Arbitrators rule on employee blogging conduct – dismissal may be warranted

Although internet "blogging" is a relatively new phenomenon, it has recently attracted interesting arbitral consideration in the Canadian employment law context. Three grievance arbitrations alleging unjust discharge have recently been decided, each one involving the dismissal of an employee because of the content in their website blogs. Although the arbitration decisions are based heavily on the particular facts of each case, collectively they establish that where an employee's blogging conduct is serious enough to irreparably undermine the employment relationship, or, where the conduct adversely impacts the legitimate business interests of the employer, disciplinary action, even up to dismissal, will be warranted.

IRREPARABLY DAMAGING THE EMPLOYMENT RELATIONSHIP

In *Alberta v. Alberta Union of Provincial Employees* (April 2008), the employee began blogging as a type of therapy by which she would express her thoughts and keep an on-line diary. Although much of the content was of a personal, non-work nature, the posts that gave rise to the termination discussed the employee's workplace, supervisors and co-workers, often in extremely unflattering terms.

One such blog, entitled "Aliens Around the Coffee Table," mercilessly ridiculed six of the employee's co-workers. This post was characterized as "malicious, insulting, nasty, [and] disrespectful." In other posts, the employee referred to her workplace as a "lunatic asylum," her supervisor as "Nurse Ratched," and described management as "imbeciles and idiot savants." Although the employee used pseudonyms for her co-workers, they were nevertheless identifiable to those in the workplace and perhaps beyond.

Upon becoming aware of the blog, management conducted an investigation and interviewed the employee. In the course of the interview the employee was largely unrepentant. The employer terminated the employment relationship on the basis that the contents of the blog had irreparably undermined the employment relationship.

In considering the merits of the decision to terminate, the Arbitration Board gave considerable weight to the effect the blog had on the workplace environment. Co-workers testified to their anger, their feelings of betrayal, and the emotional distress they suffered as a result of the employee's comments in her blog. One witness stated that they were "poisonous to the workplace" and "devastating to some individuals." The Board stated,

> "It is the Board's decision to deny the grievance. While the Grievor has a right to create personal blogs and is entitled to her opinions about the people with whom she works, publicly displaying those opinions may have consequences within an employment relationship. The Board is satisfied that the Grievor, in expressing contempt for her managers, ridiculing her co-workers, and denigrating administrative processes engaged in serious misconduct that irreparably severed the employment relationship, justifying discharge."

The decision in *Alberta* to deny the grievance was consistent with the decision in *Chatham-Kent (Municipality) and C.A.W. –Canada, Loc 127* (March 2007), a case involving very similar circumstances. In *Chatham*, the employee, a Personal Care Giver at a Home for the Aged, was advised by the employer Municipality that her employment was being terminated for breach of confidentiality, insubordination, and for conduct unbefitting a Personal Care Giver, all as a result of the content on her website blog.

The blog contained information and pictures of residents contrary to a Confidentiality Agreement the employee signed. The blog also contained inappropriate comments about certain residents, fellow employees, and management. The issue before the Arbitrator was whether the employee's conduct provided just cause for discipline, and whether termination of the employment was the appropriate response. In upholding the discharge and dismissing the employee's grievance, the Arbitrator stated,

> "Ms. Clarke has provided the employer with just cause to impose discipline on a number of grounds…First, by a breach of the confidentiality agreement and disclosing residents' personal information on a blog accessible to the public. Second, by making insubordinate remarks about management, work procedures, management decisions, and the general running of the Home and placing those on a blog available to members of the public. Third, that the nature of her comments, their hostility, and the language used to express them, demonstrated a disregard for residents' need for care, and that this was conduct unbefitting a Personal Care Giver in a Home for the Aged, as well as it being inappropriate for her to make the critical comments that she did on a public blog about some of her fellow employees."

In both *Alberta* and *Chatham*, it was the public nature of the blog, and the employees' intent to make the comments in a public forum, which established the necessary intersection between the employees' otherwise personal, off-duty conduct, and the interests of the employer.

