First Nations Public Service Secretariat

Accommodating Mental Health in the Workplace

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SINGLETON REYNOLDS

Mental Health, Disability, and Human Rights

- Mental health is a critical component to our overall health and well-being
- Due to stigma and unfair stereotypes about mental illness, it can be difficult for people to speak up about their mental health.
- Some people may find it easier to share about a physical illness, injury or physical disability, than to disclose issues with mental health
- However, it is important to remember that Human Rights law protects individuals from discrimination based on disabilities, both physical and mental
  - Mental health challenges like depression, anxiety disorders, PTSD, schizophrenia and bipolar disorder are all mental disabilities that are protected from discrimination under BC's *Human Rights Code*.
  - If an individual feels as though they have a valid claim for discrimination based on negative treatment for their mental health, those claims may be heard through the BC Human Rights Tribunal
- Employers must ensure that they do not discriminate against people with mental disabilities.

Definition of Disability

There are many definitions of “disability”.

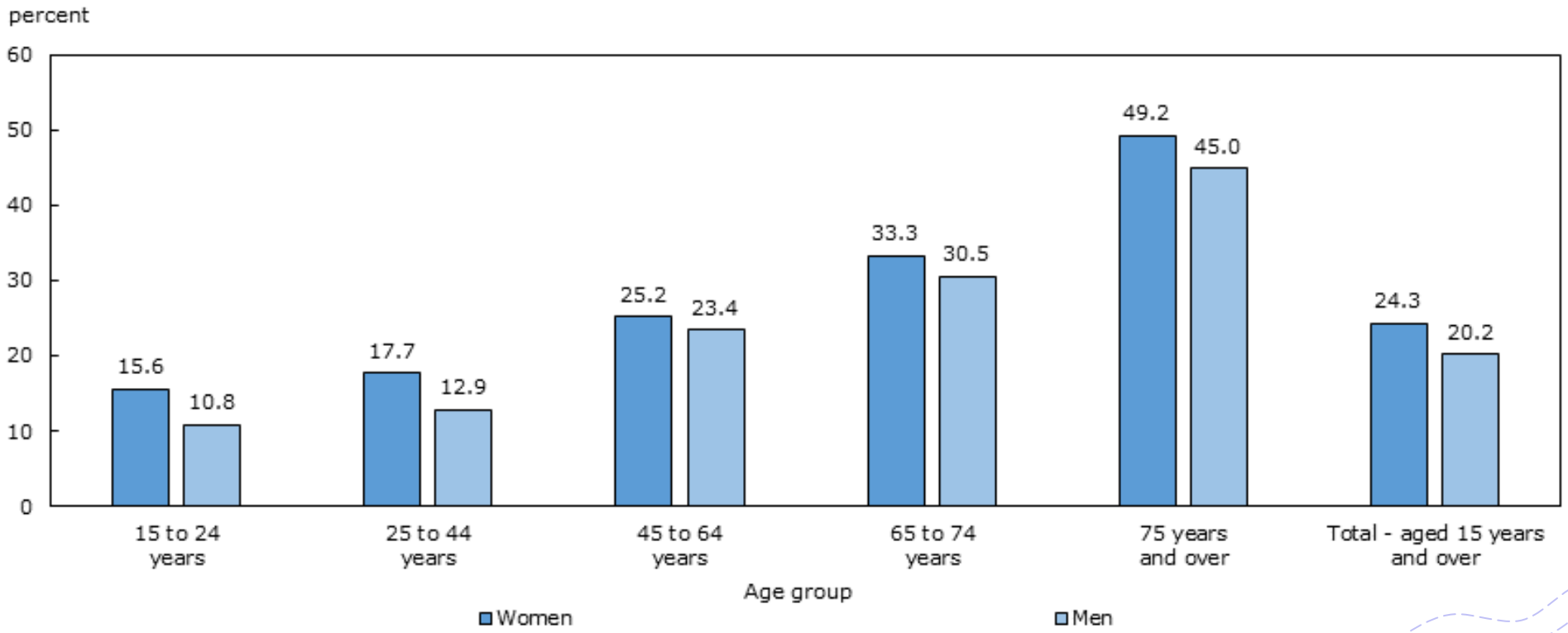
Example of general definition

“Inability to pursue an occupation because of a physical or mental impairment”.

Example of specific definition (*Health Care Benefit Trust*)

“Totally disabled” means the complete inability, because of an accident or sickness, of a covered employee to perform the duties of his/her own occupation for the first twenty-four months of disability (including a five month qualification period).

Chart 1
Canadian population aged 15 years and over with a disability, by age group and sex, 2017

