II. The Accommodation of Disability That Is a Contributing Cause in the Commission of Disciplinary Misconduct in Canadian Arbitration Law

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Introduction

I have decided to do my brief talk on the arbitral treatment of disability where it is proven to have played some role in misconduct that is the subject of discipline. I will begin with a brief overview of the traditional historical approach in Ontario and most of Canada to view it as a mitigating factor, followed by a more formal recognition of the interaction between just cause analysis and human rights analysis in more recent years in British Columbia and Ontario. I will then turn to the 2008 decision of the British Columbia Court of Appeal (BCCA) in the *Gooding* case,[1] in which a liquor store employee who was an alcoholic was discharged for stealing alcohol while on duty to feed his habit. The case is interesting for a number of reasons, not the least of which is that arbitrator Stan Lanyon initially upheld the discharge and that decision was quashed by the British Columbia Labour Relations Board for a failure to apply the new hybrid approach (the first decision came just before the adoption of a new hybrid approach by the B.C. Labour Relations Board and the BCCA). On the rehearing of the case, after applying the hybrid approach in what seemed to be the judicially approved manner in British Columbia at the time, Lanyon decided that the role played by the disability in the misconduct made discharge inappropriate and ordered several years of back pay to the grievor, who by now was retired and not interested in reinstatement. This time the review of the second arbitration decision was taken to the BCCA and it quashed the second award on a basis that seems to me to go to the very root of our understanding of adverse effects discrimination, with the majority holding in effect that as long as the same misconduct would have resulted in the discharge of a non-alcoholic

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[1]British Columbia (Public Service Agency) v. British Columbia Gov't & Serv. Employees' Union [2008] B.C.C.A. 357 (issued 18 Sept. 2008).

employee there was no discrimination and no need to apply the hybrid approach, despite the fact the disability was found to be a contributing cause of the misconduct. Leave to appeal to the Supreme Court of Canada was sought by the British Columbia Government and Service Employees' Union (BCGEU), but was denied in February 2009. In my view the BCCA decision suggests that arbitrators should not apply the commonly accepted definition of adverse effect discrimination in cases where disability is a contributing cause of an employee committing misconduct that runs afoul of employer disciplinary policy. I will conclude with a few brief remarks on the potential implications of *Gooding* and the possibility that it is part of a very recent judicial trend to narrow the test for prima facie discrimination in our Canadian law.

From the Traditional Approach to Illness or Disability as a Mitigating Factor to the Hybrid Analysis

In discipline cases, long before human rights analysis came to play a central role in arbitral jurisprudence through the expansion of our definitions of discrimination and the scope of the duty to accommodate in cases like *Simpsons Sears v. O'Malley*[2] and *Meiorin*,[3] it was common for unions to assert that the grievor's misconduct could be explained as a consequence of an illness or disease, such as drug or alcohol addiction or bipolar mental disorder, and that reinstatement would be appropriate because the grievor was undergoing treatment for the condition that caused the misconduct. In *Canada Post Corp. and C.P.A.A. (MacMillan)*,[4] Arbitrator Innis Christie held that the existence of an illness or disorder could be considered as a mitigating factor, but it should result in reinstatement only if the following criteria are satisfied:

1. The grievor was experiencing an illness or condition at the time of the misconduct.
2. A causal linkage or nexus between the illness or condition and the aberrant conduct has been established.
3. If a causal linkage is found, then the arbitrator must be persuaded that there was a sufficient displacement of responsibility from the grievor to render the conduct less culpable.

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[2] [1985] 2 S.C.R. 536.
[3] B.C. (Public Serv. Employee Relations Comm'n) v. BCGSEU [1999] 3 S.C.R. 3 (*Meiorin*).
[4] [2001] 102 L.A.C. (4th) 97.

In other words, even if it is found that the misconduct would not have occurred but for the illness or condition, the arbitrator may nevertheless conclude that the grievor was sufficiently responsible for his or her actions to make modification of the penalty inappropriate.

4. Even where the above criteria are met, the arbitrator must be satisfied that the grievor has been rehabilitated, and that the risk of a recurrence of the aberrant behaviour is minimal.

