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***Mental Illness and Addiction:  
Workplace Challenges***

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## **Introduction**

Employees with mental health and addiction issues often present difficult challenges for employers from a legal, as well as an employee relations or human resources, perspective. Dealing appropriately and effectively with such employees can be a confusing and frustrating exercise. Additionally, the duty to accommodate under human rights legislation may require an employer to invest substantial time, effort and/or money to address the challenges associated with an employee's condition. Failing to deal appropriately and effectively with these issues can have serious legal consequences for an employer. Further, the law in this area is evolving and very complex, requiring employers not only to act with great care in response to specific issues but also to regularly re-assess their human resources policies and procedures, and to amend them as necessary, to ensure compliance with the legal obligations imposed upon them.

In addition to an evolving legal landscape, there are other factors that contribute to the complexity in this area for employer. For example, the increasing sophistication of medical science has led to an apparent increase in the identification and diagnosis of illnesses and disabilities which hitherto had been poorly understood or perhaps not even recognized. Further, a greater societal awareness of at least some mental conditions (addictions and depression being two examples) has resulted in broader acceptance of the notion that employees who are dealing with these issues need, and are entitled to receive, appropriate workplace supports and further, that with such supports, they can remain productive. Additionally, demographic changes within the workplace resulting from an aging population contribute to the increased demands and expectations upon employers to accommodate workers having physical and/or mental disabilities and restrictions.

Also relevant are major changes to the processes and procedures for addressing complaints under Ontario's *Human Rights Code*<sup>1</sup> that became effective in June 2008. These changes have resulted in an increase in the number of applications (i.e., complaints) that actually proceed to a hearing before the Human Rights Tribunal of Ontario ("HRTO"). Many of the matters that have gone before the HRTO since June 2008 have involved allegations against employers for failing to accommodate employees with disabilities. In short, human rights

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<sup>1</sup> R.S.O. 1990, c. H.19 [*Code*].

litigation in regard to workplace issues, including the accommodation of mental health issues, has become increasingly common since the introduction of the June 2008 changes to the HRTO's processes and procedures.

Finally, recent changes to Ontario's *Occupational Health and Safety Act*<sup>2</sup> have impacted an employer's obligations with respect to mental health matters in the workplace. These changes include an obligation by an employer to provide "personal information" about an employee to another employee if the employee has a history of violent behaviour and presents a risk to the other employee.

This paper provides an overview of some of the issues faced by employers in relation to mental illness and addiction in the workplace, including the following:

- the duty to inquire;
- the right to receive information;
- discipline and last chance agreements; and,
- the duty to accommodate under the *Code*.

### **DEFINING DISABILITY UNDER THE CODE**

Section 5 (1), under Part I of the *Code*, states the following in respect of employment:

5. (1) Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences, marital status, family status or *disability*. [emphasis added].

Section 10 (1) of the *Code* contains a broad definition of "disability", as follows:

- (a) any degree of physical disability, infirmity, malformation or disfigurement that is caused by bodily injury, birth defect or illness and, without limiting the generality of the foregoing, includes diabetes mellitus, epilepsy, a brain injury, any degree of paralysis, amputation, lack of physical co-ordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment, or physical reliance on a guide dog or other animal or on a wheelchair or other remedial appliance or device,

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<sup>2</sup> R.S.O. 1990, c. O.1 [*OHSA*].

- (b) a condition of mental impairment or a developmental disability,
- (c) a learning disability, or a dysfunction in one or more of the processes involved in understanding or using symbols or spoken language,
- (d) a mental disorder, or
- (e) an injury or disability for which benefits were claimed or received under the insurance plan established under the *Workplace Safety and Insurance Act, 1997*.

Section 10 (3) of the Code also is relevant and provides as follows:

- (3) The right to equal treatment without discrimination because of disability includes the right to equal treatment without discrimination because a person has or has had a disability or is believed to have or to have had a disability.

The latter section is particularly significant in the context of mental illness or addiction. Notwithstanding the greater awareness and acceptance of mental health and addiction issues noted above, misconceptions about mental illness and addictions remain. Such misconceptions may result in human rights issues arising in the workplace even in the absence of an intent to discriminate.

The Ontario Court of Appeal, in *Entrop v. Imperial Oil*<sup>3</sup> confirmed that substance abuse (drugs or alcohol) fall within the scope of a “disability” under the Code. Accordingly, in some circumstances, a substance abuser may be entitled to protection under section 5 of the *Code* which in turn may result in an obligation upon an employer to implement accommodations for such an employee.