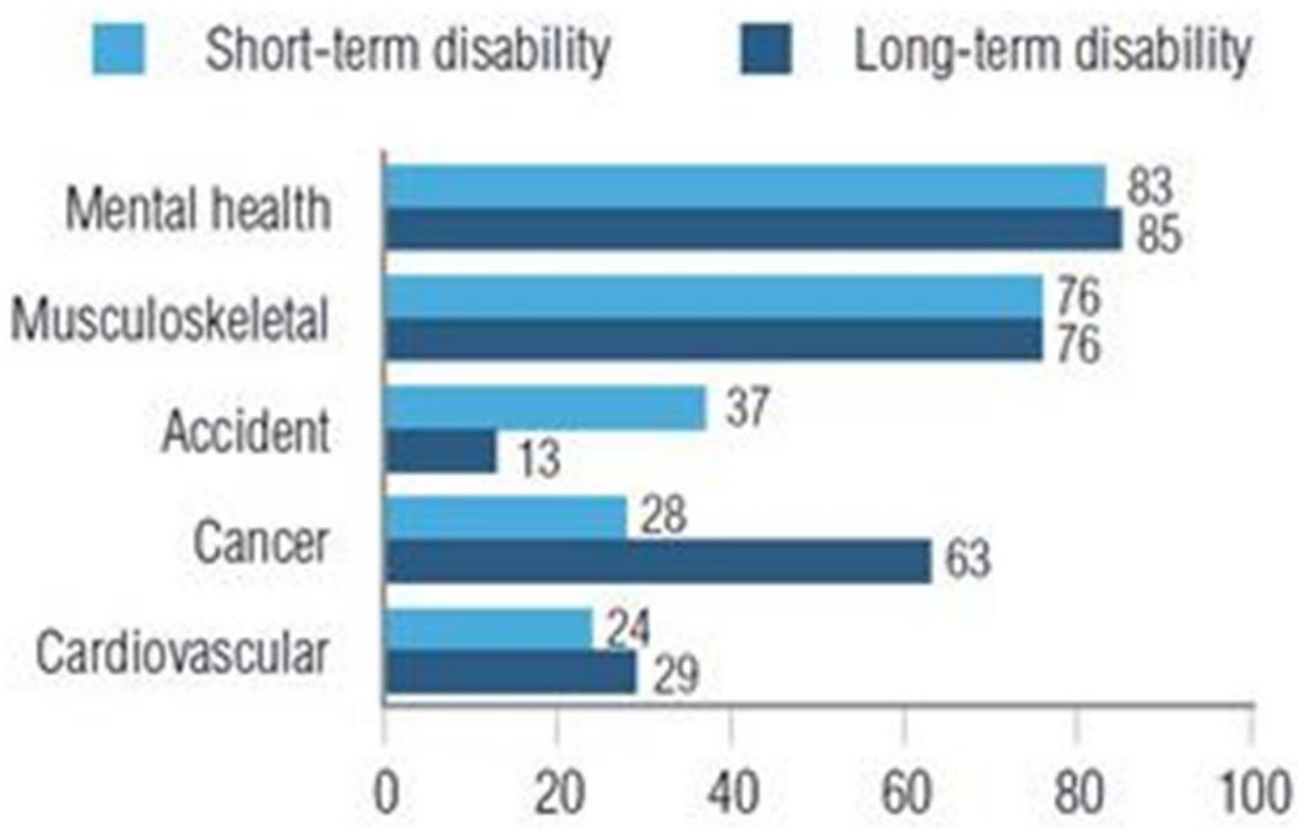


Note: Differences between women and men are significantly different for all age groups ($p<0.05$).
Source: Statistics Canada, Canadian Survey on Disability, 2017.

