

Workplace accommodation of mental disability Tips from the case law¹

1. Make sure your disability plan does not draw distinctions between those with physical disabilities and mental disabilities.

- *Gibbs v. Battlefords and District Co-operative Ltd.*, [1996] 3 S.C.R. 566

Under the terms of an employer-provided insurance policy, any employee who was not able to work because of a disability received replacement income. However, if the claimant had a mental illness, the replacement income benefit would terminate after two years unless the person was confined to a mental institution. In Ms. Gibbs' case, had she been unable to work because of a physical disability, the income replacement benefit would have continued whether she was institutionalized or not.

The Court found that the purpose of the plan was to insure employees against the income-related consequences of becoming disabled and unable to work. This particular plan treated people differently based on the type of disability they suffered from. The Supreme Court found this type of distinction to be discriminatory.

2. Be flexible in the processes that you use in dealing with members with mental disabilities.

- *Re K.H.*, [1997] SLRBD No. 44 (Sask. Labour Relations Board)

KH was experiencing difficulties in his employment due to a mental disability. The union filed several grievances on his behalf. The employer asked for an independent medical examination ("IME"). KH and his own doctor had reservations about him undergoing an IME. The union finally agreed with the employer that KH should undergo the IME. KH refused and was terminated. The union subsequently decided to withdraw several of the grievances, including the discharge grievance, because of KH's refusal to undergo the IME. There was an appeal mechanism that KH could pursue regarding the withdrawal of the grievances, but he found it very difficult to participate in the process. Eventually, KH hired a lawyer and alleged that the union had breached its duty of fair representation. It should be noted that the union followed its internal procedures to the letter.

The Labour Relations Board found that the union had discriminated against KH and therefore had violated its duty of fair representation. The Board said:

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We would not claim that it is an easy task for trade unions to find ways of ensuring that policies and practices they have devised - which may serve fairly and adequately the legitimate expectations of ordinary employees - are applied with sufficient flexibility that these policies will not have a discriminatory effect on individuals or groups within a bargaining unit. It is likely that none of these challenges are more difficult than those related to mental disabilities. K.H. himself acknowledged that his disability made it difficult for him to respond rationally, consistently, or co-operatively in all of his dealings with the Union or other employees. His mental condition made it difficult for him to assess his own situation, to articulate his concerns, or to deal effectively with the representatives of the Union who were responsible for overseeing his grievances. It was, in our view, particularly difficult for him to gain any benefit from the appeal mechanism available to him.

One must have some sympathy for the representatives of the Union who were responsible for dealing with the grievances filed on behalf of K.H. They approached their tasks in good faith, and reasonably conscientiously, and were no doubt frustrated by the difficulties and delays which occurred. Nonetheless, it is our view that overall the Union failed to take sufficient account of the disability experienced by K.H., and that they therefore discriminated against him in handling his grievances.

- *Re Winnipeg Police Service*, [2000] MLBD No. 10

In a similar case at the Manitoba Labour Relations Board, the Board stated, "The Board agrees that a union dealing with an individual in his fragile emotional state must do so with more sensitivity than would normally be necessary." The Board did not, however, find that there was a greater duty on the Association to take action on Mr. Buckboro's behalf because of his disability. In particular, there was no duty for the association to take action against the long term disability provider which would have fallen outside the collective agreement.

3. If the accommodation involves part-time work, it is not discriminatory to pay only partial salary.

- *Canada Safeway Ltd. v. Retail, Wholesale and Department Store Union, Local 454* [2004] S.J. No. 153 (Saskatchewan Court of Queen's Bench)

This was a judicial review of an arbitration decision. The grievor was unable to work 37 hours per week (the number of hours necessary to be considered full-time) due to osteoarthritis. She was able to work 32 hours per week, and the employer agreed to have her work a 32-hour week. The employer then paid the grievor at the part-time wage and salary rate. The union grieved saying that the grievor was being discriminated against because of her disability. An arbitrator agreed.