### **AN EMPLOYER’S DUTY TO INQUIRE**

It is well established that when an employer is made aware of an employee’s disability and his or her disability-related needs, the employer has a duty to make meaningful inquiries into the nature and extent of such needs in conjunction with its effort to fulfill its duty to accommodate under the *Code*.<sup>4</sup> However, an employer’s duty to accommodate may be triggered even before an employee explicitly advises it of his or her disability and resulting need for accommodation. That is, when an employer becomes aware of a possible link between an

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<sup>3</sup> (2000) 50 O.R. (3d) 18, 189 D.L.R. (4th) 14 (C.A.) at para. 88.

<sup>4</sup> See *Wall v. The Lippé Group*, 2008 HRTO 50 (CanLII) ; See also *Oak Bay Marina Ltd. v. British Columbia (Human Rights Tribunal) (No. 2)* (2004), 51 C.H.R.R. D/68.

employee's inappropriate behaviour or poor job performance and his or her disability or possible disability, the employer has a duty to investigate whether such inappropriate behaviour or poor job performance indeed is disability-related before it takes disciplinary or other action in response to such inappropriate behaviour or poor performance.

The extent of an employer's duty to inquire in such situations has been explored in a number of British Columbia Human Rights Tribunal decisions. In *Wilson v. Transparent Glazing Systems*<sup>5</sup>, the Tribunal dealt with this issue in the context of its ruling that an employer's decision to dismiss the complainant, a foreman supervising the installation of windows, was discriminatory. The employee generally had been difficult to work with, frequently threw temper tantrums on the job site, and had been the subject of many customer complaints. Upon the evidence presented, which included a fax from the site superintendent that sharply criticized the employee's work and raised the possibility that his actions were a result of medications he was taking, the Tribunal found that it was reasonable to infer that the employee's impairment due to medication was a factor in his dismissal. Since the employer admitted that it knew the employee suffered back problems and had been taking medication, the Tribunal concluded the employer was aware of, or ought reasonably to be aware of, the complainant's disability.

The Tribunal addressed this duty in more detail in another decision, *Martin v. Carter Chevrolet Oldsmobile*, in which it stated the following:

In my opinion, an employer is not obligated to inquire into whether an employee's disability is affecting performance before making a decision based on that performance *unless the employer knows or reasonably ought to have known of the relationship between the disability and the performance*. However, when an employer is aware, or reasonably ought to be aware, that there may be a relationship between the disability and the performance, the employer has a duty to inquire into that possible relationship before making an adverse decision based on performance.<sup>6</sup> [emphasis added]

This duty applies equally to situations of physical as well as mental disability. Employers are held to a reasonable standard in assessing situations where an employee's misconduct may be driven, at least in part, by symptoms related to a mental illness or addiction.

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<sup>5</sup> [2008] B.C.H.R.T.D. No. 50 (QL).

<sup>6</sup> 2001 BCHRT 37 at para. 29.

The difficulty in meeting this duty to inquire is compounded when an employee denies suffering from a mental illness or addiction. Often the denial of a mental illness, especially in situations involving addictions, is a symptom or part of the illness or problem itself. An employee's denial is not enough to relieve an employer of a duty to inquire into the possibility of non-culpable reasons for an employee's poor performance or inappropriate behaviour. This is particularly important when the employee holds a safety-sensitive position. An employer may be justified in preventing an employee's attendance in the workplace, perhaps on a non-disciplinary basis, because of concerns about an employee's mental health, even in the face of the employee's denial of any mental health problems. However, in such circumstances, it is important that the employer have a reasonable basis for suspecting that an employee's substance abuse or mental health issue impairs his or her ability to perform in a safety-sensitive position before preventing the employee from attending at work to perform his or her regular job duties.

In *United Steelworkers of America, Local 8918 v. Gerdau Ameristeel*,<sup>7</sup> this issue arose after employees voiced their concerns to management about their safety being jeopardized by a co-worker's possible abuse of narcotic painkillers. The employee in question was a "hot metal" crane operator at a steel manufacturing plant whose duties included moving vats of molten steel high above the shop floor. The employee went on sick leave just prior to being approached by management. When he returned six days later, he was suspended without pay as a non-disciplinary measure pending the employer's receipt of a medical assessment confirming he was not functionally impaired by substance abuse. After the employer did not accept a clear toxicology report from the employee's family doctor, the employee filed a grievance alleging harassment and discrimination to the point where he was not allowed to work.