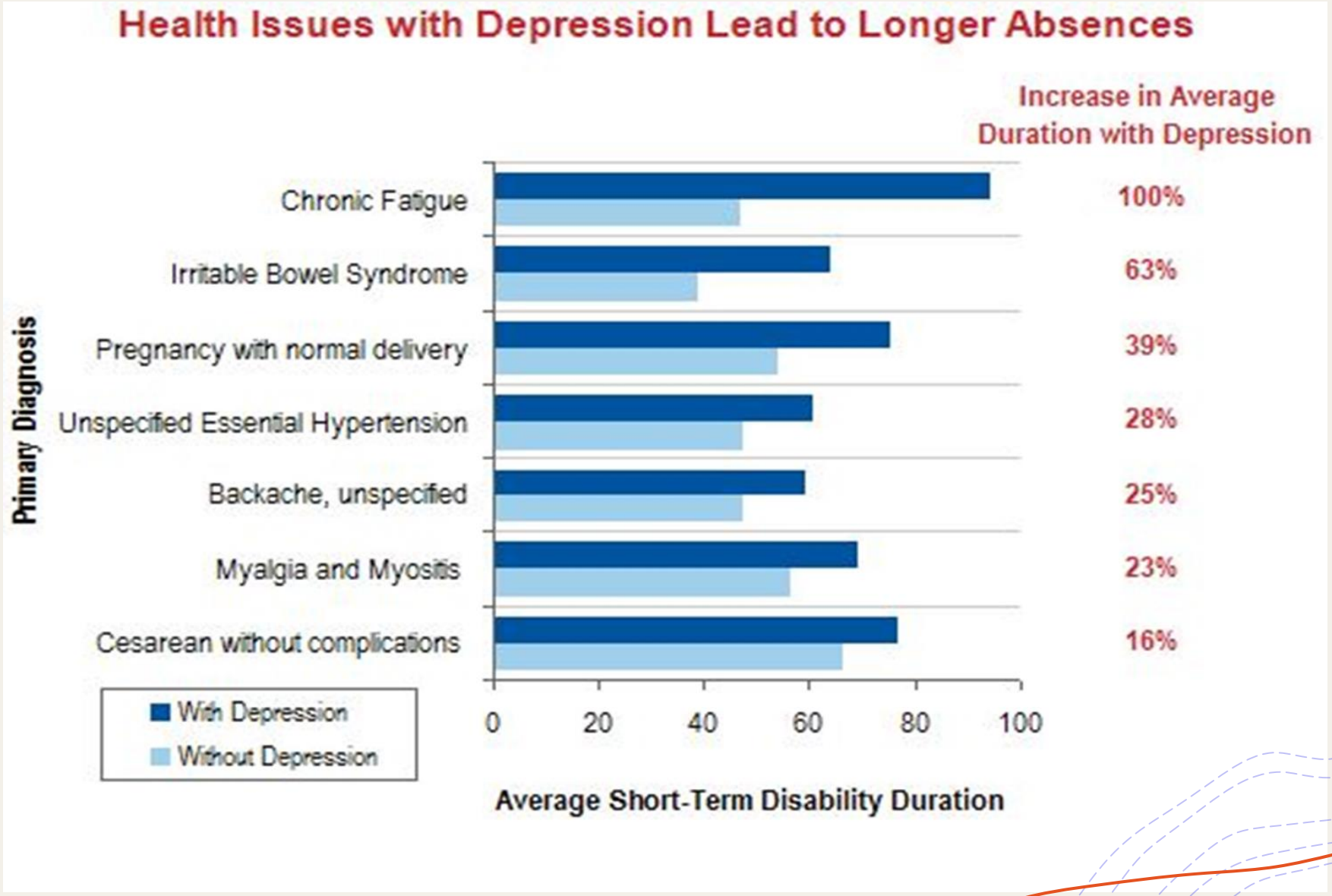
Prevalence of Mental Illness

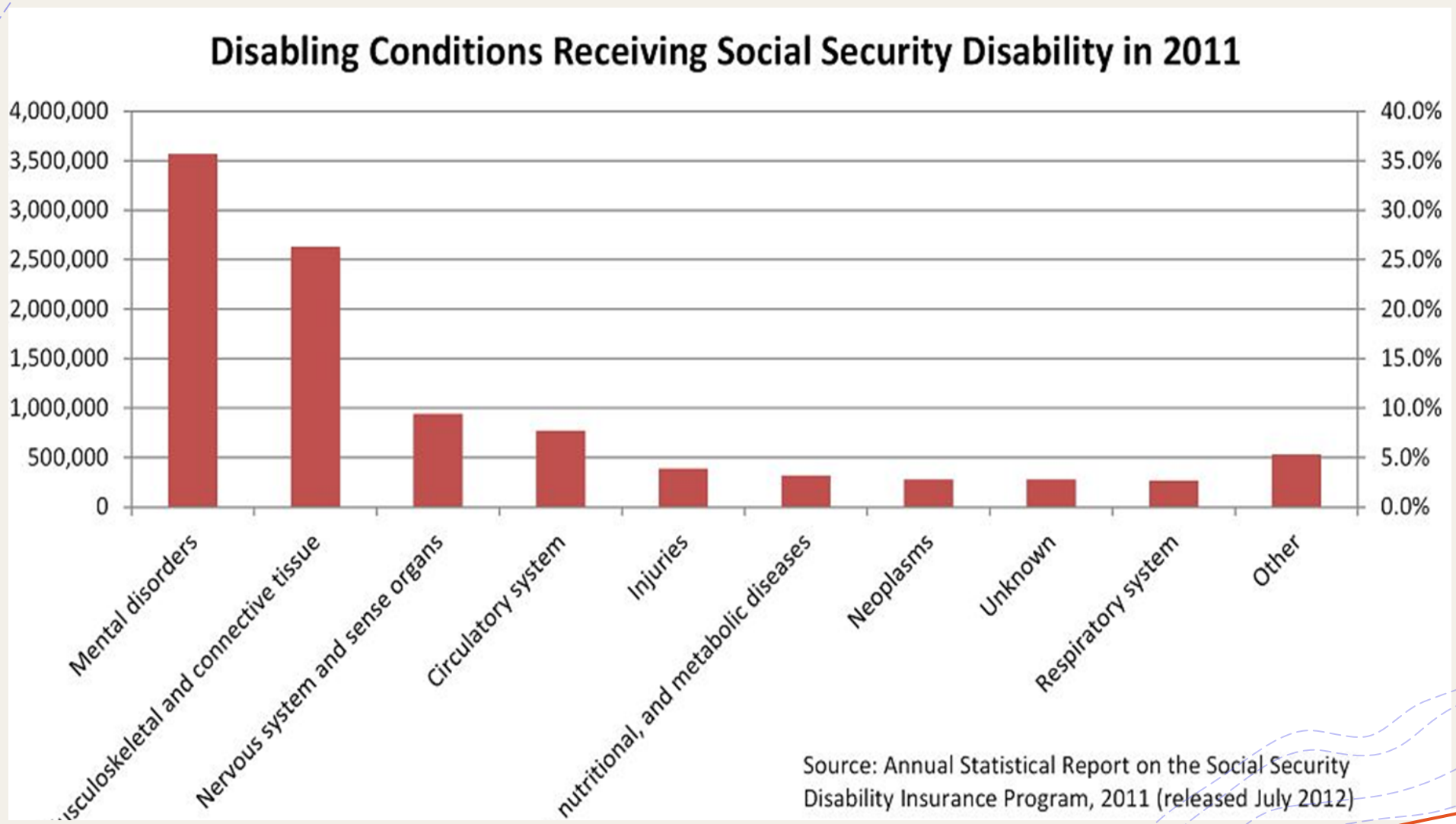
+ 1 in 5 Canadians will have a mental health problem at some point during their life.

Top Five Most Frequent Disabling Conditions
(percentage of respondents)



Note: Respondents were asked to select the top three conditions.
Source: Towers Watson, *Pathway to Health and Productivity*.


Health Issues with Depression Lead to Longer Absences
Increase in Average Duration with Depression
Chronic Fatigue
100%
Irritable Bowel Syndrome
63%
Pregnancy with normal delivery
39%
Unspecified Essential Hypertension
28%
Backache, unspecified
25%
Myalgia and Myositis
23%
Cesarean without complications
16%
Primary Diagnosis
With Depression
Without Depression
0
20
40
60
80
100
Average Short-Term Disability Duration


Disabling Conditions Receiving Social Security Disability in 2011
4,000,000
3,500,000
3,000,000
2,500,000
2,000,000
1,500,000
1,000,000
500,000
0
40.0%
35.0%
30.0%
25.0%
20.0%
15.0%
10.0%
5.0%
0.0%
Mental disorders
Musculoskeletal and connective tissue
Nervous system and sense organs
Circulatory system
Injuries
nutritional, and metabolic diseases
Neoplasms
Unknown
Respiratory system
Other
Source: Annual Statistical Report on the Social Security Disability Insurance Program, 2011 (released July 2012)

Categorizing Psychiatric Illness

The Diagnostic and Statistical Manual of The American Psychiatric Association – DSM-IV-TR

- Axis I The psychiatric disorder e.g. Major Depression
- Axis II 1. Personality Disorder
  - 2. Mental Handicap
- Axis III Medical Diagnosis e.g. Diabetes
- Axis IV Psychosocial stressors
- Axis V Global Assessment of Functioning 0 – 100
- e.g. 51 – 60 moderate symptoms or moderate difficulty in social or occupational functioning

Still used by many insurance companies.

DSM-5

- The Diagnostic and Statistical Manual of The American Psychiatric Association – DSM-5
- In use since the spring of 2013
- Major Changes:
  - No axis system, all diagnoses both psychiatric and medical are simply listed.
  - New section on Trauma and Stress Related Disorders.
  - No use of Global Assessment of Functioning Scale GAF (Axis V). Can use the World Health Organization Disability Assessment (WHODAS 2.0) but this is not in common usage.
- There is no section on Disability

What is the duty to accommodate?