Finally, Arbitrator Christie noted that even in cases where it is established that the grievor was suffering from a disability within the meaning of human rights legislation, and the disability was causally connected to the misconduct so as to require a human rights analysis, it may amount to undue hardship to require that the employer reinstate the grievor. In such instances, he observed, evidence of rehabilitation and the risk of recurrence will be of great importance.

Arbitrator Christie's comments regarding the potential impact of human rights legislation on the discipline decision proved to be quite prescient. In recent years, many arbitrators have moved beyond considering illness or disorder as a mitigating factor to adopt what has become known as a "hybrid" analysis in cases involving a mix of voluntary or culpable misconduct, and involuntary or non-culpable misconduct caused, at least in part, by mental illness or drug or alcohol addiction. In such cases, the arbitrator is required to apply a disciplinary or just cause analysis to the culpable aspects of the misconduct, and a human rights analysis—including an assessment of the employer's duty to accommodate—to the non-culpable aspects. The hybrid approach had its origins in the decision of the B.C. Labour Relations Board in *Fraser Lake Sawmills Ltd. and I.W.A., Local 1-424*.[5] In that decision, the Board adopted a new hybrid approach in circumstances where workplace misconduct is causally connected to a disability such as addiction (the non-culpable component), but the addiction is not of such a nature as to entirely remove the grievor's control (the culpable component). In these hybrid fact scenarios, the addiction-driven conduct is to be assessed in a human rights context—including an assessment of the employer's duty to accommodate—and the voluntary culpable conduct is subject to the

[5] (2002), [2003] C.L.L.C. 220-041.

traditional just cause analysis. An arbitrator's remedial response may contain elements of both corrective and rehabilitative measures, taking into account the fundamental question of whether the employment relationship remains viable. The Board also held that a duty to accommodate under the human rights portion of the analysis must be addressed with respect to the non-culpable portion of the employee's misconduct. By 2006, the hybrid approach set out in *Fraser Lake Sawmills Ltd.* had been approved by the B.C. Court of Appeal in *Kemess Mines Ltd. v. I.U.O.E., Local 115*[6] and *Health Employers Ass'n of British Columbia v. British Columbia Nurses' Union*.[7]

Cases from Ontario dealing with these same issues have demonstrated a reluctance to formally adopt or accept the hybrid approach in terms of using that technical term to describe the analysis or accept that they had to do two completely separate analyses, one for just cause and one for human rights protection. However, it has become common in the last decade or more for Ontario arbitrators, when faced with these cases, to try to identify the extent to which a grievor's disability may have caused the grievor's misconduct and thereby rendered it non-culpable in nature and required them to apply a human rights analysis and the duty to accommodate.[8] While retaining a fairly stringent standard of proof on the issues of whether the grievor suffered from a disability[9] and the existence of a clear nexus or causal connection between the disability and the misconduct,[10] once that connection has been established they have generally accepted the need to do a human rights analysis that includes consideration of the issue of whether the employer can demonstrate that it has satisfied the duty to accommodate as required by *Meiorin*, in addition to the just cause analysis that pertains to the culpable misconduct.

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[6] (2006), 264 D.L.R. (4th) 495 (BCCA).

[7] [2006] B.C.J. No. 262.

[8] See for example, *Camcar Textron Canada Ltd. and USWA, Local 3222* (2001), 99 LAC (4th) 305 (Chapman); *Toronto Transit Commission v ATU, Local 113 (Wall)* (2006) OLAA No. 156 (Roberts); *Harris Rebar v Int'l Assn. of Bridge Structural & Ornamental Ironworkers, Local 834 (Rose)* (2007), 165 LAC (4th) 1 (MacDowell); and *Hydro One Networks Inc. v. PWU (Shorey)*, [2008] OLAA No. 755 (Stewart).

[9] Although a British Columbia decision, *Coast Mountain Bus Co. v. CAW-Canada (Hundal)* [2009] B.C.C.A.A.A. No. 10 (Dorsey), provides a good example of a stringent standard of proof being applied to the issue of disability.