Arbitrator Peter Barton held in this Ontario decision that while much of the evidence was hearsay from other employees, throwing into question its reliability, it had reached a "level of certainty concerning an abuse problem [that] was above the minimum required ... which...in the case of such a safety-sensitive job [was] a reasonably based suspicion."<sup>8</sup> In fulfilling this duty to inquire, Arbitrator Barton concluded that, while there must be "reasonable cause" for requesting drug and alcohol testing, such reasonableness will be dictated by the degree of risk

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<sup>7</sup> (2009), 99 C.L.A.S. 207 (Barton) [*Gerdau Ameristeel*].

<sup>8</sup> *Ibid.* at para. 41.

involved in the safety-sensitive position held by the employee. Citing the Federal Court decision in *Canada (Attorney General) v. Grover*, [2007] F.C.J. No. 58 (QL), Arbitrator Barton stated that the degree of risk may be determined by “the seriousness of the illness and the nature of the employee’s duties.”<sup>9</sup>

Recent amendments to the OHSA concerning workplace violence and harassment implemented in Bill 168 have added greater complexity to an employer’s statutory duty to ensure the safety of its workers. Under Part III.0.1 of the OHSA, employers are now required to have policies and programs specifically addressing workplace violence and harassment including safety procedures to protect victims of violence or to resolve a refusal to work due to a threat of such violence. Pursuant to its duties to provide workers with information about safety risks within the workplace, section 32.0.5 (3) also requires employers to provide to workers information, including personal information, related to a risk of workplace violence from persons with a history of violent behaviour if the worker can be expected to encounter that person in the course of his or her work, and the risk of workplace violence is likely expose that worker to physical injury. Such employees and the threat of violence that they might pose would also need to be considered when undertaking the now mandatory risk assessments of the workplace.

The level of disclosure required under section 32.0.5(3) raises serious concerns about the potential for human rights violations of mentally ill workers. Such statutorily mandated employer action may arguably amount to discrimination or harassment under the *Code* if the threat of violence that the employee imposes within the workplace is the result of a mental disorder. In light of this new legislation, one cannot assume that workplace safety would trump any individual rights protected under the *Code*. In fact, section 47(2) of the *Code* ensures that “[w]here a provision in the *Act* or regulation purports to require or authorize conduct that is a contravention of Part I, this Act applies and prevails unless the Act or regulations specifically provides that it is to apply despite this Act.” Accordingly, Part I duties to prevent discrimination appear to supersede the provisions of the OHSA while the duty to accommodate under Part II of the *Act* does not.

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<sup>9</sup> *Gerdau Ameristeel*, *supra* note 6 at para. 31.

Employers are under a simultaneous but conflicting duty to identify and account for the potential safety risks these employees may pose within the workplace, while ensuring that in doing so, they are not subjecting these same employees to discriminatory conduct on the basis of their disability or perceived disability. As will be discussed later on in this paper, once an employer is aware of an employee's mental illness or addiction and its potential impact on workplace safety, it still has an obligation to pursue accommodation measures to the point of undue hardship. Safety concerns are a factor in this undue hardship analysis, but so too are the individual rights of the disabled employee.

### **DISCIPLINE AND LAST CHANCE AGREEMENTS**

Disciplining or terminating an employee who has a mental disability or addiction can be fraught with additional legal and human rights concerns, yet it is not impossible. Courts and arbitrators have confirmed that the existence of a condition that may be considered a disability under the *Code* cannot act, in and of itself, as a shield against discipline where employees engage in misconduct.<sup>10</sup> Once an employer has inquired into whether an employee's actions might be driven, at least in part, by non-culpable influences and has confirmed its suspicions, accommodation must be explored. Otherwise, if a link between the mental illness and the misconduct can be established, direct dismissal without considering any other options will likely be deemed to be discriminatory.

The "hybrid" approach to dealing with misconduct associated with illness or disability which was at issue in the British Columbia Court of Appeal decision *British Columbia (Public Service Agency) v. British Columbia Government and Service Employees Union*<sup>11</sup> ("Gooding") has gained popularity. While its origins are from British Columbia, Ontario arbitrators have more recently turned to this approach in such employment discrimination cases where an employee is disciplined for misconduct and the disability to be accommodated is raised in a grievance.

