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Mental Disability—A Review of Recent Cases

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MENTAL DISABILITY—A REVIEW OF RECENT CASES

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I. Introduction

The BC *Human Rights Code*, R.S.B.C. 1996, c. 210 [*Code*] prohibits discrimination on the basis of "mental disability."[1] In 2016-2017, nearly one in every five complaints to the BC Human Rights Tribunal (the "Tribunal") alleged mental disability-based discrimination. Mental disability was second only to physical disability in terms of the individual ground of discrimination most frequently cited by complainants (see British Columbia Human Rights Tribunal, *Annual Report 2016-2017 – Charts* (Vancouver: British Columbia Human Rights Tribunal, 2017) at 2).[2]

This paper reviews mental disability decisions issued during the past year.[3] I summarize notable findings from recent cases grouped by topic, and then provide brief concluding comments.[4]

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1 See *Code*, ss. 7-11, 13-14. The *Code* does not define the term "mental disability." In general, mental disabilities under the *Code* include disabling mental health conditions and substance use disorders. See discussion below.

2 In 2015-2016, half of the final decisions rendered by the Tribunal after hearing alleged mental disability-based discrimination, and half of those allegations were found to be justified (see BC Human Rights Tribunal, *Annual Report 2015-2016* (Vancouver: BC Human Rights Tribunal, 2016) at 9). Similar data regarding final decisions does not appear to be available for 2016-2017.

3 For the most part, I limited my review to BC and federal decisions. Cases were primarily identified through a Lexis Nexis *Quicklaw* search, using four search terms connected as follows: (mental or addiction) & disability & accommodat!. I searched eight *Quicklaw* sources (British Columbia Collective Agreement Arbitration Awards, British Columbia Human Rights Tribunal Decisions, Canada Labour

II. Cases

The following is a summary of notable findings from recent cases related to mental disability.[5]

A. Meaning of Mental Disability

Over the past year, several decision-makers have made findings that are relevant to determining whether a person has a mental disability within the meaning of the *Code*. Statements from the Supreme Court of Canada in *Saadati v. Moorhead*, 2017 SCC 28 [*Saadati*] are among the most notable.

1. Medical evidence

Saadati was a tort law case, in which the Court made findings regarding the evidence required to prove a "mental injury" in a negligence action. Specifically, the Court rejected the proposition that compensable mental injury is or should be confined to conditions that are identifiable with reference to psychiatric diagnostic tools, making the following general comments at para. 21:

> …The view that courts should require something more [than the elements of the cause of action of negligence, in order to prevent unmeritorious or trivial claims for negligently caused mental injury] is founded not on legal principle, but on policy – more particularly, on a collection of concerns regarding claims for mental injury…founded upon dubious perceptions of, and postures towards, psychiatry and mental illness in general: that mental illness is 'subjective' or otherwise easily feigned or exaggerated…. The stigma faced by people with mental illness,

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Arbitration Decisions, Canada Public Service Labour Relations and Employment Board Decisions, Canadian Human Rights Tribunal Decisions, British Columbia and Yukon Judgements, Federal Court Judgements, and Supreme Court of Canada Judgements) for decisions dated between October 4, 2016 and October 4, 2017, finding 194 case results. I reviewed each case for relevance and/or significance, ultimately deciding to include 29 out of the 194 case results in this paper. A handful of additional cases of interest were identified through a cursory media scan.