[10] See for example, *Toronto Transit Commission v ATU, Local 113 (Wall)* (2006) O.L.A.A. No. 156 (Roberts), where it was accepted that the grievor suffered from alcoholism and that if the disability was proven to have contributed to the misconduct the employer had to satisfy its human rights obligation to accommodate despite a specific penalty clause in the collective agreement, but it was found that the union had failed to prove that the alcoholism contributed to his drinking on the job during the incident in question.

The Gooding *Decision*

British Columbia Public Service Agency's Liquor Distribution Branch discovered that the grievor, a store manager with 26 years' seniority, was stealing alcohol from the store he managed. Upon being confronted with the thefts on June 18, 1998, the grievor revealed that he had a drinking problem and that several times a week over the preceding year he had placed product in the staff closet on the pretence of having paid for it and taken it home at the end of the day. Sometimes he paid for the product the following day, but often he did not. He had a clean disciplinary record prior to the discovery of his theft of store product. After completion of its investigation over a period of several days, the employer determined that the grievor had "willfully committed the theft of product" and terminated his employment.

At the hearing of the discharge grievance, both parties' medical experts agreed that the grievor was dependant on alcohol, and that alcoholism is a disease. Arbitrator Lanyon accepted the evidence of the union's medical expert that alcoholics would, if exposed to it, often steal alcohol from their workplace, and opined that the grievor's alcohol addiction explained the thefts even when he was not intoxicated or suffering from withdrawal at the time of the thefts. Nevertheless, Arbitrator Lanyon upheld the dismissal on the basis that the grievor's misconduct fell within a culpatory framework because both experts agreed that he understood the nature and quality of his acts and knew that it was wrong to steal.[11]

The union's appeal to the B.C. Labour Relations Board under s.99 of the B.C. Labour Relations Code was initially dismissed,[12] but its application to the Board for reconsideration pursuant to s.141 was allowed[13] on the basis of the Board's decision in *Fraser Lake Sawmills Ltd.*,[14] which was heard around the same time.

In his second decision, Arbitrator Lanyon held that the hybrid approach broadened the applicability of the human rights accommodation analysis and led to a different result, finding that the employer had failed to accommodate the grievor's disability by doing nothing more than referring him to the employee assistance plan just prior to terminating his employment. The grievor was reinstated to a position without any supervisory duties.

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[11] British Columbia v. BCGSEU (Gooding) [2000] B.C.C.A.A.A. No. 164.
[12] [2000] B.C.L.R.B.D. No. 479.
[13] [2002] B.C.L.R.B.D. No. 210.
[14] [2002] B.C.L.R.B.D. No. 390.

The employer challenged this decision before the Court of Appeal under s.100 of the B.C. Labour Relations Code. A majority of the B.C. Court of Appeal allowed the appeal and remitted the matter to the arbitrator to complete his determination under s.89 of the Code as to whether discharge was excessive in all the circumstances. Writing for the majority, Justice Huddart determined that the arbitrator erred in his conclusion that the union had established a prima facie case of discrimination on the basis of uncontested expert evidence that there was a causal connection between the grievor's disability and the thefts that were the basis of the discharge. The majority found that there was no evidence in support of the third requirement for establishing a prima facie case of discrimination (i.e., that the prohibited ground was a factor in the employer's decision to terminate), an inquiry that was distinct from the question of whether the prohibited ground was a contributing factor in the misconduct.[15] Referring to the uncontested expert evidence linking the thefts to the grievor's addiction, the court made it clear that a causal connection between the disability and the misconduct was not a sufficient basis for a finding of prima facie discrimination because that by itself would "not permit an inference that the employer's conduct in terminating the employee was based on or influenced by his alcohol dependency."[16]

Justice Huddart opined that Arbitrator Lanyon had applied a test of prima facie discrimination that was too broad and inconsistent with human rights jurisprudence. She also concluded that the policy rationale underlying human rights protection had no application to the facts of this case. To support this view she referred to a minority concurring opinion in *McGill University Health Centre (Montreal General Hospital) v. Syndicat des employés de l'Hôpital général de Montréal*,[17] in which Justice Abella explained that "the essence of discrimination is in the arbitrariness of its negative impact,"

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[15]British Columbia (Pub. Serv. Agency) v. British Columbia Gov't & Serv. Employees' Union [2008] B.C.C.A. 357 (issued 18 Sept. 2008), at para 11. "I can find no suggestion that [the grievor's] alcohol dependency played any role in the employer's decision to terminate him or in its refusal to accede to his subsequent request for the imposition of a lesser penalty. He was terminated, like any other employee would have been on the same facts, for theft."