Since the 1990 Supreme Court of Canada decision, *Central Alberta Dairy Pool v. Alberta (Human Rights Commission)*, Canadian employers have been under a duty to accommodate their employees.

The duty to accommodate requires employers to undertake genuine and thorough investigations to determine whether an employee who is protected by one or more grounds in the relevant human rights legislation can be accommodated without causing undue hardship to the employer.

The duty is incumbent upon all actors in the workplace including the employer, collective bargaining units, the employee seeking the accommodation and other employees- however, the greatest onus is on the employer who presumably has primary control over the operations of employment.

The duty applies to all stages of the employment relationship, including the hiring stage, leave due to disability and, in some cases, even post-termination.

The Current Test- *Meiorin*

- In 1999, the Supreme Court of Canada clarified and expanded the duty to accommodate in the *Meiorin* case
- *Meiorin* was a case which dealt with the human rights implications of a fitness test used to select forest fire-fighters in B.C., where the application of the test resulted in a pass-rate for men that was double that of women. Ms. Meiorin was unable to meet the standard and was laid off.
- The Court combined *direct* and *indirect* discrimination into one discrimination standard and articulated a new test for the duty to accommodate comprised of two steps:
- First, the employee must establish that (onus of proof on the employee):
    1. He or she is part of a protected group covered by the governing human rights legislation;
        - In BC, the protected grounds are Age, Ancestry, Colour, Family status, Marital status, Physical and mental disability, Place of origin, Political belief, Race, Religion, Sex (including gender and pregnancy), Sexual orientation, and Unrelated criminal conviction); and
    2. There is a relationship or nexus between the protected ground and the failure by the employer to provide an accommodation.

Meiorin- cont'd…

- Second, the employer must justify its decision not to accommodate the employee; this is referred to as the *Meiorin* test (onus of proof on the employer).
- Under the *Meiorin* test, the employer would have to establish that:
  - The employer adopted the standard for a purpose rationally connected to the performance of the job;
  - The employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfillment of that legitimate work-related purpose or in other words, that it is a *Bona Fide* Operational Requirement (BFOR); and
  - The standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer.

Meiorin- explained

Step one of the *Meiorin* test requires that the employer establish that the rule or standard is rationally connected to the performance of the job. This goes to the general purpose of the standard, not its validity or application in the specific case. Employers generally have little difficulty in satisfying this first step.

Step two of the *Meiorin* test requires that the employer establish that the rule or standard was adopted honestly and in good faith. This step ensures that the employer did not create a rule that appeared neutral on its face but was intended to discriminate in its effect. This is also generally not a difficult step for the employer to satisfy.

The Third Step

Step three requires the employer to establish that the standard is reasonably necessary for the accomplishment of the workplace objective. To satisfy the third step, the employer must establish that it cannot accommodate the employee short of undue hardship.

The Court in *Meiorin* emphasized that the accommodation standard is "uncompromisingly stringent" and must accommodate the "unique capabilities, worth and dignity" of the individual employee. In addition, the Court stated that the employer has to prove it was "impossible" to accommodate the individual, short of undue hardship, and stressed the importance of common sense and flexibility on the part of the employer. This step is clearly the most difficult for employers to satisfy.

The Third Step

- In fulfilling the third step, the Supreme Court directed employers to ask themselves the following:
  - Has the employer investigated alternative approaches that do not have a discriminatory effect, such as individual testing against an individually sensitive standard?
  - If alternative standards were investigated and found to be capable of fulfilling the employer's purpose, why were they not implemented?
  - Is it necessary to have all employees meet the single standard for the employer to accomplish its legitimate purpose or could other standards reflective of group or individual differences and capabilities be established?
  - Is there a way to do the job that is less discriminatory while still accomplishing the employer's legitimate purpose?
  - Is the standard properly designed to ensure that the desired qualification is met without placing an undue burden on those to whom the standard applies?
  - Have other parties who are obliged to assist in the search for possible accommodation fulfilled their roles?

Additional Factors

- Lastly, the Supreme Court of Canada expressed two additional factors that employers must keep in mind:

1. The employer must be aware of the differences between individuals and groups, and ensure that they do not necessarily apply the standards in the same way to all employees
2. They must build conceptions of equality into the standards themselves, which imposes a positive obligation to be proactive in extracting unintentional discriminatory barriers

So, What is Undue Hardship?

In *Hydro-Québec*, the SCC clarified the meaning of “undue hardship”.

+ The test for undue hardship is not total unfitness for work in the foreseeable future. Rather, if the characteristics of an illness are such that the proper operation of the business is hampered excessively or if an employee with such an illness remains unable to work for the reasonably foreseeable future despite the employer having tried to accommodate him or her, the employer will have satisfied the test.
+ The 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.

What Constitutes Undue Hardship?

Safety is the undue hardship factor that is most often accepted by arbitrators and human rights tribunals. However, perfect safety has not been accepted as a compelling argument; courts have found that employers must be willing to take on a certain degree of risk in order to achieve accommodation.

Preservation of collective agreement rights can be a justified undue hardship factor if an employer has other viable alternatives to creating a suitable accommodation that would not interfere with bargained employment rights in a unionized workplace. If no other reasonable accommodation is available, then the collective agreement right can be waived in order to achieve the accommodation.

The legitimate operational requirements of the workplace is a commonly used undue hardship factor. Where a requested accommodation would breach fundamental employment fairness or place an undue strain on the operations of the workplace, it can qualify as undue hardship.

What Constitutes Undue Hardship?

Employee Morale has been limited in its application. The mere fact that other employees object to an accommodation is insufficient to justify undue hardship, unless the accommodation interferes with the objecting employees' rights.

Cost has only occasionally been successful where the expense of creating the accommodation would significantly affect the viability of the employer's operations.

Interchangeability of workforce and facilities has rarely been successful in a defence of undue hardship. Rather, it operates as a reminder that the larger and more complex an operation, the greater the onus on an employer to find a reasonable accommodation.