4 Views expressed in this paper are mine and do not necessarily reflect those of the University of British Columbia.

5 In the interest of brevity, I have highlighted the findings from some, but not all, of the 29 *Quicklaw* search results included in this paper. The following are cases that I included (based on relevance and/or significance) but have not highlighted or otherwise referenced below: *A and B (o.b.o. Infant A) v. School District C*, 2016 BCHRT 184 (intersection between mental disability and race; application to dismiss denied); *Choe v. Pacific Coach Lines Ltd.*, 2017 BCHRT 28 (duty to inquire — frustration of employment contract — non-culpable dismissal; application to dismiss denied); *Davies v. College of Physicians and Surgeons of BC*, 2017 BCHRT 41 (continuing contravention; complaint accepted for filing); *Greene v. British Columbia (Ministry of Justice)*, 2016 BCHRT 151 (accommodation of mental disability in benefit claim process under *Crime Victim Assistance Act*; application to dismiss granted); *Havard v. Relish Bistro Inc.*, 2017 BCHRT 35 (service dog used to mitigate symptoms of mental disability; application to dismiss denied); *J v. Gym*, 2017 BCHRT 141 (sexual assault — performance issues — accommodation; application to dismiss denied); *Kone Inc. v. International Union of Elevator Constructors, Local 82*, [2017] B.C.C.A.A.A. No. 78 (QL) (meaning of "total disability" under health or accident insurance policy); *Sitar v. Babine Forest Products Ltd.*, 2017 BCHRT 90 and *Sylvain v. Westbank Pacific Realty Corp.*, 2017 BCHRT 26 (where delay in filing complaint is due to disabling condition, it may be in public interest to accept late-filed complaint); *Talbot v. Strata Plan LMS 1351*, 2017 BCHRT 69 (strata plan refused to grant hardship exemption from rental restriction to condo owner with disabilities who was assaulted by immediate neighbour; application to dismiss denied); *Thomas v. AbbotsfordWORKS*, 2017 BCHRT 5 (complainant's refusal to undergo recommended psychotherapy allegedly resulted in denial of employment services; application to dismiss denied).

> including that caused by mental injury, is notorious (J. E. Gray, M. Shone and P. F. Liddle, *Canadian Mental Health Law and Policy* (2nd ed. 2008), at pp. 139 and 300-301), often unjustly and unnecessarily impeding their participation…in civil society…[6]

Similar to the liberal approach taken by the Court in *Saadati*, the Tribunal in *Gichuru v. Purewal*, 2017 BCHRT 19 [*Gichuru*] concluded that "medical evidence is not the only basis upon which a mental disability [under the *Code*] can be proved." Rather, the Tribunal is "entitled to consider the whole of the evidence on this issue" (para. 275). In *Gichuru*, the complainant had "provided extensive *viva voce* evidence of a history of depression," but "called no physician to confirm that he suffered from depression at any material time" to the allegations in the complaint (para. 271). Despite concerns regarding the lack of "medical support" for the complainant's "declared mental disability," the Tribunal accepted the complainant's evidence "of his medical issues and attendant struggles," and found that the complainant "suffered from depression" during "the relevant timeframe for the events complained of" (paras. 275-76).

Whereas the decision-makers in *Saadati* and *Gichuru* addressed the *need* for a mental health diagnosis, the Tribunal in *Burman v. Adventist Health Care Home Society (c.o.b. Rest Haven* Lodge), 2016 BCHRT 142 [*Burman*] dealt with the timing of such a diagnosis. *Burman* involved various preliminary applications related to a mental disability-based discrimination complaint, including an application by the respondent to dismiss the complaint on the basis that it lacked a reasonable prospect of success. Relying on a medical report in which a psychiatrist found that the complainant's mental status and test scores did "not support the presence of an active condition that is definable within the DSM criteria" (para. 20), the employer argued that the complainant had "failed to provide evidence which could establish that she had a mental disability at the relevant period of time" (para. 99).[7] The Tribunal rejected this argument, observing that the medical evidence pointed to "a previous diagnosis of a DSM mental disorder" (para. 100), and concluding that "the medical information supports a finding that, at the relevant time, [the complainant] had a mental disability, was symptom free with respect to that disability, but was at risk [of a relapse] in the event that her accommodation was not maintained" (para. 103). According to the Tribunal, under the circumstances, the complainant "could well be successful in establishing that she has a disability within the meaning of the Code" (para. 104).