The Court found that the arbitrator had gotten it wrong in this case. The Court said that there was a distinction between two separate concepts: the participation of disabled employees in the workplace and the compensation that such employees receive for their work. The Court stated:

The duty to accommodate does not extend so far as to oblige an employer to provide better salary and benefits to a disabled employee than it provides to non-disabled employees working the same number of hours. Safeway fully discharged its obligations to accommodate the grievor by allowing her to work 32 hours per week and by compensating her on the same basis as other employees who worked those hours. Accordingly, there was no discrimination and no duty to “accommodate” further by providing enhanced benefits.

4. A mental disability does not automatically excuse otherwise disciplinable conduct.

There are two ways that a proven mental illness might affect discipline:

1. If the mental illness is so severe that it completely deprives the employee of the ability to form the intent to commit the offense;
2. If the mental illness is not so severe as to negative intent, it may be taken into account as a mitigating factor when deciding the appropriate penalty.

- *Spawn v. Parks Canada Agency*, [2004] CPSSRB No. 23

Mr. Spawn was a firefighter for Parks Canada. He was found guilty of stealing gasoline from his employer. The employer decided to demote Mr. Spawn to the position of groundskeeper.

At the hearing it was established that Mr. Spawn was suffering from severe depression that impaired his judgment. According to his physician, Mr. Spawn’s action of stealing gas was not an example of irresistible impulse or being unable to stop an action undertaken. It was a good example of bad judgment typical of depression.

The arbitrator stated:

The factor that I cannot ignore is that Mr. Spawn knew that what he was doing was wrong. His judgment was impaired but he knew stealing was wrong. While his medical condition is a mitigating factor, it does not entirely excuse his conduct. His conduct warranted discipline but I find that demotion to a seasonal position is too severe in the circumstances. To be corrective, a sanction cannot be excessive.

I therefore order that Mr. Spawn be reinstated to a full-time, indeterminate position. The employer may choose to assign Mr. Spawn to a position other than that of Firefighter/Security Person but it must be indeterminate, full-time and in the same

geographical area. If no such position is available, then Mr. Spawn is to be reinstated in his Firefighter/Security Person position within three weeks of the date of receipt of this decision.

However, case law suggests that, where there is evidence of premeditation, lack of remorse, failure to admit misconduct or recurring instances of misconduct, this evidence may outweigh the evidence of the disability. Conduct with very serious implications for other workers may also overcome disability as a mitigating factor.

- *P. v. Canada (Treasury Board)*, [2002] CPSSRB No. 35

A federal employee threatened a co-worker. The employee was given a 20-day suspension for uttering the threats which had a very debilitating effect on the co-worker. The employee had been diagnosed as suffering from depressive disorder. The arbitrator upheld the 20-day suspension saying:

According to the testimony at the hearing, the employer took Mr. Proulx's state of health into consideration in determining the disciplinary measure. Although the Warden of the institution had not been informed by either Mr. Proulx or his representatives that Mr. Proulx was depressed, and although the Warden was unaware of the medical assessments and reports submitted to Health Canada, he was well aware that Mr. Proulx was fatigued and stressed. This stress and fatigue constituted an attenuating factor that the employer took into consideration in determining the severity of the penalty it imposed. This factor was also taken into consideration at the various levels of the grievance procedure, as was emphasized by Deputy Commissioner Watkins' reference to [translation] the "state of human weakness" in his response dated November 3, 2000.

I conclude that the 20-day suspension imposed on Mr. Proulx is reasonable, given the circumstances and the seriousness of the effects on Mr. Chaumont's health (post-traumatic stress). The negative consequences on a number of employees, and the need to hold a debriefing session, confirm the seriousness of Mr. Proulx's acts and justify the severe penalty of a 20-day suspension.

And see: *Amalgamated Transit Union, Local 113 v. Toronto Transit Commission* [2005] O.L.A.A. No. 743, in which a Board did not reinstate an employee with a mental disability where there was evidence that the threatening and violent behaviour could not be controlled.

5. Failure to follow medical treatment, especially failure to take prescribed medications, may result in dismissal being upheld.

