examined the grievor and the other side does not, an unfairness manifests itself in an inability to adequately understand the medical evidence as it relates to the individual, an inability to adequately cross-examine on critical points and an inability to call contradictory evidence. This unfairness manifests itself regardless of whether or not the expert called by the union was retained by it and it manifests itself regardless of whether the evidence called by the union is in some way equivocal. . If the employer's request is refused the union will have conferred with and called evidence from a psychiatrist who [has] examined the grievor, while the company will be required to conduct its case without benefit of firsthand

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35 *Canada Post Corp. and C.U.P.W. (620-95-00166) (Re)* (1998), 69 L.A.C. (4th) 393 (Burkett).
36 *Ibid*. at p. 396.

> medical knowledge related to the grievor. The result is an unfairness that must be redressed to whatever extent possible.[37]

Similarly, in *Pharma Plus Drugmarts Ltd. and U.S.W. (Retail Wholesale Canada Division)*[38], the grievor had been dismissed from her position because she had failed to return to work after an extended absence on long-term disability benefits due to depression. In the ensuing arbitration, the union sought reinstatement and alleged that the grievor was still suffering from depression, despite the insurance company's contrary positions, and that she would have to remain off work. In support of its position, the union tendered medical reports into evidence to support the assertion of depression. However, the employer considered these reports to be contradictory and inconsistent. Consequently, prior to the hearing being resumed, the employer asked the arbitrator to order the grievor to be subjected to a psychiatric evaluation by one of its own doctors.

Arbitrator Stanley reviewed the law and held that his decision would have to balance the privacy rights of the grievor with the right of the employer to a fair hearing. Given that the Ontario *Labour Relations Act, 1995* explicitly empowered arbitrators to order pre-hearing disclosure, Arbitrator Stanley held that he did have the authority and discretion in this case to order a psychiatric assessment. Owing to the conflicting medical evidence, Arbitrator Stanley ordered a psychiatric assessment for the following reasons:

> Given the conflicting opinions and the position taken by the grievor, that her mental or emotional condition renders her unfit to return to work, the employer is justified in seeking to have an assessment done by their own expert in order to properly address the medical issues raised by the grievor. I accept what Justice Brooke said in the [*Rysyk v. Booth Fisheries Canadian Co.* (1970), 14 D.L.R. (3d) 539; [1971] 1 O.R. 123 (C.A.)] case at pp. 540-41:
>
> > It is plain that, if the defence proceeds to trial without the advantage of the examinations sought, it could be seriously prejudiced. Fairness in the conduct of this litigation seems to

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37 *Ibid*. at p. 397.

38 *Pharma Plus Drugmarts Ltd. and U.S.W. (Retail Wholesale Canada Division)* (1995) 49 L.A.C. (4th) 360 (Stanley).

> demand the defendants have the right now contended for, as , otherwise, the opinion of the plaintiff's expert in psychiatry and the plaintiff's own evidence would not be subjected to what is probably the best test and to a very great extent go unchallenged.

As a result, Arbitrator Stanley allowed the employer to pick a psychiatrist to examine the grievor.

In *Re Brinks Canada Ltd. and Teamsters Union, Local 141*[39] the grievor had been off work and presented a medical certificate stating that he was suffering from "acute and severe situational reaction". His benefit and WCB claims were denied. Based on the doctor's certificate, the company formed the opinion that the grievor should be examined by a psychiatrist. The company was concerned about safety issues. The grievor and other employees of Brinks were required to use firearms in the exercise of their duties. The company required the grievor to undergo a psychiatric assessment with a doctor of its choosing prior to returning to work.

The employer argued that it had a statutory obligation under the *Canada Labour Code* to ensure safety on the job and, therefore, it was entitled to demand a psychiatric report of fitness.