Mr. Gooding was the manager of a liquor store operated by the BC government who was terminated after being caught stealing alcohol. When confronted, he admitted that he was an

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<sup>10</sup>See *London (City) and C.U.P.E., Local 101 (D.(M.)) (Re)* (2001), 101 L.A.C. (4<sup>th</sup>) 411 (Marcotte).

<sup>11</sup> (2008), 177 L.A.C. (4<sup>th</sup>) 193, 298 D.L.R. (4<sup>th</sup>) 624 (B.C. C.A.) [*Gooding*].

alcoholic and apologized for his behaviour. He was first suspended without pay and eventually terminated after the employer completed its investigation. Shortly after his termination, Mr. Gooding entered a rehab program and was successful in achieving sobriety. At arbitration, his termination was upheld as the Arbitrator found that while his alcoholism had played a role (it was the reason why he stole the alcohol), the evidence presented by the employer showed that Mr. Gooding knew what he was doing and knew it was wrong. The addiction played no role in assessing his responsibility for the thefts.

On appeal to the BC Labour Board, the decision was overturned on the basis that the arbitrator had applied the incorrect analysis when dealing with misconduct of an addicted employee. The Board concluded that a “hybrid analysis”, which recognized that addiction could play a factor in an employee’s misconduct even if other aspects of the misconduct could be found to be voluntary, should have been applied at arbitration. Taking this approach, an employer is expected to separate that part of the employee’s conduct that resulted from an addiction, and which therefore would trigger the duty to accommodate, from the part that was within the employee’s control and hence subject to discipline. This could result in accommodation of the disability-related behaviour as well as some form of discipline for the non-disability-related behaviour. The Board sent the matter back to the arbitrator who reinstated the employee and concluded that the termination was *prima facie* discriminatory on the basis of disability and that Mr. Gooding should have been accommodated while also being disciplined short of termination.

This approach, however, was rejected by the BC Court of Appeal, which allowed the appeal and sent the matter back to the arbitrator to determine whether Mr. Gooding’s termination was excessive in all of the circumstances. In the majority decision of Huddart J., the Court held that Mr. Gooding had not proven a *prima facie* case of discrimination, which was a threshold required to be met before an employer’s duty to accommodate was even triggered. The Court stated:

I can find no suggestion in the evidence that Mr. Gooding's termination was arbitrary and based on preconceived ideas concerning his alcohol dependency. It was based on misconduct that rose to the level of crime. That his conduct may have been influenced by his alcohol dependency is irrelevant if that admitted dependency played no part in the employer's decision to terminate his

employment and he suffered no impact for his misconduct greater than that another employee would have suffered for the same misconduct.<sup>12</sup>

The Court of Appeal decision indicates that an employer has the right to discipline regardless of an employee's addiction or mental illness when that employee engages in criminal conduct. The addiction would only be considered when assessing an appropriate penalty, at which stage the duty to accommodate would be considered as well.

Since the Court of Appeal's decision in 2008, many arbitrators have been reluctant to completely do away with the hybrid approach, and have attempted to distinguish *Gooding*.<sup>13</sup> In a 2009 Manitoba labour arbitration decision, Arbitrator Graham went as far as declaring that the Court of Appeal in *Gooding* was wrong, and instead adopted the minority decision of Kirkpatrick J., which found that a *prima facie* case of discrimination may be established in situations where the addiction or mental illness was a factor in the employee's misconduct which gave rise to the discipline, thereby triggering the duty to accommodate.<sup>14</sup>

Whether a hybrid approach is used or not, it is clear from the jurisprudence that an employee must establish a causal nexus between the misconduct and the disability. That is, the mental illness or addiction must be shown to be the cause of the conduct and will be a complete explanation if it can be shown that the employee's actions were beyond his or her free will. A hybrid analysis gives arbitrators flexibility in dealing with such situations complicated by evidence of a mental illness or addiction, which flexibility is particularly valuable in addressing the broad spectrum of symptoms of mental illness or addictions that afflicted employees may exhibit in the workplace.