2. General Principles

Other Tribunal decisions during the past year have affirmed long-standing general principles related to the meaning of mental disability.

For instance, in *Athlete v. Sport Club*, 2017 BCHRT 190 [*Sport Club*], the Tribunal cited *Morris v. BC Rail*, 2003 BCHRT 14 as setting out "the following considerations for assessing whether an

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6 See also *Morris v. British Columbia Public Service Agency*, 2017 BCHRT 27 (discussed below) and *Beaton v. Perkes*, 2016 BCSC 2276 at para. 25 ("Ultimately…counsel agree that it is not the particular formal diagnosis, under the DSM V, that is ascribed to Ms. Beaton's mood issues that truly matters [in determining whether she suffers from a "depressive disorder" as a result of a motor vehicle accident]. What matters is that Ms. Beaton has, without any question, suffered from serious low mood issues since the Accident. This evidence is uncontradicted and it is apparent in multiple forms.")

7 The "DSM," or *Diagnostic and Statistical Manual of Mental Disorders*, is a publication that is widely used in the United States and Canada to diagnose and classify mental disorders. The most recent edition of the manual is the "DSM-5." See American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders*, 5th ed. (Washington: APA, 2013).

individual has a disability [under the *Code*]: the individual's physical or mental impairment, if any; the functional limitations, if any, which result from that impairment; and the social, legislative or other response to that impairment and/or limitations, assessed in light of the concepts of human dignity, respect and the right to equality" (at para. 102).[8]

In another case, *Viswanathapuram v. Canadian Alliance of Physiotherapy Regulators*, 2017 BCHRT 29 [*Viswanathapuram*], the Tribunal stated that the "concept of physical disability, for human rights purposes, has generally been held to involve a physiological state that is involuntary, has some degree of permanence, and impairs the person's ability, in some measure, to carry out the normal functions of life" (para. 39). According to the Tribunal in *Viswanathapuram*, the "determination of whether an ailment is a disability is made on a case-by-case basis," and the "general principles" that apply to the meaning of a physical disability "are equally applicable to a mental disability" (para. 38).

The Tribunal in *Viswanathapuram* also confirmed that, although "human rights legislation is to be interpreted broadly, disability under the *Code* has some limitations in its interpretation." For example, "not every medical problem constitutes a…disability within the meaning of the *Code*." According to the Tribunal, factors "commonly taken into account in determining whether a given illness or medical condition amounts to a disability are whether the condition entails a certain measure of severity, permanence and persistence" (para. 40).

Finally, in several of its decisions this past year, the Tribunal reiterated that the concept of mental disability-based discrimination within the meaning of the *Code* does not necessarily encompass "conduct [that] results in an individual experiencing stress and anxiety, or even a mental disability" (*Kahan v. J.I. Properties Inc.*, 2017 BCHRT 25 at para. 59). Put simply, "conduct that causes a disability is not, without more, discrimination" (*Kras v. Coast Mountain Bus Co.*, 2017 BCHRT 122 at para. 68).

B. Employee Medical Information

Issues related to the collection, use and disclosure of medical information came up frequently in mental disability cases from the past year.

1. Collection

In the workplace context, BC decision-makers have typically endorsed a "least intrusive" principle with respect to medical information (see *e.g. Gichuru v. Law Society of BC*, 2009 BCHRT 360; *Dudra v. Labour Unlimited Temporary Services*, 2012 BCHRT 256; *West Vancouver (District) v. West Vancouver Fire Fighters' Union, Local 1525*, [2012] B.C.C.A.A.A. No. 166 [*West Vancouver*]). The least intrusive principle generally translates to an incremental approach to information collection (see *e.g. West Vancouver* at para. 49).

This approach is reflected in *Morris v. British Columbia Public Service Agency*, 2017 BCHRT 27 [*Morris*] and *Layne v. Deputy Head (Department of Justice)*, 2017 PSLREB 10 [*Layne*].