The arbitrator agreed that employers have an obligation to ensure the safety of employees in the workplace but was unable to find statutory authority requiring the grievor to submit to an exam. The arbitrator concluded that the employer's requirement was unreasonable because there were less intrusive means of obtaining the assurances that the employer sought. The employer made no attempt to obtain further information from the grievor's doctor and should have explored that possibility prior to insisting on the psychiatric assessment. The arbitrator noted, however, that there may be situations where it is obvious that a psychiatric assessment is necessary and appropriate prior to allowing an employee to return to work. He concluded that those factors were not present in this case.

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[39] *Re Brinks Canada Ltd. and Teamsters Union, Local 141* (191), 41 LAC (4th) 422 (Stewart).

In another interesting twist on this issue, the BC Court of appeal confirmed an arbitrator's finding that section 92 of the *School Act* that required teachers to attend a medical examination when requested was not in violation of the Canadian Charter of rights and Freedoms: *British Columbia Teachers' Federation v. Vancouver School District No. 39.*[40] The dispute involved a teacher asked to attend for a psychiatric examination after exhibiting some bizarre behaviour. Her employment was terminated when she twice refused to attend for the examination.

The Court concluded that the liberty rights protected by s. 7 of the *Charter* did not extend to the right of an individual to practice a particular profession. Similarly, purely economic interests were not covered by s. 7. The right to any specific employment was not covered by s. 7. The Majority of the Court (Prowse J.A. dissenting) found (at para 209):

> ... What is at issue in this case does not, in my opinion, rise to the level of any interest concerning the life, liberty or security of the person that would invoke the application of s. 7 of the Charter. La Forest J. noted in R. v. Bear, [1988] 2 S.C.R. 387 (the fingerprinting case), that while s. 7 must be given a generous interpretation, it was important not to overshoot the purpose of the right in question. To allow s. 7 to be invoked in the context of this case, in my view, would amount to overshooting the purposes this section was designed to protect.

In summary on this point, the following principles should guide employer efforts to obtain medical information:

- Employers cannot rely on assumptions about an employee's medical condition or prognosis to make decisions about their continued capacity or employment, or about accommodation.

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[40] *British Columbia Teachers' Federation v. Vancouver School District No. 39, 2003 BCCA 100. Leave to Appeal dismissed, [2003] SCCA No. 156.*

- Employers must obtain or at least attempt to obtain medical information if there is a reason to believe an employee suffers from a medical condition (including mental illness).

- Employers require employee consent to obtain information directly from his/her physician.

- Employers must establish a reason for requiring the medical information (e.g. objective reason to question fitness to continue working or return to work, questions about accommodation requirements, or odd behaviour in the workplace.)

- Employers must start with the least intrusive means of obtaining medical information (e.g. requesting employee to obtain and pas along information from her own doctor).

- Employers can resort to more intrusive IME's only when there are conflicting medical reports creating a legitimate medical question that can only be resolved through such means.

UNDUE HARDSHIP AND MENTAL DISABILITIES

Employers have a duty to make every effort to inquire into the health, including the mental health, of the employee and be diligent in considering possibilities for accommodation. An employer should, wherever possible, discuss concerns with the employee's doctors and the union and get all available information about potential methods of accommodating the individual to allow him to work in a productive and safe manner. All efforts to investigate and assess safety or productivity risks should be well researched and documented. The duty to accommodate may include placing the employee in a different position or reconfiguring their existing job.

The leading BC decision regarding the duty to accommodate an employee with mental illness is *Gordy v. Oak Bay Marine Management Ltd. dba Painter's Lodge*.[41] This is the

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[41] *Gordy v. Oak Bay Marine Management Ltd., dba Painter's Lodge, 2004 BCHRT 225.*

second decision of the BC Human Rights Tribunal relating to Mr. Gordy's complaint against the Oak Bay Marine Group's decision not to employ him as a fishing guide because of his mental disability. The BC Court of Appeal quashed the first Tribunal decision which found in favour of the Complainant. The Employer was successful on judicial review. The Court of Appeal 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 roadmap of how employers must face accommodation issues and be prepared to prove that they have faced them in order to successfully make out a *bona fide* occupational requirement ("BFOR") defence.

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 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 BFOR defense. 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 (at para 84):

> 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.