[16]*Id.*

[17][2007] S.C.J. No. 4. To further buttress this narrower conception of the purpose of human rights protection, Justice Huddart also made reference to the Supreme Court of Canada decisions in *Honda Canada Inc. v. Keays* [2008] S.C.C. 39, and *Hydro-Quebec v. Syndicat des employes de techniques professionnelles et de bureau d'Hydro-Quebec, section locale 2000* (SCFP-FTQ) [2008] S.C.C. 43, as further rulings on the importance of proof of discriminatory conduct (in the sense of stereotyping or arbitrariness) by the employer.

which arises from the attribution of stereotypical or arbitrary characteristics rather than a consideration of actual ability. "I can find no suggestion in the evidence that [the grievor's] termination was arbitrary and based on preconceived ideas concerning his alcohol dependency," Justice Huddart stated. "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."[18] Having concluded that there was no prima facie discrimination, the majority of the court did not address the issue of accommodation.

Justice Kirkpatrick wrote a dissenting judgment holding that a prima facie case was made out because the grievor's termination was based on his thefts, which were in turn related to his disability, therefore his disability was a factor in his termination. In doing so she applied the broad definition of adverse effects discrimination set out by the SCC in *Simpsons-Sears v. O'Malley*[19] and subsequent human rights decisions. Under this broad definition, as long as the employee establishes that he had a disability, received adverse treatment, and his disability was a factor in the adverse treatment, there is a case of prima facie discrimination that requires the employer to demonstrate a BFOR defence under the *Meiorin*[20] test, including the duty to accommodate.[21] She went on to agree with the arbitrator's conclusion that the employer failed to discharge its duty to accommodate to the point of undue hardship.[22]

The Implications of *Gooding* for Human Rights Analysis in Discipline Cases

My main concern with the majority decision in *Gooding* is that it appears to seriously question the application of the broad definition of adverse effect or indirect discrimination, which was first adopted in *Simpson-Sears v. O'Malley* and may indeed suggest that

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[18] *Gooding* [2008] B.C.C.A. 357, at para 15.
[19] [1985] 2 S.C.R. 536.
[20] B.C. (Pub. Serv. Employee Relations Comm'n) v. BCGSEU [1999] 3 S.C.R. 3.
[21] *Gooding* [2008] B.C.C.A. 357, at para 58.
[22] Perhaps not surprisingly, given the reasons of the majority of the BCCA, in his third decision on the merits in *Gooding*, Arbitrator Lanyon upheld the original discharge (*BC Pub. Serv. Agency v. BCGEU* (Gooding Gr., Remittal Award II, released July 8, 2009)). Based on the majority reasons, Arbitrator Lanyon held that he had to apply a hybrid approach without any human rights analysis, instead simply looking at the grievor's alcohol addiction and subsequent recovery as mitigation factors that were not sufficient to render his discharge excessive.

the test for prima facie discrimination should be limited to direct or intentional discrimination when applying human rights analysis to the imposition of discipline for misconduct. It does so by holding that a causal connection between the disability and the adverse treatment under an employer disciplinary policy is not enough to establish prima facie discrimination and instead holding that there was no prima facie discrimination in the absence of evidence that the employer's conduct in terminating the employee, or refusing to accede to his subsequent request for a lesser penalty, was based on or influenced by his alcohol dependency. In my view this comes very close to requiring intentional or direct discrimination by stating that unless there is clear proof that an employer terminated the employee at least in part because it knew or perceived that he or she suffered from a disability, there is no prima facie case and therefore no duty to accommodate. In my view this is quite inconsistent with the stated purposes for the adoption of the concept of adverse effect discrimination, to have an effects-based definitional approach to the issue of prima facie discrimination to allow us to remove all discriminatory practices and barriers in the workplace and require employers to justify and prove the necessity for workplace rules or policies that appear neutral on their face but have disadvantageous effects on persons identified by prohibited grounds of discrimination. If this line of reasoning is accepted, then it will effectively exempt employer rules, policies, and decisions concerning the imposition of discipline from the application of the prohibition against adverse effects of indirect discrimination, instead limiting findings of discrimination against persons with disabilities in the imposition of discipline to cases of direct or intentional discrimination, where the union can prove that the employer consciously chose the disciplinary measure at least in part due to the grievor's disability. If this is the case, then employers will no longer have to justify the implementation and enforcement of zero-tolerance policies against persons with disabilities as a BFOR under the principles accepted in *Meiorin* and *Entrop v. Imperial Oil*.[23]