Important Take-aways

- Undue hardship is an onerous standard; if you don't think you've met it, you probably haven't.

- *Meiorin* and subsequent case law changed the law by requiring employers to build accommodation and equality into workplace standards themselves, rather than simply remedying the effects of discrimination.

- In other words, design workplace standards at the front-end in a way that reflects the differences between individuals and builds equality into those standards.

Important Take-aways cont'd…

- Sometimes, meeting those standards may mean individual assessments of employees rather than a collective standard. The fundamental idea behind this was explained by the Court in *Meiorin:*

> "…there may be different ways to perform the job while still accomplishing the employer's legitimate work-related purpose…The skills, capabilities and potential contributions of the individual claimant and others like him or her must be respected. Employers, courts and tribunals should be innovative yet practical when considering how this may be best done…" (para. 64)

- Lowering the standard in order to accommodate is not objectionable if the standard has been artificially set too high in order to keep out particular groups and is not a true measure of what is necessary to perform the job.

Case Study – Undue Hardship:
Thanh v. BC Ministry of Public Safety and Solicitor General 2020

+ In this recent case, the complainant employee suffered serious mental injury while working as a community coroner
+ He developed PTSD as a result and did not return to work
+ The employee filed a human rights complaint, alleging that the respondent employer failed to accommodate his disability, but the complaint was dismissed
+ Modifying the role to exempt attendance at scenes of death would alter the very function and purpose of a coroner, and impose undue hardship onto the employer

The *Bona Fide* Operational Requirement

- The doctrine of the *"bona fide* occupational requirement (BFOR) refers to employment limitations – such as mandatory retirement at a fixed age – which must be imposed honestly, in good faith, and in the sincerely held belief that such limitation is imposed in the interests of the adequate performance of the work involved with all reasonable dispatch, safety and economy and not for ulterior or extraneous reasons aimed at objectives which could defeat the purpose of human rights legislation
- It must be related in an objective sense to the performance of the employment concerned, in that it is reasonably necessary to assure the efficient and economical performance of the job without endangering the employee, their fellow employees, or the general public.

Case Study – *Bona Fide* Occupational Requirement: *Stewart v. Elk Valley Coal Corp* 2017 SCC 30

- In this case, the SCC affirmed that the firing of an employee following an onsite accident and a positive drug test was not a discriminatory act.
- The employer had a clear drug and alcohol policy in place, which allowed employees to voluntarily seek treatment without fear of discipline except in the event where treatment was sought after a workplace incident
  - Further, Although Mr. Stewart was immediately terminated, he was offered the opportunity to apply for employment after six months, provided that he completed a rehabilitation program at a recognized facility.
  - The employer agreed to pay 50 percent of the cost of the program on certain conditions being met. There was also evidence that there would have been vacant positions available had Mr. Stewart applied for employment after completing the program.
- The SCC held that this policy involved *bona fide* occupational requirements and thus satisfied the test for accommodation to the point of undue hardship
- Thus the SCC affirmed that the employee was terminated for breaching company policy, not for his addiction.

Let's Play "Guess the Decision"!

Datt v. McDonald's Restaurants (No. 3), 2007 BCHRT 324

- Facts: Beena Datt worked at the same McDonalds for 20 years before she developed a skin condition that prevented her from meeting the restaurant's hand-washing policy. Ms. Datt was unable to work for long periods of time, was on disability benefits, tried a number of different treatments and unsuccessfully attempted to return to work three times. Ms. Datt's doctor eventually stated that she could not work in a restaurant at which point McDonalds terminated her employment.

- McDonalds argued that:
  - It has a strict hand-washing policy to meet health and food safety requirements;
  - Restaurant employees work as a team and all positions must help as needed;
  - It had accommodated three lengthy absences and return-to-work attempts;
  - And the employee's own doctor had determined that she could not work in a restaurant

- Was the hand-washing standard appropriate and did McDonalds meet its duty to accommodate?

Decision

The B.C. Human Rights Tribunal found that McDonalds had failed to meet its duty to accommodate

Ms. Datt no longer wanted to work for McDonalds after the complaint process, so reinstatement was not ordered. Instead, she was awarded $55,000 in damages, including lost wages and profit-sharing benefits, extra compensation for the tax effect of a lump-sum payment, reimbursement of some expenses, and $25,000 for injury to “dignity, feelings, and self-respect.”

The Tribunal noted that if she had provided expert evidence about her employability and earnings potential, she could have been awarded an amount for future wage loss as well.

Lessons

Although it may seem that the Tribunal was insensitive to the realities of business operations, there are a number of lessons that may be learned from this decision:

- An employer must be “innovative, yet practical, in considering how to accommodate a disabled employee.”
- An employer must discuss the disability and options for accommodation with that employee. In that regard, the Tribunal was particularly sensitive to the fact that McDonalds was not open to considering what Ms. Datt had to say, her suggestions for a change in duties or whether other jobs were available.
- An employer must consider other jobs that are available or jobs that may be modified to achieve accommodation. This includes the bundling of duties which may result in a new position altogether.

Let's Play "Guess the Decision"!

Mazuelos v. Clark [2000] B.C.H.R.T. No. 1

+ Facts: The Complainant, Ms. Mazuelos, had been hired to care for the employer's two young children. She subsequently became pregnant and informed her employer, Clark, that she was having difficulty coping with morning sickness and nausea. Clark dismissed her because she did not believe that she would be able to adequately care for the children.

+ Did the employer meet her duty to accommodate?

Decision

The Tribunal found that the employer should have made a greater effort to determine Mazuelos' present and future capacity to perform her job. By way of illustration, the tribunal proposed that Clark should have asked whether the complainant was using anti-nausea medication or given her a chance to perform under supervision before terminating her employment.

The complainant was awarded one month of wages and $1,500 in compensation for harm to dignity and self respect.

Lessons

- This case is a part of a line of authority that has held that the obligation to accommodate prompts a **separate duty to investigate or inquire into the nature of an employee's disability**, including severity, impact and anticipated duration, and whether there is a **relationship between the disability and workplace performance**, before deciding on how to accommodate.