To satisfy the elements of the SCC *Meiorin* 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:

1. 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.

2. 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.

3. 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.

By way of summary, 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."

The Tribunal found that Oak Bay Marine failed to establish that it was reasonably necessary to refuse to hire Mr. Gordy in order to achieve its goal of safety on the water. It ordered Oak Bay to pay Mr. Gordy $5,000 for lost wages plus interest from October 1995 to the date of the decision; and $5,000 as compensation for injury to dignity, feelings and self-respect.

This case is very important reading for employers addressing their obligations to employees with mental illness in the workplace. 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 “intuititive” 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 Emily Burke followed the analysis established in *Gordy, supra,* in *Code Electric Products Ltd.*[42] 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 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 “stalled” in its ability to do so given 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. The greivor’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 certain safety 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.

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[42] *Code Electric Products Ltd.,* [2005] BCCAAA No. 14.

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

1. continue to regularly attend his psychiatrist and immediately report indicators for relapse to them;

2. continue to comply with his medical caregivers' testing, monitoring, treatment and medication recommendations;

3. continue to regularly use his familial support team to monitor his indicators for relapse;

4. authorize his psychiatrist to contact his manager, if he/she identifies indicators for decompensation or has a concern about the Grievor's conditions;

5. 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;

6. meet with supervisors or other administrative personnel to monitor his condition, if and when requested to do so;

7. not report for work if he has a suspicion he is not well;

8. agree to work predictable, routine shifts, and no night shifts;

9. agree not to work excessive overtime;

10. advise his co-workers about the indicators for relapse;

11. 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.

Another recent decision, this one from the federal sector provides important comment on the extent of an employer's obligation to tolerate absenteeism that flows from mental

illness. In *Desormeaux et al v. Ottawa-Carleton Regional Transit Commission*[43] the employer applied for judicial review of two decisions of the Canadian Human Rights Tribunal that upheld complaints of discrimination by former employees, Desormeaux and Parisien, who had been dismissed for excessive absenteeism. The judicial review applications were successful and the decisions of the Human Rights Tribunal were overturned. Separate issues were considered in each case. For our purposes, the Parisien facts are the most relevant, accordingly, only that portion of the decision is summarized here.

Mr. Alain Parisien had been employed by OC Transport as a bus driver for 18 years. Beginning in 1980 he was the victim of a number of unfortunate incidents on the job including physical assaults and verbal threats by passengers as well as one motor vehicle accident for which he was not at fault. He also suffered some personal tragedies during the same period. As a result he regularly missed a substantial amount of time from work. Many these absences were long term and he was compensated by way of disability benefits. By 1991 he was diagnosed with post traumatic stress disorder (PTSD). From that time until his termination in 1996 he attempted various methods of overcoming that disability including a stay in hospital. He would intermittently attempt to return to work without enduring success. There was no doubt that his disability and other reasons for absence were real. There was no suggestion that he was malingering.

After a long absence in 1995/1996 during which he was treated for PTSD Mr. Parisien was terminated when he attempted to return to work. The basis for the termination was the employer's assessment that Mr. Parisien would not be able to maintain regular attendance at work in the future.

The Human Rights Tribunal concluded that Mr. Parisien had established a *prima facie* case of discrimination. The decision to terminate was influenced by his medical condition. To justify the dismissal the employer was required to demonstrate that it could not accommodate Mr. Parisien short of undue hardship.

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[43] *Desormeaux et al v. Ottawa-Carleton Regional Transit Commission,* [2004] FCJ No. 2172 (Fed. Ct.).

The Tribunal concluded that the employer had not accommodated the complainant to the point of undue hardship. There was no evidence of the financial cost of the Complainant's continuing absences; no evidence as to undue hardship to other employees; and no evidence of any safety concerns.

The decision of the Tribunal was overturned by the Federal Court. The Court agreed that a *prima facie* case of discrimination had been established, however, they found that the Tribunal erred in concluding that the employer failed to meet its duty to accommodate. The Court determined that it would be undue hardship for an employer to tolerate an ongoing, excessive level of absenteeism.