I note here that at least one British Columbia arbitrator has already indicated an unwillingness to follow the narrower test for prima facie discrimination set out by the BCCA in *Gooding*. In *Rio Tinto Alcan Primary Metal (Kitimat/Kemano Operations v. CAW-*

[23] [2000] 189 D.L.R. (4th) 14 (Ont. C.A).

Canada, Local 2301) (Grant),[24] Arbitrator Steeves reinstated a grievor who had been discharged for marijuana use in the workplace contrary to the employer's zero-tolerance policy. The union established that the grievor's cannabis addiction had played a role in his breach of the zero-tolerance rule. The arbitrator held that he was required to apply a hybrid approach in a manner consistent with the pre-*Gooding* case law on situations where a disability appears to be causally connected to violation of employer disciplinary policy. He simply stated that he had jurisdiction to apply a just cause analysis based on the *Labour Relations Code* and was required to apply human rights code principles under the decision of the Supreme Court of Canada in *Parry Sound (District) Social Services Administration Board v. OPSEU, Local 324*.[25] He then concluded that because the authorities establishing arbitral jurisdiction in both areas was long-standing and pre-dated both the BCCA's earlier decisions on the hybrid approach and its decision in *Gooding*, he could proceed to deal with an analysis in both areas without paying much attention to *Gooding*. He went on to find that there was a prima facie case of discrimination on the basis that grievor's addiction had a causal nexus to his misconduct and as such was a factor in his termination. As long as the disability was one factor in the grievor's misconduct that resulted in termination, there was no requirement to prove that his addiction played a direct role in the employer's decision to terminate.

Of course the larger question is whether the narrow approach to the test for prima facie discrimination stated in *Gooding* will spread more broadly to questions concerning the application of human rights protections to non-disciplinary rules or policies. This question is a very real one given that the majority of the BCCA appears to rely heavily on the recent minority concurring opinion of Justice Abella in *McGill University Health Centre*.[26] In that decision the majority opinion does not take issue with the traditional arbitral jurisprudence accepting that automatic termination clauses based on absence of a certain duration for any reason, including disability, constitute prima facie discrimination under human rights legislation and must be justified as a BFOR requiring the employer to satisfy an obligation to accommodate to the point of undue hardship before termination. And indeed the majority does conclude

[24] [2008] B.C.C.A.A.A. No. 178 (Steeves).
[25] [2003] 2 S.C.R. 157.
[26] [2007] S.C.J. No. 4.

that the collective agreement clause providing for automatic termination after 3 years of absence for any reason, including disability, did satisfy the requirements for a BFOR given the prognosis of the grievor. However, Justice Abella, in an opinion that some labour advocates have described as ironic given her standing as one of the original authors to advocate for the adoption of the broad definition of adverse effect discrimination,[27] takes the position that such clauses are not always prima facie discriminatory simply on the basis they may have a negative impact on members of a group identified by a prohibited ground like disability. Justice Abella holds that the threshold test for prima facie discrimination today should be elevated to proving not only a disadvantageous impact on groups identified by prohibited grounds, but also to proving that the disadvantageous distinction is based on the employer making stereotypical or arbitrary assumptions about persons with disabilities, something she held could not be established for an automatic termination clause with a 3-year time limit.