IMPACTING THE LEGITIMATE BUSINESS INTERESTS OF THE EMPLOYER

The intersection between the employee's conduct in a blog and the interests of the employer are best illustrated by the decision in *EV Logistics v. Retail Wholesale Union, Local 580* (January 2008). In *EV Logistics*, the employee, a forklift driver at a

distribution facility, maintained a blog in which he identified both himself and his employer by name. The blog contained racist comments, and celebrated Nazism, Hitler, and violence. The various entries in the blog were characterized as ranging from "banal and bizarre to disturbing and hateful" and when the employer became aware of the blog the employee was dismissed.

The issue before the Arbitrator was whether the off-duty conduct of the employee was a disciplinary concern to the employer. Although the union argued that there must be evidence of actual harm before an employee's off-duty conduct is actionable, the Arbitrator disagreed. He stated,

> "Obviously measurable harm to an employer will make the case for an employer clearer and stronger. However, where the employment identity is linked to off-duty conduct that is sufficiently abhorrent or reprehensible, harm can be presumed, provided of course there is public access to the conduct. That condition applies here…Clearly, there was a serious reputational risk to the employer and the employer had the right to respond to the misconduct that caused the risk."

Interestingly, in *EV Logistics*, although the employer was found to have the right to action the conduct, the Arbitrator held that dismissal was not justified in the circumstances. This was based on the following factors which, for the most part were not present in *Alberta* or *Chatham*:

- The identification of the employment relationship was coincidental to the employee's conduct. The employer, individual employees, customers, and products were not specifically attacked or criticized.
- The employee closed down his blog as soon as he was contacted about it demonstrating a mature and responsible response.
- The employee immediately prepared and gave to the employer a letter of apology that accepted full responsibility and expressed shame and humiliation for what he had said and done.

The Arbitrator was persuaded that the employee had the capacity to satisfactorily reintegrate himself into the workplace and therefore reduced the disciplinary penalty of discharge and directed that the employee be reinstated. The period of time from the date of the termination of employment to the date of reinstatement was treated as a disciplinary suspension without wages or compensation.

In our view

The employees' conduct during the employers' investigations were an important factor in each of the Arbitrators' decisions. In *Alberta*, the employee was unrepentant and upon termination reportedly warned, "You ain't seen nothing yet." This unapologetic attitude

continued through the hearing, and was an important factor in the upholding of the termination. By way of contrast, in *EV Logistics*, upon becoming aware that the employer was investigating his conduct, the employee immediately removed the blog and replaced it with a public apology. He accepted full responsibility and drafted a thorough and remorseful letter of apology to the employer. He also committed to seek counseling through the Employee Assistance Program. All of these factors persuaded the Arbitrator that the employee could be reintegrated into the workforce and the discharge was replaced by a suspension.

Arbitrator Upholds Termination of Employee who Defrauded Employer, Doctors, WSIB, and the Arbitrator

Deliberate deception and lack of remorse have been confirmed as constituting just cause for dismissal in *Ideal Roofing and United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local 8327* (June 2008). In this case, Lynn Harnden successfully argued, on behalf of the employer, and Arbitrator Allen upheld the decision of the employer to terminate the grievor for deceiving them as to his inability to work and the fraudulent information he provided to his own doctors.

INJURY, ACCOMMODATION, DECEPTION, AND SURVEILLANCE

The grievor was a 41-year old machine operator employed by Ideal Roofing for 17 ½ years. During his employment, a combination of work-related and motor vehicle accidents had resulted in two back surgeries. His injuries were so extensive that the grievor had worked in an accommodated position since 1995. His modified job duties included operating a Flattner machine but also extended to work on the shingle starter machine.

The events which gave rise to his termination started on April 11, 2007. The grievor was working on the Flattner press machine with two helpers when he reported to the employer that he had injured his wrist. He was driven to the hospital and given a Functional Abilities Form (FAF) which set out what duties he could perform while injured. The FAF suggested that he perform light duties, but he remained off work until he was contacted by Human Resources on April 12. The grievor was asked to attend work for office clerk duties on Monday, April 16, and he agreed. On April 16, he did not attend work, forcing management to try to contact him. He informed the employer that he had a physiotherapist appointment at 4:00 and as such could not have attended work at 8:00 that morning. As a result of this, the employer issued a two day suspension.