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8 *Sport Club* is an interesting and compelling decision on an application to dismiss a complaint alleging that a non-profit sport club and the coach of a team of "elite level young athletes" at the club discriminated against a team member with a disabling mental health condition. In addition to referencing general principles related to the meaning of mental disability under the *Code*, the Tribunal in *Sport Club* engages (at paras. 108-119) in a useful analysis of the "nexus" issue discussed below.

Morris involved an application to dismiss a complaint of discrimination in the administration of a sick leave benefits plan, pursuant to sections 27(1)(b) and 27(1)(c) of the *Code*. The complainant, an employee, disputed his employer's decision to pause his sick leave benefits, following his failure to attend an independent medical exam (IME). The Tribunal granted the employer's application under section 27(1)(b), dismissing a portion of the complaint. The application under section 27(1)(c), however, was denied. The Tribunal's reasoning in *Morris* suggests the following takeaways:

(1) Procedural deficiencies in the administration of a sick leave benefits plan "does not on its own constitute discrimination absent a connection to [the employee's] mental disability" (para. 35).

(2) An employer's decision to cut off an employee's sick leave benefits, based "on a view grounded in stereotype that [the employee] did not have a mental disability despite the medical information, diagnosis and treatment outlined by his doctors," could constitute a breach of the *Code* (para. 45).[9]

(3) Depending on the circumstances, an employer-imposed requirement that an employee attend an IME could be found to contravene the *Code*. Factors relevant to this determination may include the sufficiency of the medical information previously collected from the employee's doctor, and whether the employee's doctor has recommended against the IME for therapeutic reasons (see paras. 35, 47-48).

Like *Morris*, the *Layne* case involved an employer attempt to collect additional employee medical information through an IME. *Layne* was a grievance matter, heard by a panel of the Canada Public Service Labour Relations and Employment Board. The case involved several allegations, one of which related to a delay in the grievor's return to work (RTW) following long-term disability leave. The grievor alleged that the employer's refusal to accept medical information provided by her physician was discriminatory. The panel rejected this allegation, finding that the employer "had a legitimate doubt about the validity or the completeness" of the medical information from the grievor's physician (para. 259), and had "established that it had reasonable and probable grounds for requesting that the grievor be medically assessed by a doctor other than her physician before coming back to work" (para. 277).

In a similar way, the Tribunal in *Kahan* found no evidentiary support for "any contention that the Respondents' requests [for employee medical information] were nefarious in nature or intent" (para. 69). *Kahan* did not involve an employer-imposed requirement that the employee attend an IME. Rather, the employer in *Kahan* had requested medical information "to enable them to assess the nature of [the employee's] absence, needs, and expected return to work process" (para. 66). The Tribunal ultimately dismissed the employee's discrimination complaint against the employer, finding that the manner in which the employer had navigated performance issues and disciplinary matters in the course of the employee's disability-related RTW process was not discriminatory.

2. Use and Disclosure

In addition to dealing with information *collection* issues during the past year, decision-makers have discussed the *use* and *disclosure* of employee medical information.

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9 Recall the Court's comments in *Saadati* (at para. 21), discussed above.

For example, in *Dupuis v. Canada (Attorney General)*, 2016 FC 1137 [*Dupuis*], the Federal Court reviewed the Canadian Human Rights Commission's assessment of an employer's accommodation efforts in light of relevant employee medical information in the employer's possession. *Dupuis* involved a Statistics Canada employee with Asperger's Syndrome, who filed a complaint with the Commission in relation to his employer's efforts to accommodate mental disability-related job performance issues. Following the dismissal of his complaint, the employee sought judicial review on various grounds, including "that the Commission erred in concluding that he had been reasonably accommodated" (para. 2). The Federal Court granted the employee's application, observing that the employer had – without justification – failed to follow the medical information and recommendations it had collected for accommodation purposes. The court found that the Commission never addressed this failure, nor did the Commission consider other relevant factual questions regarding the employer's accommodation efforts.