- The question is not only did you know of the disability but should you have known of it? Constructive knowledge is sufficient to trigger the duty to accommodate a disability.

The *Gooding* Decision

+ Mr. Gooding was the manager of a liquor store operated by the BC government. He was terminated after being caught stealing alcohol. When confronted, he admitted that he was an alcoholic and apologized for his behaviour. Initially, he was suspended without pay and eventually terminated after the completion of the employer's investigation. Shortly after his termination, Mr. Gooding entered a rehab program and was successful in achieving sobriety.
+ In the majority decision of Huddart J., the BC Court of Appeal held that Mr. Gooding had not proven a *prima facie* case of discrimination and the employer's duty to accommodate had not been triggered.
+ Madam Justice Huddart held at para. 11:

> [11] ...The fact that alcohol dependent persons may demonstrate "deterioration in ethical or moral behaviour", and may have a greater temptation to steal alcohol from their workplace if exposed to it, does not permit an inference that the employer's conduct in terminating the employee was based on or influenced by his alcohol dependency.

The *Gooding* Decision

- In other words, the focus is on whether the employer terminated the employment **because** of the disability.
- The decision suggests 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.
- The *Gooding* decision demonstrated a significant shift in the treatment of disability and termination by the courts. Many arbitrators have distinguished *Gooding* or altogether refused to follow it and instead use the old "hybrid" approach which separates those parts of the misconduct for which the employee is culpable and those for which he is not culpable by virtue of disability. It is not always clear how an arbitrator will approach the issue.

Lessons

Even in cases where termination seems reasonable, such as termination of an employee who commits theft, The Human Rights Tribunal, Labour Relations Board and the courts may arrive at opposing conclusions.

In addition, consider that this matter took **more than ten years to resolve**. Many businesses would not be able to carry on litigation for so long. This is why it is advisable to seek legal advice on termination and accommodation before taking any steps, no matter how egregious the employee's offence.

Knowledge of the Disability is not enough to establish discrimination

- *Ryan v. Canada Safeway Ltd*., 2008 BCHRT 12 (B.C. Human Rights Trib.) is a case in which an alcohol-dependent employee stole money from the cash register and subsequently returned it. Evidence was tendered that considered the extent to which Ms. Ryan's substance abuse problem may have played a role in the conduct giving rise to the termination of her employment.
- The Tribunal held:

> Assuming that Ms. Ryan were able to establish at hearing that the Employer knew or ought to have known that she was an alcoholic, that alone would not be sufficient for her to establish discrimination on the basis of disability. It is not enough to show that one is disabled, that that fact was known or ought to have been known to the Employer, and that one was treated adversely. In order to succeed in her complaint against the Employer, Ms. Ryan would also have to show that there was a connection between her alcoholism and the misconduct for which she was terminated. The Tribunal's case law refers to the required connection as a "link" or "nexus": (para. 25)

Multi-Party Duty

+ Accommodation is everybody's business and responsibility

+ Employer

+ Employee

+ Union

Employer's role in DTA

- Duty to Inquire
- Duty to consider individual circumstances and explore/assess accommodation options
- Duty to provide accommodation to the point of undue hardship

Employee's Role in DTA

- Raise need for accommodation
- Must participate, cooperate, assist and facilitate the search for reasonable accommodation
- Must provide sufficient information for the Employer to know generally what the problem is and what accommodation is needed
- Employee is not entitled to perfect accommodation

Union's Role in DTA

- Duty to accommodate if negotiated terms and conditions are discriminatory
- Duty to facilitate and cooperate in the accommodation process
- May have to consider alternatives that affect collective agreement and other bargaining unit members in order to achieve reasonable accommodation

Duty to inquire:

+ *Mackenzie v. Jace Holdings (No.4)*, 2012 BCHRT 376

+ **Facts:** Ms. Trotter worked for Thrifty's for several years. In that time she often exhibited mood swings, irritability, became tearful during meetings and had gone on a two month stress leave. She did not tell the employer she was suffering from depression and was eventually terminated.

Decision:

- Thrifty's had a **duty to inquire into whether the behaviour exhibited by Ms. Mackenzie was due to her mental disability and whether she required any accommodation.** They did not fulfill that duty. Thrifty's dismissed Ms. Mackenzie because of behaviour she exhibited; particularly mood swings, irritability and being manipulative which was consistent with her diagnosis of adjustment disorder and depression…I find that part of the reason for Ms. Mackenzie's dismissal was due to discrimination. **Any issue of *bona fide* occupational requirements and any accommodation of Ms. Mackenzie's disability cannot be answered until the duty to inquire has been fulfilled .** [paras 50-51]

Lessons

+ The employer should have reasonably understood that the employee's depression was affecting her work performance and should have made efforts to accommodate her, despite not knowing for certain that she was suffering from a disability.

Salazar v. J.S.L. Investments Corporation, 2020 AHRC

- Employee was employed as a dental assistant from January 2011 to January 2013, when she commenced sick leave for major depressive disorder requiring hospitalization, and attendance at a day program for one month
- She requested to return to work one to two days per week.
  - Her employer requested to contact her psychiatrist directly, to which she agreed.
  - After a call between her employer and psychiatrist, the employer terminated her employment via text message
- The employer's reason for this was that the demand of patients would be too stressful for her, given the severity of her depression, and the employer could not accommodate her request to work one to two days weekly

Decision

- Both reasons for the employees termination of employment related to her mental disability.
- The employer failed in both procedural and substantive aspects of the duty to accommodate:
  - The employer did not ask the employee if she could work more than two days per week and never asked if she would be able to return to work full time at some point
  - Then employer did not discharge their duty to at least enquire about the request from the employee, or about the employees actual medical limitations or requirements
    - The Tribunal held that this in and of itself constituted a failure to accommodate

Employee vs. Employer Obligations re the Duty to Accommodate

- *Foley v. Local Venture* 2018 BCHRT 232
  - The employee in this case alleged that his employer discriminated against him on the basis of mental disability when it terminated his employment
  - Following his leave of absence to attend residential addictions treatment program, the employee claimed that his employer pressured him to divulge the reason for his leave of absence
  - He continued to miss work regularly and was eventually terminated due to frequent absenteeism
  - The employee claimed that he had a mental disability both due to ADHD and substance addiction