- *CAW Loc. 80 v. Honeywell Ltd.*, [2002] 70 CLAS 104

An employee suffering from paranoid schizophrenia was discharged when her behaviour escalated from verbal outbursts to physical violence. The employer presented evidence that over several years they had tried to deal with the employee's mental illness, but the employee refused to continue with medical treatment. The arbitrator found that the employee had the right to refuse medical treatment, but that this resulted in an unacceptable risk to co-workers. The discharge was upheld.

- *Re York Region Board of Education* (2000), 84 L.A.C. (4th) 90

A teacher with bipolar disorder stopped taking his anti-depressive medication, contrary to his physician's directions. The teacher engaged in some highly inappropriate behavior with students and colleagues as he suffered a relapse of his illness. The school board attempted to assist him, and when he refused help, he was terminated. The arbitration board found that while his disability was a mitigating factor, he had been willfully reckless by going off his medication knowing that this would likely affect his work performance. The arbitration board did not reinstate the teacher, instead ordering that he be given six months' salary as compensation.

6. There may be a duty on employers to investigate the cause of strange behaviour on the part of the employee.

- *Sylvester v. BC Society of Male Survivors of Sexual Abuse*, [2002] BCHRTD No. 14
- *United Steelworkers of America, Local 5885 v. Sealy Canada Ltd.*, [2006] B.C.C.A.A.A. No. 23 (QL)

In the first case, Ms. Sylvester, a counselor for the employer, became depressed after a client committed suicide. The employer was aware that Ms. Sylvester was attending counseling because of the issue. After a three-day absence, Ms. Sylvester called the employer and said that she was taking an extended medical leave and the employer responded by dismissing her with three weeks' notice. A human rights tribunal ordered that the employer must make inquiries into whether an employee might require accommodation when it becomes aware, or ought to be aware, of a change in the employee's behaviour and attitudes.

In the second case, the grievor suffered from bipolar disorder, but was undiagnosed at the date of an unusual and serious workplace incident. The grievor assaulted a fellow employee. The Board found that the employer had sufficient evidence to be alerted to a potential disability and thereupon had a duty to investigate.

See also: *R. G. v. Oak Bay Marine Management Ltd.*, [2004] B.C.H.R.T.D. No. 180 (QL).

But the jurisprudence is divided on the scope of and existence of a duty to investigate strange behaviour in the absence of prior information of a disability.

See: *CAW, Local 111 v. Coast Mountain Bus Co.*, [2006] B.C.C.A.A.A. No. 87 (QL) in which the Board found that the employer did not have a duty to investigate complete refusal to return to work in the circumstances.

And see: *Industrial, Wood and Allied Workers of Canada, Local 1-207 v. Shelter Regent Industries*, [2003] A.G.A.A. No. 114 (QLS).

And see: *Kamloops/Thompson SD No. 73 v. British Columbia Teachers' Federation*, [2005] B.C.C.A.A.A. No. 39 (February 24, 2005).

A teacher presented a medical note saying that she would be off work due to an "intolerable work environment." At no time did the teacher tell the employer that she was suffering from a mental disability (in this case depression and obsessive compulsive disorder.) The union argued at arbitration that the employer ought to have been aware that the grievor suffered from a disability and that the employer should have made inquiries regarding the situation and whether a disability existed. The union claimed that the teacher was concerned about her privacy. The arbitrator responded by saying:

While the grievor and/or the Union may be entitled to invoke privacy rights, lack of disclosure which in turn leads to lack of knowledge, may ultimately impact on whether the employer has fulfilled its duty to accommodate to the point of undue hardship. Without sufficient information, an employer may not be able to accommodate to the extent expected by the grievor.

In this case there were no tell-tale signs of unusual behaviour which might have led the employer to suspect that the grievor suffered from a mental disability.

Note: it is open to the union to argue that the employee's privacy rights have been violated if the employer treats the information regarding a disability carelessly. However, this case makes it clear that the information must be given in order to compel the employer to start an accommodation analysis.

7. Accommodations for mental disabilities must be approached on a case-by-case basis. University personnel must work with the employee and the union to come up with creative and flexible solutions to workplace barriers.