A useful disciplinary tool available to unionized employers when dealing with mental illness and addiction are Last Chance Agreements ("LCAs"). Such agreements are often used when dealing with alcohol and drug-addicted employees. If carefully crafted, an LCA that respects an employee's rights under the *Code* can serve as effective progressive discipline

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<sup>12</sup> *Ibid.* at para. 15.

<sup>13</sup> See *Rio Tinto Alcan Primary Metal v. C.A.W- Canada, Local 2301 (Grant)*, (2008), 180 L.A.C. (4<sup>th</sup>)1, [2008] BCCAAA 170 (Steeves).

<sup>14</sup> *Legal Aid Lawyers Association v. Manitoba*, (2009) 96 C.L.A.S. 510, 1818 L.A.C. (4<sup>th</sup>) 296 (Graham).

tool.<sup>15</sup> Courts are generally loathe to strike down LCA's made between employees and employers as it is seen as a serious infringement on a party's right to freely contract. Interference may also discourage parties from fashioning their own resolutions to unique problems and also from employers providing employees with a last chance at all.

An LCA typically makes an employee's continued employment conditional upon the employee meeting a number of conditions, such as maintaining a specified level of attendance or refraining from behaviour which may have led to the initial discharge. It also may stipulate that a failure to adhere to any of the prescribed conditions will result in the employee's automatic termination without recourse to the grievance procedure. They are generally entered into with the intention of preserving or reclaiming a failing employer/ employee relationship.

Although more frequently employed in a unionized context, there is no reason LCA's cannot be used by non-unionized employers under appropriate circumstances. They are commonly used to bring home to alcoholics or drug addicts the serious consequences of continued addiction, while at the same time allowing them the opportunity to obtain appropriate treatment. Indeed, as noted by Arbitrator Knopf, "accommodating an alcoholic employee may demand allowances for a relapse and require unions, employers and arbitrators to fashion careful solutions that balance the interests of the grievor, co-workers and the employer while at the same time being realistic about the nature of the disease."<sup>16</sup> Realistic employers in such situations may also be assured by the fact that a carefully worded LCA may be valuable evidence of an employer's good faith dealings with mentally ill employees.

These agreements are subject to human rights legislation and accordingly must be free from discrimination. The potential for discrimination in such agreements exists where, for example, they impose special reporting requirements or conditions upon an employee that go beyond what is expected of other employees or that exceed the basic requirements of the job.

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<sup>15</sup> See *CUPW v. Canada Post Corp.* (2008), 171 L.A.C. (4th) 353, 2008 BCSC 338 (B.C.S.C.) in which permanent conditions imposed on an alcohol- and drug-addicted employee were upheld on judicial review as consistent with the duty to accommodate; See also *Capital Health Authority v. AUPE, Loc. 054 (M.(K.))*, (2006), 152 L.A.C. (4th) 81, 86 C.L.A.S. 202 (Jolliffe).

<sup>16</sup> *Re Uniroyal Goodrich Canada Inc. and U.S.W.A., Loc. 677 (N.S.)* (1999), 79 L.A.C. (4th) 129 (Knopf) at para. 183.

Such terms may be found discriminatory and overturned even when the agreement with the employee is entered into in good faith by the employer and the union.<sup>17</sup>

The following four step approach to determining whether an LCA term is enforceable has developed through the arbitral jurisprudence:

1. Has the employee breached a term of the LCA?
2. If so, was the breached standard more stringent than standards imposed on other employees? For example, if the breached standard is to maintain an attendance record that is higher than the workplace average or if the number of allowable absences is fewer than those enjoyed by other employees, such requirements may be discriminatory under the *Code* and therefore unenforceable.
3. Was the breached requirement or standard imposed on the employee because of his/her disability?
4. Finally, if the answer to the third question is yes, was the breached standard or requirement a *bona fide* occupational requirement and/or did the employer reach the point of undue hardship in attempting to accommodate the grievor?

The final two steps involve the application of a human rights analysis which will be discussed in greater detail below.

### **HUMAN RIGHTS OBLIGATIONS AND THE DUTY TO ACCOMMODATE**

As the previous discussion illustrates, an individual employee's human rights under the *Code* and an employer's duty to accommodate must be at the forefront of an employer's approach to managing and disciplining employees with mental illness and addiction issues. The requirements of establishing the defence of undue hardship once a *prima facie* case of discrimination in employment is made out was most recently clarified in the 2008 Supreme Court decision, *Hydro-Quebec v. Syndicat des employes de techniques professionnelles et de bureau d'Hydro-Quebec, Section locale 2000 (SCFP-FTQ)*,<sup>18</sup> in the context of accommodating employees with mental illness and addiction.