The great problem with this narrowing of the long-accepted broad test for adverse discrimination under human rights legislation first endorsed in *O'Malley* is that it turns us back from an effects-based approach to the definition of prima facie discrimination toward a blame- or fault-based conception, and in so doing shifts the burden of proof on the justification of facially neutral workplace rules or policies that have discriminatory effects on prohibited grounds from the employer to the complainant. By placing the burden on the complainant to prove that stereotypical or arbitrary assumptions are the reason for the creation and enforcement of such policies, this raising of the threshold for prima facie discrimination will significantly undermine the enforceability of human rights code protections in the workplace and thereby eliminate facially neutral barriers to equality in the workplace.

The BCCA also makes reference to two other recent Supreme Court of Canada decisions that some labour counsel have viewed as evidence of a retrenchment or retreat by the Court on its traditional stance of a large, liberal, and remedial interpretation of human rights codes to ensure the effective protection and promotion of human rights in the workplace. Here I refer to *Hydro-*

[27]Judge Rosalie Abella, Equality in Employment—Report of the Royal Commission on Equality in Employment (Ottawa: Ministry of Supply and Services, 1984).

Quebec[28] and *Honda Canada Inc. v. Keays*.[29] Although the majority decision in *Honda Canada Inc.* makes such cursory, apparently off-the-cuff, findings concerning the lack of any human rights code violations (contrary to both the factual and legal findings of the trial judge and the Ontario Court of Appeal) that it is difficult to comment much on the "reasoning," it does rather strangely cite the above-mentioned minority ruling of Justice Abella in *McGill University Health Centre* for its conclusion that there must be proof of stereotypical or arbitrary assumptions for there to be prima facie discrimination, rather than citing the majority position in that decision. The *Hydro-Quebec* decision, to the contrary, makes no ruling on the threshold test for prima facie discrimination in another case of the application of an automatic termination clause to a disabled employee. However, it does very openly suggest a reduction in the stringency of the test for the duty to accommodate to the point of undue hardship in at least two respects that suggest a ramping down of the stringent approach to establishing a BFOQ as adopted in *Meiorin*. First, it held that the test in *Meiorin* was never intended to establish a duty on the employer to accommodate to the point of impossibility. The threshold of undue hardship did not require the employer to accommodate the employee unless it could prove it was impossible to do so. Second, undue hardship had to be assessed globally, including all past efforts and expense made by the employer to accommodate the employee's disability. It was an error to suggest that the employer had to demonstrate undue hardship based on costs and other problems viewed from a certain point forward, such as the time of the decision to terminate.

Some might suggest that the recent trio of decisions by the Supreme Court of Canada, and indeed a decision like the BCCA ruling in *Gooding*, can be viewed as a reaction, and perhaps a natural one, to the steady progression in the past 25 to 30 years of placing ever more stringent human rights requirements on employers and their workplace rules and policies in our desire to attain a discrimination-free workplace environment. That progression has come primarily on three fronts: the expansion of prohibited grounds of discrimination, the extension of the definition of discrimination from direct or intentional to indirect or adverse

[28]Hydro-Quebec v. Syndicat des employes de techniques professionnelles et de bureau d'Hydro-Quebec, section locale 2000 (SCFP-FTQ) [2008] S.C.C. 43.
[29][2008] S.C.C. 39.

effects and systemic discrimination, and the increased stringency of our tests for BFOR defences to claims of prima facie discrimination. But I would suggest that to the extent it is determined that these developments may present too great a regulatory burden for employers in our current economic environment, the better response is to look at the stringency of our approach to BFOR defences through re-examination of concepts such as the duty of accommodation, as was done in *Hydro-Quebec*, rather than attempting to narrow the test for prima facie discrimination and turning away from an effects-based approach and back toward a fault- or intent-based approach to discrimination as evidenced by decisions like *Gooding* and the Abella minority ruling in *McGill University Health Centre*. Opting for the latter route radically alters the burden of proof in dealing with potential discrimination in the workplace and will mean that many rules, policies, and decisions that have discriminatory effects will escape any form of scrutiny to establish legitimate justification as a BFOR. This, in my view, has much greater potential for undermining the use of human rights legislation to eliminate real workplace barriers to equality than the *Hydro-Quebec* approach of maintaining a broad definition of adverse effects discrimination but taking steps to reduce the stringency of BFOR requirements.