On June 17, the grievor alleged that he hurt his back while he was feeding a coil of cold roll sheet metal. The employer sent him to the hospital emergency room which provided an FAF suggesting he be off for 24 hours and placed on modified duties. The grievor then attended work and completed one shift, injury free. Over the next month and a half, the grievor began to engage in deceptive conduct to hide the fact that he was actually capable of working. The grievor continued to submit doctor’s notes to the employer indicating that he needed to be off work. The notes varied in content, but most either suggested he be off work, or that he be offered light duties in keeping with his injuries. The employer continuously tried to contact the employee and meet with him to discuss performing light

duties, such as in the office. He refused and maintained that his doctor told him to be off work completely. The employer, suspecting that he was capable of performing his duties, hired a private surveillance firm which found the employee to be driving his car, lifting groceries, and doing some light lifting during his spouse's move. On August 29, the employer terminated the employee for defrauding both itself and the WSIB. Although the grievor admitted to doing those activities captured by the surveillance firm, he remained unrepentant. In addition, his MRI tests indicated that there was nothing wrong with his back save his existing condition and that he would have been able to work in his usual position at the Flattner.

ARBITRATOR AGREES GRIEVOR CAPABLE OF PERFORMING LIGHT DUTIES - DEFRAUDED EMPLOYER, DOCTORS, WSIB AND ARBITRATOR

Looking to the evidence presented by the employer and the testimony of the employee's physician, Dr. Barnabe, the Arbitrator found that the grievor was capable of performing light duties and his refusal to do so amounted to wrongdoing. During the hearing, Dr. Barnabe testified that he accepted much of the information which the grievor told him. In fact, he indicated that the grievor told him that the employer was trying to have him go back to his usual, unmodified position which led Dr. Barnabe to write a note suggesting that the grievor be off work until his MRI results came in. He also testified that had he known the grievor was picking up groceries, helping family members to move, and driving his car, he would have never considered writing him notes to be off work. As a result of this testimony, the Arbitrator held that the grievor was intentionally misleading his physician by not telling them facts which would have assisted them with diagnosis and treatment. This gave the employer just cause to terminate the grievor. She wrote at page 12-13:

> There was no evidence that [the grievor]'s condition had changed in the past twelve years. Combined with [the grievor]'s frank admission during cross examination that he could have performed office work during the entire period, I am forced to the conclusion that [the grievor] was capable of performing modified duties throughout the period July 19th to August 29th, 2007. He had been dishonest with his physicians, his employer, the WSIB and this arbitrator. In addition, it was clear that he had not been forthright with the union. The dishonesty was intentional and protracted and continued through the course of the hearing, while under oath. There is no other conclusion that can be made than that it was done for the purpose of defrauding WSIB, albeit no actual money has yet to be collected.

APPROPRIATENESS OF THE DISCHARGE: APPLYING *MCKINLEY*

As the Arbitrator concluded that the employer had just cause to terminate, she turned to whether or not discharge was excessive in the circumstances. Rather than turn to the traditional factors looked to by arbitrators such as seniority and disciplinary record, she

held that the approach to employee dishonesty contained in the employment law case of *McKinley v. B.C. Tel.* (2002, S.C.C.) was applicable. That approach requires that the arbitrator examine each case on its own particular facts and circumstances and considers the nature and seriousness of the dishonesty in order to assess whether it is reconcilable in sustaining the employment relationship. Turning to the facts of the case, she had no hesitation in concluding that the employment relationship was irreparable. It was held that the grievor's behaviour was deliberate and protracted and was calculated to cause harm to not only his employment relationship but also to his "fellow and sister workers." Moreover his stance that he had done nothing wrong and was entitled to take the course of action he did would not benefit from reinstatement. Throughout the arbitration hearing, the grievor felt that he was not required to come in to do office modified duties as it was "not his job" and that he was justified in his conduct. The discharge was therefore upheld.