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<sup>17</sup> See *S.R. v. City of St. John's*, [2007] N.L.H.R.B.I.D. No. 1 (QL).

<sup>18</sup> [2008] 2 S.C.R. 561, 2008 SCC 43 [*Hydro-Quebec*].

The Court in *Hydro-Quebec* articulated several principles with respect to an employer's burden to prove undue hardship, specifically:

- The employer is not required to prove that it is impossible to accommodate the employee's disability, or that the employee will be totally unable to perform his or her work in the foreseeable future;
- A measure that would require the employer to modify working conditions in a fundamental way constitutes undue hardship;
- A measure that would completely alter the essence of the employment contract (i.e., the employee's obligation to perform work) constitutes undue hardship; and,
- When, despite the measures taken by the employer, the employee remains unable to resume his or her work for the reasonably foreseeable future, the employer will be justified in terminating the employment contract.

The case involved a unionized Hydro-Québec employee who suffered from a number of physical and mental conditions that caused her to miss work on a regular basis. In fact, the record showed that she had missed 960 days of work over a period of seven and a half years. The employer had made several unsuccessful attempts to adjust the employee's working conditions so that she would be able to perform her work. At the time of her dismissal on July 19, 2001, she had been off work for over five months, and her treating physician had recommended that she remain off work for an indefinite period. The employee grieved her dismissal.

The arbitrator dismissed the employee's grievance on the grounds that he did not believe she would be capable of performing regular and consistent work for the foreseeable future and that the solutions proposed by the union constituted undue hardship. The Superior Court's dismissal of the motion for judicial review of the arbitrator's decision was set aside by the Court of Appeal which held that the employer had not proven that it was impossible to accommodate the complainant's characteristics. In allowing the employer's appeal, the Supreme Court of Canada ruled that in all cases if, despite the measures taken by the employer, the employee remains unable to perform his or her fundamental duties for the reasonably foreseeable future, the employer will have established undue hardship and will be justified in terminating the

employment relationship. In the words of the Court, “[t]he employer’s duty to accommodate ends where the employee is no longer able to fulfill the basic obligations associated with the employment relationship for the foreseeable future.”<sup>19</sup>

The duty to accommodate is an individualized one, such that the legal extent of this duty will depend on the circumstances of each case. *Lane v. ADGA Group Consultants Inc.*<sup>20</sup> is another 2008 decision, this time from the Ontario Divisional Court, which explores this duty in the context of accommodating an employee suffering from a mental illness. The Court in *Lane* upheld the Ontario Human Rights Tribunal’s ruling that a bipolar employee had been the victim of disability-based discrimination since management had based its decision to terminate his employment on false stereotypes of people with bipolar disorder.

The complainant, who had been diagnosed with bipolar disorder three years earlier, had been dismissed from his employment one week after being hired into a position testing a software program which calculated and formulated aim points for NATO’s field artillery fire control systems. He did not reveal his illness during the interview process and lied about the number of sick days he had taken in the prior year out of concern that he would otherwise not be hired. He disclosed his mental illness to his manager at the end of his first week and advised that any emotional abuse by his co-workers could trigger its effects. He also offered to provide further information about the illness, including how to identify symptoms of when he was becoming manic. He also requested that his wife or doctor be contacted if the manager noticed him presenting with any such symptoms.

The manager expressed concern for the employee due to the inherent stress of the job. The employee sensed this apprehension and as a result, began to display pre-manic symptoms a few days later. By the following day, it was clearly evident that he was pre-manic. Management met with the complainant that same afternoon and fired him and did not notify the employee’s wife or doctor of his behaviours. As a consequence of the dismissal, the employee’s condition worsened into a full-blown mania requiring hospitalization. This was followed by severe depression, financial ruin, marital dissolution and several years of unemployment.

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<sup>19</sup> *Ibid.* at para. 19.

<sup>20</sup> (2008), 91 O.R. (3d) 649 (Div. Ct.), aff’g 2007 HRTO 34 (CanLII) [*“Lane”*].