This decision may be the subject of a further appeal. The other complainant, Ms. Desormeaux. has filed a notice of appeal of this judicial review decision. A motion for dismissal of her appeal was heard and rejected by the Federal Court of Appeal on March 31, 2005.[44] There was no decision on the merits of the Appeal available on Quicklaw as of September, 2005.

Labatt Brewing Co. -and- Brewery, Winery and Distillery Workers' Union, Local 300[45] contains an employment analysis of an employer's ability to address intimidating or threatening behaviour in the workplace. The grievor in that case was terminated for such behaviour towards another employee. The union argued first that his conduct was protected by his shop steward status and alternatively that he was suffering from a mental disability that caused his misconduct.

The following three incidents were established on the evidence at the hearing:

- February 7 - grievor stopped work on the production line to have a conversation with another employee - his work backed up and blocked the feed line to Ms. Chambers' line - she called out to the grievor to fix the problem - he responded "get off your fat ass and fix it yourself"

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[44] *Ibid.*, [2005] FCJ No. 530 (Fed. C.A.).

[45] *Labatt Brewing Co. –and- Brewery, Winery and Distillery Workers' Union, Local 300,* [2002] BCCAAA No. 414 (McPhillips).

- March 9 - Ms. Chambers and Mr. Grigg, a friend of the grievor's, were involved in an incident that lead to Mr. Grigg's termination - the grievor approached Ms. Chambers in the lunch room and said he would get the Union to go after her and "I'd be careful if I were you"

- March 28 - the grievor, after being warned by union representatives to stay away from Ms. Chambers approached her in the lunch room leaned over her at the table where she was sitting and said "Go downstairs and clean out the sewer and don't fall in, if you know what I mean." - Ms. Chambers testified she felt as if the grievor was going to hit her.

The arbitrator agreed that the grievor had engaged in conduct that was harassing and threatening of a fellow employee. That action was not protected by his shop steward status. The first two questions in *Wm. Scott* were, therefore, answered in the affirmative. The grievor's conduct was deserving of discipline and termination was appropriate absent some mitigating factor. The issue then became whether the grievor's misconduct should be considered culpable or non-culpable.

The arbitrator accepted a doctor's report based on an assessment performed after the termination to conclude that the grievor was, at the time of his dismissal, suffering from Social Anxiety Disorder impacted by long-term alcohol abuse. This constituted a mental disability.

The next issue for consideration was whether this disability caused the dysfunctional behaviour that led to the grievor's dismissal. The mere existence of the disability did not result in the conclusion that the misconduct was non-culpable. The arbitrator noted that: "There has to be clear evidence that the disability 'significantly impaired his or her ability to choose to act otherwise".

There was no evidence that the grievor was suffering from stress or anxiety at the time of the incidents in question. There was no provocation for any of the incidents. The union did not establish, in the arbitrator's view, that the grievor's medical condition "impaired his ability to choose to act otherwise".

The arbitrator also considered the medical opinion that the grievor was so stressed and anxious generally that dysfunctional behaviour would randomly occur and could have caused the incidents in question. The arbitrator concluded that if that diagnosis was accepted then the employer's duty to accommodate had been fulfilled. It would be undue hardship to return the grievor to the workplace because there was no evidence that his disability had been overcome or that the cause of his stress had been removed. The grievor continued to deny most of the events and continued to refuse to take responsibility for his behaviour. Indeed, he suggested, at the hearing, that his co-worker should have a better sense of humour:

> The Board not only has to consider Mr. Napier but also the other employees who work at the Brewery. There is clearly a duty to accommodate any diagnosed disability but that duty requires that steps are undertaken which fall short of undue hardship: *AirBC Ltd.*, 50 LAC (4th) 93 (McPhillips). One must remember that placing Mr. Napier back in the workplace in any capacity would be grossly unfair to Ms. Chambers, many of the other women and, undoubtedly, some of the men. there is simply no way, based on the evidence presented, that Mr. Napier could be returned to the workplace with any certainty at all that the other employees, and particularly Ms. Chambers, would be able to have a safe and secure environment in which to work[46].