In Our View

This case suggests that the test in *McKinley* will now be used more frequently in cases of employee dishonesty in the unionized context. Although this means that it is more difficult to meet the test that the employment relationship is irreparable because of its high threshold, where an employee engages in calculated, protracted deception and does not apologize for his or her behaviour, the threshold will be met.

Arbitrator Reduces Discharge to Suspension for Joint Occupational Health and Safety Member Employee who Violated Safety Procedures

Unionized employers often face review of their decisions to terminate employees before arbitrators as a result of a grievance. In the case of *Goodyear Canada Inc. v. United Steel, Paper and Forestry, Rubber Manufacturing, Energy, Allied, Industrial and Service Workers Industrial Union, Local 189L (Cummins Grievance)* (January 2008), the employer faced such a challenge by the union when it terminated a member of the Joint Occupational Health and Safety Committee for a violation of its workplace safety rules.

The grievor in this case had worked for Goodyear Canada in its Bowmanville Factory, known as Banbury 1, for 14 years. Although he was employed as a Mixer Operator, he was also qualified to work on the plant's mill. In addition to those duties, the grievor was a member of the Joint Occupational Health and Safety Committee and was responsible for performing monthly inspections, participating in health and safety training and staying informed of workplace safety accidents and issues in the workplace.

The culminating incident, for which the grievor was terminated, took place on August 9, 2007. The employer received an anonymous call that the employee, while filling in for another co-worker on the mill, was circumventing the mill's safety guard by placing a pin on the bypass button. That guard had been installed three months prior, in response to a critical incident, which had resulted in an order of the Ministry of Labour and a $60,000 fine, all of which the grievor was well aware.

The employer confronted the grievor who immediately admitted to placing the pin on the bypass button. It was discovered through this incident that employees regularly did this and that it was so frequent that there was a depression where the pin had worn the button. At the disciplinary meeting, the grievor was told that he was suspended indefinitely and to meet with Human Resources on Monday. At that subsequent meeting the grievor was terminated for three reasons including an incident of poor workmanship, an incident of unacceptable job performance, and for ultimately the safety violation.

THE ISSUES AT ARBITRATION

Before Arbitrator Marcotte, the union presented three arguments. The first was that the grievor had been disciplined twice for the same misconduct, known as double jeopardy, claiming that he had received an indefinite suspension and had been terminated. Second, the union argued that the employer had discriminated against the grievor by punishing him more severely for safety violations than other employees in the workplace. They alleged that he was being set up as a scapegoat for the unsafe actions of other employees

on the mill. Finally, the union claimed that there were substantial mitigating factors which suggest that the employee should have received a lesser penalty than discharge.

DOUBLE JEOPARDY

The Arbitrator agreed that the arbitral jurisprudence shows a strong prohibition against an employer penalizing an employee twice for the same offence. He noted that where an employer does so, the second discipline will be null and void. However, there is an exception to this rule which is stated in the Federal Court of Canada Case of *Re Canada (Attorney General) v. Babineau* (2005). In that case, the Court held that an employer may "discipline" twice by instituting a two-step process whereby at the first step the employer clearly communicates that the discipline, such as a suspension, is temporary pending the outcome of a review of the misconduct. The second step is where the employer makes the final decision as to the specific penalty and imposes it on the employee. The Court was careful to stress that it must be clearly communicated to the grievor that the discipline is either pending a final decision or whether it is final.

Applying that law to the facts of the case, the Arbitrator found that although there was some ambiguity as to the nature of the 'indefinite' suspension, he was satisfied that it was clearly communicated that the decision was pending a final decision as to the appropriate discipline. Although the indefinite suspension coupled with the instruction to the grievor to call Human Resources on Monday did not meet the test of clearly communicated, he pointed to the notes of management which indicated that the discipline was pending an investigation and also through the grievor's own question as to "what kind of timeline am I looking at" as evidence of the test being met. The employer had not imposed multiple disciplinary penalties.