The Ontario Human Rights Tribunal allowed the complaint on October 17, 2007 and awarded general damages of \$35,000, damages of \$10,000 for mental anguish and special damages of \$34,278.75, plus pre- and post-judgment interest. The Divisional Court dismissed the appeal and cross-appeal by the Human Rights Commission and concluded that the Tribunal had correctly stated and applied the law to the circumstances as it had reasonably found them to be. The Court also affirmed the Tribunal's extensive review of the two dimensions of the duty to accommodate and their application to situations involving mentally ill employees.<sup>21</sup>

The procedural aspect of the duty to accommodate involves obtaining all relevant information about the employee's disability, including the employee's current medical condition, prognosis for recovery, ability to perform job duties, and capabilities for alternative work, at least where such information is readily available. The Court upheld the Tribunal's conclusion that the complainant had not been accommodated in the procedural sense of the duty. The employer was required to consider the extent to which the careful managing of the complainant's condition, along with the potential role the employer could play in the process of management, could avoid creating problems for the employee.<sup>22</sup>

The second part of the duty to accommodate highlighted in *Lane* is the substantive aspect, whereby an employer must show that accommodation was not possible without incurring undue hardship. Affirming the Tribunal's analysis, the Divisional Court found that the employer had failed at this substantive aspect, concluding:

While common sense and intuitive reasoning may be utilized by an employer, in a case where accommodation is refused "there must be some evidence to link the outright refusal of even the possibility of accommodation with an *undue* safety risk" [emphasis added]. In other words, ADGA had to show that it was *impossible* to accommodate Lane without risking reasonable safety.<sup>23</sup> [emphasis in original]

When not suffering from either a manic or depressive episode characteristic of bipolar disorder, the complainant was fully capable of performing the job for which he was hired. His previous employer had accommodated his mental illness and his past work performance had been highly

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<sup>21</sup> The Tribunal applied the Supreme Court's analyses in *British Columbia (Public Service Employee Relations Commission) v. BCGSEU* ("Meiorin"), [1999] 3 S.C.R. 3, 1999 SCC 48 and *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council for Human Rights)* ("Grismer"), [1999] 3 S.C.R. 898.

<sup>22</sup> *Lane v. ADGA Group Consultants Inc.*, 2007 HRTO 34 (CanLII), at para. 144.

<sup>23</sup> *Lane*, *supra* note 20 at para. 118.

rated, yet management at ADGA had failed to discuss the complainant's specific needs, or to explore any steps towards assessing and pursuing accommodation.

The employer also failed to present any evidence to show that reasonable accommodation would be impossible. Instead, ADGA rushed to judgment, guided by generalized fears about the complainant's ability to do the job and what the Tribunal referred to as "false stereotypes" of individuals with bipolar disorder working and their ability to work in what was described as a "mission and safety critical" position. Believing the complainant would require constant supervision, the employer argued that his manager was too busy for such additional responsibilities. Further, the employer's ignorance of the illness was evident in its generalised and unfounded fears that, while in an irrational state, the complainant might disclose the nature of his work to the Department of National Defence, thus risking national safety.

The undue hardship analyses applied by the Courts in *Hydro-Quebec* and *Lane* illustrate the extent to which employers must go in upholding the human rights of mentally ill or addicted employees in the workplace. At one end of the spectrum, *Hydro-Quebec* supports an employer's position that, in spite of an employee's mental illness, he or she must still be able to fulfill the basic obligations of the position. Another limit to such accommodation erroneously relied upon by the employer in *Lane* but applicable in other circumstances, is when the safety of the workplace is compromised because of the employee's disability-related behaviour. At the other end of the spectrum, however, the case law recognizes that people living with mental disorders are often stigmatized and subject to false stereotypes. Employers cannot conclude that mentally ill employees actually pose a serious threat of violence to the workplace simply because co-workers feel threatened by or uncomfortable with the employee's behaviour. Such safety concerns must be substantiated by actual medical evidence, so that they are not actually being informed by discriminatory biases against mentally disabled employees.

## **SUMMARY**

An employee with a mental health or addiction issue can represent a very difficult challenge. Employers who do not devote the necessary care and attention to understanding their legal obligations with respect to these employees risk significant legal liability. Such legal

obligations arise as soon as an employer is alerted to the possibility that employee misconduct may be disability or addiction-related, or when an employer is informed by the employee of such mental health issues. Disciplining such employees is complicated by an employer's duty to accommodate under the *Human Rights Code* as well as the sensitive and often misunderstood nature of mental illness in today's society.