Similarly, in *Labatt Breweries Alberta -and- Brewery Workers Local 250*[47], the union argued that the grievor's admitted acts of industrial sabotage flowed from a mental disability that required accommodation. The greivor's mental disability consisted, essentially, of a low IQ. He was considered a "slow learner". He had been employed by Labatts for 19 years on a full time basis. He worked at a variety of labouring jobs. He sincerely apologized for his behaviour and said he would do things differently in the future. He was not, however, able to fully articulate what had led him to engage in the repeated acts of vandalism. The arbitrator considered this point to be significant. There was no accommodation suggested other than putting him back to work.

Based on the evidence of experts, the arbitrator concluded that the grievor did suffer from a mental disability which contributed to some of his misconduct. The grievor did not act from a deliberate attempt to harm his employer. His conduct was likely caused by pent up frustration. The arbitrator concluded, as a result, that the employer was required to accommodate the grievor's disability. The arbitrator also held that the employer reached the point of undue hardship when the grievor could not provide assurance that similar acts would not occur in the future if he was reinstated:

> . . . The duty to accommodate limited abilities does not extend to tolerating deliberate acts of damage to equipment, particularly where the employee's limited explanation holds limited hope for future reliability and trustworthiness on that score. ...
>
> In the end result, I am not persuaded the Employer should be required to reinstate Mr. Jeroski to work in this plant despite his longevity as an employee. Its opportunity for close supervision is too limited, the safety needs too pressing and the nature of the harm done here too serious to justify setting aside the termination. For these reasons the grievance is denied[48].

Another example of the point of undue hardship is illustrated in *Re Canadian National Railway Co. and CAW-Canada.*[49]. The grievor was dismissed for theft of company property after he was stopped at the exit gate by CN police who found tools and other material belonging to the company in the grievor's van. The CN Police obtained a search warrant for the grievor's home and discovered about $48,000 work of goods belonging to the company. The goods varied in value. The grievor admitted taking the property over a period of 14 years. The goods were not taken for use or gain but were stored in the grievor's garage.

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46 *Ibid*, at para 128.
47 *Labatt Breweries Alberta –and- Brewery Workers Local 250,* [2005] AGAA No. 23 (Sims).
48 *Ibid*, at paras 108 and 110.
49 *Re Canadian National Railway Co. and CAW-Canada* (1994), 43 LAC (4th) 129 (Picher).

The union argued that the grievor suffered from a mental disorder, kleptomania, and that the employer had a duty to accommodate him. The illness was diagnosed by a psychiatrist following the grievor's dismissal. The grievor took no steps, either before or after his dismissal from employment, to seek counselling or therapy. There was no evidence of any recovery or that the grievor now had his condition under control.

The arbitrator concluded that the employer should not be required to reinstate an employee who was likely to continue his misconduct. It would be impossible to supervise the grievor's work at all times without undue hardship on the employer:

> . . . In the arbitrator's view, such a prescription goes beyond the obligation of the employer, even as it might be defined in relation to the duty of reasonable accommodation of a psychiatric disability. Very simply, it is, in my view, beyond the standard of undue hardship to ask the employer to return an individual to the workplace who will, in all probability, steal again and whose day-to-day employment will involve changing a largely unsupervised work setting to require continual vigilance on the part of supervisors, fellow employees and security personnel[50].

*City of Calgary –*and- *Amalgamated Transit Union*[51] is an example of an employer that failed to properly assess the role of disability in an employee's behaviour, resulting in a finding that it had failed in its duty to accommodate. The grievor was terminated for four incidents that included threats of suicide and violence. The arbitrator concluded that the employer did not make sufficient inquiries into the grievor's mental health. The grievor suffered from a mental disability. The employer did not fulfill its duty to accommodate. The arbitrator ordered the grievor to be reinstated on certain conditions.