DISCRIMINATION THROUGH DEVIATION FROM USUAL RESPONSE TO SAFETY INFRACTIONS

The Arbitrator also agreed with the employer that although the level of discipline was substantially more severe than that usually given for a safety infraction, there was no discrimination in its decision. The union, in making this argument, referred to almost eight years of disciplinary decisions to demonstrate that the most severe discipline for a safety infraction was a notation to a suspension. Although the Arbitrator acknowledged that an employer should treat similar cases of misconduct in a like fashion, he noted that arbitrators should be cautious when looking to comparative cases. Quoting from a decision by Arbitrator McPhillips in *Re Westcost Energy Inc*, he wrote:

> "Accordingly, when an employee is able to prove that other employees who engaged in the same conduct for which he was disciplined were either not disciplined at all, or suffered much less severe disciplinary sanctions, arbitrators will generally find the employer to have discriminated against that employee oven though it may be established that the employer did not act in bad faith or did not

> intend to discriminate against her personally ... However, it is obvious that the principle demanding equality of treatment is only applicable where it can be shown that the material circumstances of the grievor's case substantially conform to the circumstances of those who were treated more leniently."

In the case before him, he found that the discipline was not based solely upon a safety infraction but also other misconduct on the grievor's record. As such, there was no discrimination against the grievor.

MITIGATING FACTORS IN SAFETY-RELATED CASES

The union argued that there were sufficient mitigating factors which suggested that the discipline imposed on him was too severe. It used the typical approach mitigating factors found in the arbitral jurisprudence which looks at elements such as length of service, previous record and the seriousness of the offence. Although the Arbitrator acknowledged that these are important considerations, he noted that in cases involving disciplinary penalties for a safety-related infraction, there are more specific guiding principles. He cited the case of *Re Imperial Tobacco* and listed the following principles to be following in safety-infraction cases:

1. Safety in the workplace is both a stringent statutory obligation and an important industrial relations concern that involves employers, unions and employees. Given the potential consequences, safety infractions are among the most severe workplace offences.

2. As the industrial relations party with the preeminent control over the workplace, the employer has a legal obligation to provide a safe and secure workplace for its employees. Hand in hand with this obligation is the employer's authority to insist that workers perform their duties in a safe and efficient manner.

3. Workplace misconduct arising from deliberate, reckless, or negligent behaviour and which results in a potential safety threat or actual injury is grounds for significant discipline, up to and including dismissal.
4. There does not have to be a physical injury or actual harm to establish the seriousness of the incident.

5. The mitigating circumstances that an arbitrator will consider in a safety discipline case are those accepted disciplinary elements as listed in *Steel Equipment Co.* [supra] and *Wm. Scott & Co. Ltd.,* [1977] 1 Can. L.R.B.R. 1 (B.C.L.R.B.). In any particular safety-related offence, the most important mitigating factors are those that will address the probabilities of the grievor repeating the same type of offence.

6. Safety rules have to build in the concept of the duty to accommodate. These rules have to ensure that, while they may be stringent and demanding, they also incorporate concepts of equality that eliminate all forms of discrimination.

Taking those principles and applying them to the case at bar, the Arbitrator found that the penalty should be reduced. He took into consideration the fact that the employee was a member of the Joint Health and Safety Committee and should have known better than to expose the employer to such serious liability but held that other factors mitigated the misconduct. In particular, he pointed to the fact that the groove on the button suggested that employees routinely inserted the pin yet the employer had no knowledge of this frequent safety violation. As well, although the guard had been installed at the Banbury 1 plant, it was not present at the Banbury 2. Given this lack of uniformity in the enforcement of the employer's safety policies and the grievor's apologies, he reduced the discharge to a 4-month unpaid suspension with no loss of seniority.

In Our View

This case highlights the importance of ensuring that both discipline and safety policies are followed strictly. Where the employer is unclear about the disciplinary penalty it is giving to an employee or where it does not clearly state that the discipline is temporary pending an outcome of an investigation, it will find its decision overturned by an arbitrator. Moreover, if an employer wishes to implement severe penalties for safety infractions, it will not only have to strive for consistency in enforcing the penalties for breaching the infractions but also have to ensure that regular inspections are done to catch employees who are violating the policies. Where the employer is neglectful in such investigations, it may be found that the policy is not enforced consistently and could result in a reduction of the penalty sanctioned by the employer against unsafe workers.