- *Shuswap Lake General Hospital v. BCNU*, [2002] BCCAAA No. 21 (QLS)

In this case the grievor was a registered nurse. She was diagnosed with a mental disability. Her physician cleared her for return to work. The employer refused her request to return to work because of uncertainty of potential relapse. Finding failure to accommodate to the point of unjust hardship, the arbitrator in this case outlines in her decision both the responsibilities of the grievor and the accommodative measures that will be carried out. These include:

- scheduling the nurse for predictable routine shifts
- formalizing communication structures with the nurse's family members
- provision of an educational workshop for co-workers
- facilitated discussion amongst co-workers regarding concerns
- procedure for dealing with signs of relapse
- employer to permit absences if the nurse identified indicators of relapse

8. "Disability" includes mental health illness that can episodically result in physical symptoms. The existence of such symptoms, if related to mental health illness, requires accommodation regardless of existing "last chance agreements."

- *Canadian Union of Public Employees, Local 503 v. The City of Ottawa*, [2005] O.L.A.A. No. 502 (QL)

The arbitrator agreed with the employer that suffering from numerous physical symptoms did not in and of themselves constitute a *disability*. Thus, an employee that had a high absenteeism due to illnesses that did not constitute a *disability*, could be subject to a *last chance agreement*. However, where the same employee also suffered from an ongoing mental disability that episodically caused physical symptoms requiring leave, that absenteeism could not be used to justify termination on the basis of a *last chance agreement*.

9. More generally, in accommodation cases and the union's duty of fair representation: How far does the union have to go in accommodation cases?

- *Bingley v. Teamsters Local Union 91 and Purolator Courier*, [2004] C.I.R.B.D. No. 32

In this case the Canada Industrial Relations Board confirms that there may be a higher standard of care in accommodation cases than the usual DFR standard which prohibits treatment that is arbitrary, discriminatory or in bad faith.

The Board provided four guidelines to consider when deciding whether a union had met the duty of fair representation standard in accommodation cases:

1. Whether the union's intervention was reasonable when the employer failed to implement appropriate accommodation measures;
2. Whether the quality of the process that allowed the union to come to its conclusion was

reasonable;

3. Whether the union went beyond its "usual" procedures and applied an extra measure of care in representing the employee; and
4. Whether the union applied an extra measure of assertiveness in dealing with the employer.

The Board was critical of the fact that Ms. Bingley had to have her complaint acknowledged by a spokesperson for the Human Rights Commission before the union took her request to file a grievance seriously.

The Board criticized the union representative who attended the first step grievance meeting without having done a serious investigation of Ms. Bingley's situation which limited his ability to intervene effectively and in a timely fashion on Ms. Bingley's behalf.

There was no evidence that the union raised the usual questions as to the obstacles that prevented the employer accommodating Ms. Bingley's medical restriction or how her limited working hours restriction would have been detrimental to the employer's operation.

The Board criticized the union's delay and the union's second-guessing and skepticism related to Ms. Bingley's claim.

The Board suggests that the union must apply an extra measure of assertiveness in dealing with the employer in these types of cases.

10. Expert medical evidence is necessary to show the presence of a disability, and in cases of misconduct, to establish a connection between the disability and the misconduct.

- *Thunder Bay (City) v. CAW, Local 229*, [2005] O.L.A.A. No. 472 (August 5, 2005).

If you are attempting to explain your member's conduct by reason of a disability, the following guidelines apply:

1. The union must establish that there was an illness or condition experienced by the grievor;
2. There must be a link established between the illness and the aberrant conduct;
3. If there is a link, the arbitrator must be persuaded that there was a sufficient displacement of responsibility from the grievor rendering his/her conduct less culpable; and
4. If those elements have been established, the arbitrator must be satisfied that the grievor has been rehabilitated.

In establishing the existence of a disability or condition, expert medical evidence is key. The expert must establish the existence of the condition, and the connection between the condition and the conduct.

Generally, you need to use a specialist in the area (i.e. mental illness or addictions) and not simply the grievor's general practitioner. *[This is an issue of reliability of evidence which will depend upon particular facts of the case, i.e. is the general practitioner the best evidence, the one managing the mental illness, etc.]*