Foley Cont'd

- Decision:
  - The BC Human Rights Tribunal dismissed Foley's claim
  - His employer did not know of Foley's addiction, and Foley failed to prove that all of his absences were related to his disabilities
    - His addiction thus was not a factor in the employer's decision to dismiss
  - Employer **must know, or ought reasonably to know**, that an employee is suffering from a disability before the **duty to accommodate** will arise
    - It is the employee's obligation to communicate the nature of their disability to the employer
  - Where an employee effectively declines to participate in the accommodation process, he cannot successfully complain of his employer's failure to reasonably accommodate

Duty to consider individual circumstances

Davis v. Sandringham, 2015 BCHRT 148

- **Facts:** Employee worked as Resident Care Aide at a psychogeriatric care facility for over 1 year with no performance issues. A co-worker she confided in about suffering from PTSD told the Manager to “check-in” with the employee. The employee was interrogated in a meeting and after disclosing her PTSD, her employer ordered her to attend the Emergency Department for medical treatment and placed her on medical leave.

Decision:

- “If there is a work performance issue and it is reasonable for an employer to query whether the work performance issue may be related to a disability, an employer is required to inquire whether the employee requires an accommodation and, if so, to provide medical documentation….That is not the case here. Mrs. Davis did not request a workplace accommodation, there is no evidence that she had job performance issues related to a disability and there was no other reasonable basis for the employer to believe that her mental health could impact her ability to do her job.” [para 328]

Lessons:

Tribunal found the Employer's behavior was discriminatory. The Manager reacted **based on mistaken and stereotypical assumptions about the nature and extent of the employee's mental illness**.

Employers are often not doctors. **If there are performance issues, employers should ask for medical evidence or documentation before making decisions**.

Benton v. Richmond Plastics 2020 BCHRT 82

- In this case, the employee was hired to work for the respondent employer
- Benton's co-workers had a negative first impression of her. They described her as odd, unprofessional, nervous, talking loudly, not making eye contact, and wearing an inappropriate outfit.
- Her employment was terminated by the Chief Financial Officer who explained that Benton was being terminated because she did not disclose her medications, and that makes her feel "uncomfortable."
- The employee filed a human rights complaint, alleging discrimination based on mental disability

Decision

- The Tribunal pointed to the suspicious timing of Benton's termination in finding evidence of discrimination
  - She was terminated mere hours after disclosing her mental illness
- Benton having been told that she was being terminated explicitly because of her mental health disclosures was further evidence of discrimination
- The Tribunal, in handing down its decision emphasized that mental illness did not have to be the only cause – or even the primary cause – for Benton's termination, and awarded her $30,000 for injury to dignity as well as $35,000 for 12 months' wage loss.
  - "It is not necessary for Ms. Benton to prove that her mental illnesses were an overriding factor in the decision, or the only cause underlying it. Rather, it is enough for the purposes of human rights law that it be one factor."

Lessons

The duty to accommodate is owed to all employees, even those employed for short periods of time.

- Benton received $65,000 in damages despite having only worked at Richmond plastics for one day
- Benton's mental health declined severely, and did not begin to recover until almost a year after the discrimination

It is crucial to remember that while there may be other non-discriminatory factors that contribute to termination, what really matters is that a mental disability (or other protected characteristic) is a factor.

Chalifour v. HepCBC Hepatitis C Education and Prevention Society and another, 2019 BCHRT 216

- The complainant was an Indigenous employee who filed a complaint against HepCBC Hepatitis C Education and Prevention Society, and another individual respondent alleging discrimination on the basis of race and mental disability
- She alleged that the movement of a needle and paraphernalia exchange into the same building as the Society's office had an adverse impact on her by exposing her to situations that exacerbated her disability: Post-Traumatic Stress Disorder
- She stated that she was subject to adverse treatment in which both her race and her disability were a factor
- This adverse treatment included exposure to violence in the workplace and insensitive comments
- She claimed this treatment culminated in a discriminatory letter from the Society which suggested that she was a victim of intergenerational trauma who was too traumatized to effectively carry out the duties of the position

Decision

- The respondents applied to dismiss the complaint on the basis that it had been dismissed already by the Workers Compensation Board
- But the BCHRT denied the respondents' application to dismiss the claim
  - The Workers Compensation Board did not consider the employee's allegations that her race was a factor in the Society's adverse treatment of her during her employment, or that she was subjected to an environment and conduct that exacerbated her disability
  - **Nor did the Worker's Compensation Board address the issue of whether the Society failed to adequately accommodate her**
- The BCHRT allowed the complaint to continue towards a hearing or alternative dispute resolution process.

Mental Disability and Poor Performance

- Disciplining or terminating an employee with a mental disability or addiction, even if it is for serious misconduct or poor performance may trigger potential legal and human rights liabilities.
- If an employee can prove a nexus or a causal link between the mental illness and the termination or discipline, then a *prima facie* case will be established that the dismissal is discriminatory. In these circumstances, the duty to accommodate arises and the employer must accommodate the employee to the point of undue hardship.
- In other words, 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 or that they were the employer's reason for termination.

Sometimes Discipline/Dismissal is Justified

- In *BCTF and Teachers' Federation Employees' Union (Bradshaw), Re*, 2014 CarswellBC 2814 (B.C. Arb.), a case in which an employee made threats against other employees, the Arbitrator stated that in the determination of whether inappropriate conduct is blameworthy:

  > ...it is important to understand that even if some inappropriate conduct is found to be non-culpable, having occurred as a result of some medical condition, it may still give rise to a right in the employer to terminate the employee's employment. If the inappropriate conduct continues despite the employer's efforts to accommodate it or alleviate it, the employer may ultimately be entitled to terminate the employee's employment on non-culpable grounds [resulting from the disability] if the employer can establish that it is no longer receiving its side of the bargain under the employment contract and will not likely receive it in the future.