Chronic Absenteeism: Supreme Court of Canada adjusts the balance between an employer's duty to accommodate and an employee's duty to work – basic obligations of the contract of employment prevail

In July 2008 the Supreme Court of Canada revisited the rules protecting employees in the event of non-culpable absenteeism. The high court adjusted the balance between an employer's duty to accommodate a sick employee and the employee's duty to do his or her work. In *Hydro-Québec v. Syndicat des employe-e-s de techniques professionnelles et de bureau d'Hydro-Québec, section locale 2000 (SCFP-FTQ)* (July 2008) the Supreme Court reversed a decision of the Québec Court of Appeal. The top court allowed the employer's appeal, finding that in a case involving an employee's chronic absenteeism, the employer's duty to accommodate ended where the employee was unable to fulfill the basic obligations of the contract of employment.

Hydro-Québec dismissed an employee who suffered from numerous physical and mental health problems and who was chronically absent from work. Some of the employee's ailments included tendonitis, epicondylitis and bursitis, episodes of reactive depression, and mixed personality disorders with borderline and dependant character traits. The employee missed 960 days of work between January 3, 1994, and July 19, 2001, the date on which she was dismissed. At the time of her dismissal, she had been absent from work since February 8, 2001.

The dismissal letter referred to the employee's absenteeism, her inability to work on a regular and reasonable basis, and the fact that, based on expert medical opinion, no improvement in her attendance at work was expected.

The employee grieved the dismissal. She alleged that the dismissal was not justified and that Hydro-Québec failed in its duty to accommodate her.

In dismissing the grievance, the Arbitrator found that the employer had proven that the employee was unable, for the reasonably foreseeable future, to work steadily and regularly as required in the contract of employment. Although the union's expert witness suggested that, with the elimination of stressors in the employee's work and home environment, the employee could return to work, the Arbitrator found this would require the employer to periodically change the employee's work environment, including supervisors and co-workers, in order to keep up with the love-hate cycle of the employee's depression. The Arbitrator also found that the employee's home environment stressors were beyond the control of the employer. Therefore the conditions for a return to work suggested by the union's expert would constitute undue hardship.

The employee's motion for judicial review of the arbitrator's decision was dismissed by the Superior Court which noted that although the employee's illnesses were handicaps within the meaning of Québec's Charter of Human Rights and Freedoms, the decision to terminate the employment was based on the employee's inability to work regularly because of her health, and therefore was not discriminatory. The Superior Court also agreed with the arbitrator's findings relating to undue hardship.

The union appealed the decision to the Québec Court of Appeal. The Court of Appeal set aside the lower court's decision on the basis that the employee was not totally unable to work and that the Arbitrator had misapplied the approach adopted by the *Supreme Court of Canada in British Columbia (Public Service Employee Relations Commission) v. BCGSEU* (1999) ("*Meiorin*"). In the Court of Appeal's view, the employer failed to prove that it was impossible to accommodate the employee's characteristics, as required by *Meiorin*.

Hydro-Québec appealed to the Supreme Court of Canada.

THE STANDARD FOR PROVING UNDUE HARDSHIP – SUPREME COURT EXPLAINS *MEIORIN*

The Supreme Court of Canada began its analysis by identifying an error in the Court of Appeal's interpretation of *Meiorin*. The Supreme Court found the error to be central to the lower court's analysis. The *Meiorin* approach was reproduced as follows:

> An employer may justify the impugned standard by establishing on the balance of probabilities:
>
> 1) that the employer adopted the standard for a purpose rationally connected to the performance of the job;
>
> 2) that 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; and
>
> 3) that 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.

The interpretation issue revolved around the meaning of the term "impossible."

The Supreme Court stated that the applicable test is not total unfitness for work in the foreseeable future, as suggested by the Court of Appeal. Rather the test is whether the characteristics of the illness are such that the proper operation of the business is hampered excessively, or if an employee with such illnesses remains unable to work for the reasonably foreseeable future even though the employer has tried to accommodate the employee.