In June 2000 the grievor attempted suicide. At the time of the suicide attempt the grievor was arrested for breaching a restraining order brought by his ex-wife. Following his arrest and confinement in the Forensic Unit and later in the remand centre, the grievor was assessed by a psychiatrist and diagnosed as suffering from an alcohol and

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[50] *Ibid,* at para 136.
[51] *City of Calgary –and- Amalgamated Transit Union,* [2004] AGAA No. 75 (Elliott).

drug dependence and an adjustment disorder with depressed mood and antisocial personality disorder. He applied for sick benefits to cover the period that he was off work. His application was denied and he appealed. As part of that process he provided the employer with a note saying that he was attending AA meetings and was under the care of a doctor and that he had been ordered into "medical detainment" and was having problems with stress and anxiety.

He was returned to work following his "medical detainment" on July 22. On July 23, 2000 the first incident occurred that formed part of the reasons for termination. He was involved in an argument with a Transit Protective Services Officer, was disrespectful to the officer and raised his voice.

The second incident occurred the following day, July 24, when he expressed his frustration about the denial of his sick claim, shook his finger in the face of the claims administrator and suggested that she should "take a leap off the 11th floor".

On July 26, the third incident occurred. The grievor met with a payroll clerk that he had known for some time and expressed his frustration over denial of his sick claim. He said he should call the media and start throwing bodies from the 11th floor. The clerk was not upset by the comment.

The final incident relied on by the employer as cause for termination occurred on August 18, 2000. The grievor told one of the C-train operators that she did not need to worry because he would not jump in front of her train but that he might throw himself off the top of the City Hall and then commented "if only guns were legal he would take care of his problem". The C-train operator notified Protective Services of the conversation.

The grievor was not terminated until May 2001. In August 2000 the employer told the grievor not to come to work. Between September 2000 and May 2001 the employer tried to figure out what was happening with the grievor but had trouble contacting him. The grievor's long term disability claim was accepted in October 2000 pending receipt of further information. Great West Life requested the grievor to attend an independent medical assessment in March 2001. He attended and was diagnosed with depression

and anxiety. Great West Life considered the grievor fit to return to duties by May 3, 2001. The employer relied on that assessment.

On May 18, 2001 the employer held an "investigation meeting" with the grievor. The employer reviewed the four incidents with the grievor. The grievor said he was willing to take responsibility for his actions but that he could not remember or recall all the incidents and regarded at least one as a joke. Based on his responses the employer decided to terminate his employment.

The arbitrator determined that the employer had a duty to inquire into the extent of the grievor's disability and to consider whether it may have affected his conduct at work. The arbitrator concluded that the grievor was suffering from a mental disability at the time of the incidents that led to his termination and that his disability triggered or contributed to his misconduct. By engaging in a disciplinary investigation rather than an investigation into the health and fitness of the grievor to return to work the employer failed its obligations under the *Human Rights, Citizenship and Multiculturalism Act*.

The arbitrator determined that grievor's remarks and the misconduct that the employer relied on for termination clearly constituted threats and as such justified some discipline. The arbitrator concluded that the grievor was at least partly aware of his conduct and in control of it although it was triggered by his disability. The employer should have accommodated the grievor by exploring the possibility of a return to work.

The arbitrator ordered the grievor to be reinstated with a 6 month suspension (3 months unpaid) provided that he undergo an assessment by a physician, of the employer's choice, that showed he was not a threat to himself or anyone else and was safe to work without supervision and fit to return to work as a station cleaner. The grievor was also required to undergo a drug and alcohol test prior to returning to work to verify his abstinence. If the grievor was unable to meet those requirements within 3 months of the award, his employment would be terminated.

If he was successful in returning to work and his remaining at work was subject to further conditions:

- regular attendance at AA meetings

- random drug and alcohol tests
- completion of any treatment program recommended by the physician who completed the fitness assessment
- continuing to act responsibly at work
- being subject to immediate termination for any direct or indirect threat to himself or others

In summary, employers must make the inquiries necessary to determine the presence or absence of an underlying medical condition; and obtain expert information about the medical condition and the risks associated with it in considering the ability to accommodate an employee with mental health problems.

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