Performance Standards

- Certain disabilities make usual performance standards that organizations use, like minimum production rates, completion deadlines, punctuality requirements, or attendance, difficult to meet.
- Though the standards are facially neutral, it may be that they adversely affect those employees who suffer from disabilities. Insofar as the performance standards are a *Bona Fide Operational Requirement* and are not being met, the employer will be able to justify the need for these standards and if, after exploring accommodation options up to the point of undue hardship, the employer is unable to accommodate the employee, then termination may be justified.
- This is the same standard that is applied for all discriminatory standards under the *Meiorin* test.

Disciplinary Measures

- Subjecting a disabled employee to discipline is not necessarily unjust.
- Only where the behaviour leading to discipline is actually caused by the disability can there be discrimination. The duty to accommodate will then arise, but only after the employer is notified or ought to have investigated and discovered, that accommodation is required.
- In cases of mental disability, the disability itself can affect the employee's ability to recognize his or her own needs and hinder his or her ability to make an accommodation request. As such, employers may be held to a higher standard when it comes to investigating whether there is a disability issue.

The Duty Continues

Sometimes, the duty to accommodate arises after disciplinary measures have been imposed, such as when new medical evidence becomes available.

In one case, *Re Canada Safeway Ltd. And U.F.C.W., Loc. 401* (1992), 26 L.A.C. (4th) 409 (Alta. Arb.), an arbitrator found that new medical evidence gave rise to a duty to accommodate nearly two years after an employee was discharged.

In *Re Babcock and Wilcox Industries Ltd. and U.S.W.A., Loc. 2859* (1994), 42 L.A.C. (4th) 209 (Ont. Arb.), evidence of reactive depression was brought to an employer after the employee was discharged. The employee was reinstated.

In *Re Calgary Co-operative Assn. and Calco Club* (1992), 24 L.A.C. (4th) 308 (Alta. Arb.) and employee displayed rude behaviour towards customers as a result of frontal lobe behaviour caused by 15-year-old brain injury. Evidence of this arose after discharge and the employee was reinstated.

Failure to discharge the duty to accommodate mental illness

+ *UBC v. Kelly*, 2015 BCSC 1731

+ After graduating the Undergraduate Medical Program at the University of Alberta, Dr. Kelly was admitted to UBC's Family Medicine Residency Program.
+ Despite attempts to accommodate his Attention Deficit Hyperactivity Disorder (ADHD) and Non-verbal Learning Disorder, the Program Director dismissed him from the Program concluding that he could not meet the required Program standards.

Decision:

- Tribunal found UBC discriminated against Dr. Kelly because his disability was “a factor, if not the sole factor in his adverse treatment.”
- Tribunal awarded Dr. Kelly $385,194 for lost wages and $75,000 for injury to dignity, feelings, and self-respect (this amount was more than double the highest previous award for such injury of $35,000)

- UBC sought judicial review…..
  - The BC Supreme Court reviewed the Tribunal’s decision and upheld the decision on its merits and the award for lost wages.
  - Court found the $75,000 award excessive and patently unreasonable and remitted the matter back to the Tribunal for reassessment.
  - However, the court inferred that the award could be higher than $35,000: “I refrain from suggesting that Dr. Kelly’s award for this injury should not be more than $35,000. It may well be that a higher award than the previous high is appropriate in the circumstances of this case.”

Reliance on Reports from Family Doctors

+ The Family Doctor is an advocate for the patient.
+ In psychiatric illness, FD's rely on what their patients tell them.
+ They consider their patients to be truthful.
+ FD's frequently are adversarial with employers or insurance agencies.
+ Need to ask very specific questions on any forms; example, all 5 Axes of DSM-IV-TR or full diagnosis using DSM-5.

Independent Medical Examinations

No doctor patient relationship.

Not an advocate for either party.

Will consider malingering or symptom exaggeration.

Have appropriate time to conduct a thorough examination.

Need access to all records:

- Family doctor
- Specialist
- Hospitals
- Employment
- School

Malingering

- Survey of American Board of Clinical Neuropsychology
  - Probable malingering / symptom exaggeration
    - 29% personal injury
    - 30% disability
    - 8% medical cases
    - 41% mTBI (mild traumatic brain injury)

Mittenberg, J Clinical Exp. Neuropsychiatry 2002, 24: 1094-1102

Medical Information

What does the Collective Agreement provide for?

BALANCE: employee privacy rights and the need for the employer to have information to run its business

What is reasonably necessary in the circumstances

What is the least intrusive means

The scope and type of information that is reasonably necessary may change

Possible Accommodations

- Ongoing or periodic absences
- Reduced Hours
- Light or restricted duties
- Bundling duties
- Shift re-assignment or rescheduling
- Transfer (with or without restricted duties)
- Training or trial periods

Recent Updates to Human Rights Law in BC

- In 2020, the BCHRT released a Report entitled “Expanding Our Vision: Cultural Equality & Indigenous Peoples Human Rights, addressing serious access to justice concerns for Indigenous Peoples bringing human rights complaints to the Tribunal
- The Report discusses access to justice issues facing Indigenous claimants, and makes recommendations to broaden the concept of human rights, including:
  - Adding Indigenous Identity to the BC Human Rights Code; and
  - Incorporating Indigenous legal traditions and international human rights principles as reflected in the UN Declaration on the Rights of Indigenous Peoples, which BC has committed to implementing through legislation
- In January 2021, the Tribunal appointed Indigenous Members in order to prioritize increasing Indigenous representation within the Tribunal
- Adding Indigeneity as a protected characteristic takes into account circumstances and experiences uniquely faced by Indigenous peoples in Canada

In Conclusion

It is important for employers to be aware of employees' particular situations. Inquire where necessary. Be aware of what managers know and what they ought to know about individual employees.

Listening and engaging the employee in meaningful discussions can go a long way in proving accommodation.

Before taking any drastic steps such as termination, be creative in creating a comprehensive accommodation plan. Consider if other positions are available or if it is possible to modify existing positions to achieve accommodation.

Remember that accommodation can be a long game and courts will likely not find that the passage of time, previous attempts at accommodation or cost will prove undue hardship.

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