Another noteworthy decision in relation to employee medical information is a preliminary award issued by Arbitrator John Hall this past spring. In *B.C. Hydro and Power Authority v. International Brotherhood of Electrical Workers, Local 258* (2017), 278 L.A.C. (4th) 137 [*B.C. Hydro*], Arbitrator Hall resolved a difference between the parties regarding the admissibility at arbitration of employee medical information in the possession of the employer's RTW department. The award is noteworthy for its discussion and analysis of various matters, including the interpretation of consent forms, the use and internal disclosure of employee medical information, and the admissibility of evidence of a confidential nature.[10]

C. Nexus

The most frequently discussed mental disability decision issued in 2017 is probably the Supreme Court of Canada's judgement in *Stewart v. Elk Valley Coal Corp.*, 2017 SCC 30 [*Elk Valley*]. In *Elk Valley*, the Court reviewed a 2012 Alberta Human Rights Tribunal decision to dismiss a complaint filed by a union on behalf of an employee with a substance use disorder who violated his employer's drug policy and was subsequently terminated.[11]

Elk Valley, like several other employment cases decided during the past year, centered around the application of the *prima facie* test for discrimination, under which the employee alleging discrimination on the basis of mental disability must show that (1) they have a mental disability, (2) they experienced an employment-related adverse impact, and (3) the mental disability was a factor in the adverse impact (see *Elk Valley* at para. 24).

More specifically, the decisions in these employment cases, including in *Elk Valley*, turned on the third part of the *prima facie* test – i.e. whether there was a connection, or nexus, between the employee's mental disability and the impugned adverse impact. The following are brief summaries of the findings from some of these cases.

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10 By "internal disclosure" I mean disclosure of lawfully collected personal information from one department or representative of an organization to another.

11 By "drug" policy, I mean a workplace policy related to the use of psychoactive substances, including alcohol, illicit drugs, certain medications, etc. The World Health Organization defines the term "psychoactive substance" as a "substance that, when ingested, affects mental processes, e.g. cognition or affect." The term encompasses "the whole class of substances, licit and illicit, of interest to drug policy." See World Health Organization, *Lexicon of alcohol and drug terms* (Geneva: 1994) at 53.

1. Elk Valley

In terms of legal analysis, the majority decision in *Elk Valley* re-affirms long-standing principles, rather than breaking new ground. Writing for the majority, Chief Justice McLachlin described the case as follows at para. 21:

> …this case involves the application of settled principles on workplace disability discrimination to a particular fact situation. The nature of the particular disability at issue – in this case addiction – does not change the legal principles to be applied. The debates here are not about the law, but about the facts and inferences to be drawn from the facts. These issues were within the purview of the [Alberta Human Rights] Tribunal, and attract deference…

The majority's reasons confirm the following:

(1) The traditional, three-part test for *prima facie* discrimination still stands (para. 24).

(2) Discrimination can take many forms, including "indirect" discrimination, where otherwise neutral policies adversely impact certain protected groups (para. 24).

(3) Discriminatory intent is not required to demonstrate *prima facie* discrimination (para. 24).

(4) Under the third part of the *prima facie* test, the protected ground or characteristic (e.g. mental disability) need only be "a factor" in the adverse impact. This is a factual determination for the decision-maker (para. 46).

(5) There is no requirement for a finding of stereotypical or arbitrary decision-making under the *prima facie* test (para. 45).[12]

Reviewing the Alberta Human Rights Tribunal's decision against a reasonableness standard, Chief Justice McLachlin found that, in the tribunal's view, the employee's policy breach and subsequent termination were not the result of functional impairments resulting from his health condition. The tribunal had concluded that the expert evidence established that the employee's substance use disorder did not result in a diminished capacity to comply with the employer's policy; rather, the employee chose to breach the employer's policy and was terminated for making this choice (see paras. 32-35).