The Supreme Court held that in cases involving chronic absenteeism, if the employer shows that, despite measures taken to accommodate the employee, the employee will be unable to resume his or her work in the reasonably foreseeable future, the employer will have discharged its burden of proof and established undue hardship.

DUTY TO ACCOMMODATE ENDS WHERE THE EMPLOYEE CANNOT FULFILL BASIC OBLIGATIONS OF CONTRACT OF EMPLOYMENT

The Supreme Court found that in spite of Hydro-Québec's repeated efforts to accommodate the employee, the evidence showed that the employee would remain unable to work steadily or regularly for the reasonably foreseeable future. As a result, the impact of Hydro-Québec's attendance standard was legitimate and the dismissal was found to be non-discriminatory.

The Supreme Court ruled that "it is less the employee's handicap that forms the basis of the dismissal than his or her inability to fulfill the fundamental obligations arising from the employment relationship." Moreover "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."

THE TIME THE DUTY IS ASSESSED

The Supreme Court held that the Court of Appeal also erred by failing to assess the duty to accommodate in a global way that took into account the entire time the employee was absent, as required by the Supreme Court's decision in *McGill University Health Centre* (2007).

In providing the proper comprehensive approach, the Supreme Court stated,

> "Where, as here, the employee has been absent in the past due to illness, the employer has accommodated the employee for several years and the doctors are not optimistic regarding the possibility of improved attendance, neither the employer nor the employee may disregard the past in assessing undue hardship."

The Supreme Court of Canada set aside the decision of the Québec Court of Appeal, and affirmed the decision of the Superior Court to dismiss the motion for judicial review. Hydro-Québec was awarded its costs throughout the proceedings.

In our view

The Supreme Court of Canada has discouraged the development of rigid rules to assess the employer's duty to accommodate. The high court noted that the circumstances that may arise are numerous. Therefore courts must be flexible in determining whether an employer has met its duty to accommodate. The court also urged employers to be flexible in accommodating employees. "If a business can, without undue hardship, offer the employee a variable work schedule or lighten his or her duties – or even authorize staff transfers – to ensure that the employee can do his or her work, it must do so to accommodate the employee," said the court.

While employers are to be flexible in their attempts to accommodate employees, the court was emphatic that this duty ends where the employee cannot meet his or her fundamental obligations under the contract of employment.

Employer's "rush to judgment" on mental disability results in $80,000 award under *Human Rights Code*

In *Lane v. ADGA Group Consultants* (August 2008) the Ontario Superior Court of Justice upheld the decision of the Human Rights Tribunal that ADGA, an engineering consulting firm, had discriminated against a probationary employee suffering from bipolar 1 disorder. The employee had been dismissed after only eight days of employment after revealing his mental disorder to the employer. The Court found that in terminating the employment, the employer had failed to establish that it could not accommodate the disability without undue hardship. The Tribunal award of almost $80,000 in damages to the employee was upheld by the Court.

The employee, a software program tester, was diagnosed with bipolar 1 disorder, a condition sometimes characterized by periods of manic behaviour, and periods of extreme depression. In September of 2001, the employee applied for a position with ADGA who, at the time, was developing sensitive software for NATO military field operations. During the interview the employee was informed that the job could be stressful with tight timelines. He stated that he was accustomed to stress having operated his own business. On the application form, he lied about the number of days he had been on sick leave during the last 12 months and at no time prior to the offering of employment did he reveal that he had bipolar 1 disorder.

The employee commenced his employment and after two days, without specifically identifying his disorder, informed his supervisor that she should intervene if she observed any inappropriate behaviour on his part. Later, he disclosed that he had bipolar disorder and that emotional abuse from co-workers could trigger a manic episode. He again encouraged his supervisor to intervene if she observed any inappropriate behaviour, as early intervention could assist in avoiding a full blown manic episode. He also advised that he may need time off work to avert such episodes.

Upon becoming aware of the employee's condition, ADGA had concerns relating to security and reliability in terms of the nature of its work; and the employee's ability to handle the stress of the position. In addition, the operation was not staffed to address prolonged absences. After only eight days of employment, management met with the employee and dismissed him. In the aftermath, the employee rapidly declined into a full blown manic state which ultimately led to hospitalization, marital breakdown, and the loss of the employee's family home.

The employee filed a human rights complaint claiming discrimination. The Human Rights Tribunal found that ADGA had discriminated against the employee on the basis of his disability, namely his bipolar disorder. It also found that ADGA had failed to establish that it could not accommodate the employee's disability without undue hardship. The Tribunal awarded $35,000 for the violation of the employee's human rights and to compensate for the events following the dismissal ("general damages"), $10,000 for the infliction of mental anguish, and $34,278.75 for loss of salary (special damages) as well as pre- and post-judgment interest. ADGA sought judicial review of the Tribunal's decision.

DISCRIMINATION UNDER THE CODE: A *PRIMA FACIE* CASE

The Ontario Superior Court of Justice stated that once it is established that the termination of an employee is because of, or in part because of, a disability, the claimant has established a *prima facie* (i.e. appearing to be self evident) case for discrimination. Although ADGA claimed that the employee had misrepresented his ability to do the job for which he was hired, the Court rejected this argument. It held that the employee was under no obligation to disclose his disability, nor his record of sick days. It accepted as reasonable the Tribunal's findings of fact that:

- the employee did not misrepresent his ability to perform the tasks required of him;
- the employee was terminated because of his disability;

and therefore agreed that a *prima facie* case of discrimination was made.

THE PROCEDURAL DUTY TO ACCOMMODATE

Having accepted the Tribunal's finding that the employee was terminated because of his disability, the Court then considered whether ADGA had failed to meet its duty to accommodate. The term "accommodation" refers to what is required or necessary in the particular circumstances to avoid discrimination. Employers are required to accommodate employees with disabilities up to the point of undue hardship.

The duty to accommodate requires the employer to obtain all relevant information about the employee's disability and to seriously consider how the employee can be accommodated. This is called the "procedural duty" and it is assessed at the time of the alleged discrimination.

The Court agreed with the Tribunal that at the time of dismissal, ADGA failed to take any of the steps it could have taken to pursue the question of accommodation, and that there was a "rush to judgment" by ADGA. ADGA had failed to consult with its legal department regarding any obligations it may have under the *Human Rights Code* and it failed to conduct any type of assessment of the employee's condition.

THE SUBSTANTIVE DUTY TO ACCOMMODATE

The "substantive duty" to accommodate requires the employer to establish that it could not have accommodated the employee's disability without undue hardship, such as excessive cost or safety concerns. In this respect ADGA put forth numerous arguments relating to,

- the security of the project,
- the inability to monitor the employee for signs of a manic state, and
- the inability of the company to shift employees between projects to compensate for long periods of absence.

The Court however agreed with the Tribunal that such concerns were based on generalized fears and false stereo-types of those with mental illnesses. The Court also noted that ADGA failed to produce any independent or expert testimony that would establish undue hardship. The Court agreed with the Tribunal's finding that the employer could not establish undue hardship.

DAMAGES

ADGA also challenged the Tribunal's awards for general damages ($35,000), and for the infliction of mental anguish ($10,000) in claiming both were excessive. The Court disagreed stating,

> "ADGA argues that it should not have to account for Lane's full blown manic episode which ultimately led to hospitalization, marital breakdown, the loss of Lane's family home and further instability. I disagree. Lane's disability and his decision to reveal his disability made him vulnerable. He was the classic "thin-skulled employee". ADGA had a duty to act reasonably and in good faith and its actions had foreseeable tragic consequences to Lane."

The Court upheld the Tribunal's awards for damages totaling almost $80,000.

In our view

ADGA has indicated that it will appeal the Superior Court's decision and indeed, the decision from the Superior Court lays out numerous Tribunal findings of fact in order to provide a more fulsome record for consideration by an appellate court. In the meantime organizations should be aware that there are considerable risks in summarily dismissing an employee on the basis of a mental disorder, or any disability, without fully investigating accommodation.