According to Chief Justice McLachlin, there was "no basis for interfering with the decision of the Tribunal" (para. 5). The tribunal had relied on expert evidence in deciding that the employee's disability was not a factor in his termination (para. 6). This was "essentially a question of fact, for the Tribunal to determine" (para. 5).[13]

Finally, the majority of the Court rejected the stereotypical notion that employees with substance use disorders are incapable of complying with workplace rules (para. 39). Chief Justice McLachlin noted that where a tribunal concludes that an employee with a substance use disorder was

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12 According to the majority, the "goal of protecting people from arbitrary or stereotypical treatment or treatment that creates disadvantage by perpetuating prejudice is accomplished by ensuring that there is a link or connection between the protected ground and adverse treatment." The "existence of arbitrariness or stereotyping is not a stand-alone requirement for proving *prima facie* discrimination" (para. 45).

13 The Chief Justice pointed out that "the role of reviewing courts is to determine whether a tribunal's decision falls within a range of acceptable outcomes, not to reassess the evidence." Making findings and drawing inferences from the evidence is the role of the tribunal, not the reviewing court (para. 41).

terminated for breaching a workplace policy or for some other misconduct, "the mere existence of addiction does not establish *prima facie* discrimination" (para. 42).[14]

2. Other Nexus Cases

In addition to *Elk Valley*, several other recent employment cases turned on whether there was a nexus between the employee's mental disability and the impugned adverse impact.

For instance, in *Chatfield v. Deputy Head (Correctional Service of Canada)* (2017), 275 L.A.C. (4th) 217 [*Chatfield*], a correctional officer was terminated for submitting a "fraudulent bereavement leave request" and for subsequent attempts "to conceal [her] misconduct and mislead management" (para. 34). The employee grieved, alleging discrimination on the basis of mental disability. She asserted that she had an alcohol use disorder, severe depression and other mental health conditions, and that these conditions resulted in her misconduct. Her grievance, however, was dismissed by a panel of the Canada Public Service Labour Relations and Employment Board. The panel rejected the employee's assertions, finding that she had "not established that her disabilities were a factor in

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14 In *Elk Valley*, the union, on behalf of the employee, disputed the employer's *interpretation* and *application* of the workplace policy; however, the union did not impugn the policy itself. The dispute has a long history. The employer's drug policy was implemented in May 2005, without challenge. In November 2005, the employer terminated the employee after determining that the employee had breached the policy. The union grieved the termination, and the matter was heard by Arbitrator Gerald A. Lucas in 2006 and 2007. In his 2008 decision, (*Elk Valley Coal Corporation, Cardinal River Operations v. United Mine Workers of America, Local 1656* (24 April 2008), Edmonton), Arbitrator Lucas noted that the union did not challenge the terms of the drug policy, nor its reasonableness, nor the employer's right to implement the policy (see paras. 24, 59, 67). Nor did the union dispute the employer's assertion that the worksite was "safety sensitive" and the drug policy was "vital to safety" at the worksite (para. 67). Ultimately, the arbitrator assumed for the purpose of his award, without deciding, that the policy was *prima facie* discriminatory, giving rise to an onus on the employer to prove that the policy was justified as a *bona fide* occupational requirement and that the duty to accommodate had been discharged (para. 68). In the end, Arbitrator Lucas found that the employer had not fully satisfied its duty to accommodate (para. 79), and ordered the employee's conditional reinstatement following a disciplinary suspension for the "culpable elements" of the employee's misconduct (para. 81). Both the employer and the union applied for judicial review of the arbitration decision, submitting that Arbitrator Lucas erred by assuming, without deciding, that the employee's termination was *prima facie* discriminatory. The parties asserted that the *prima facie* test required the decision-maker to make a *finding* regarding discrimination. The Alberta Court of Queen's Bench agreed, and set aside the arbitration award in 2009 (*United Mine Workers of America, Local 1656 v. Elk Valley Coal Corp.*, 2009 ABQB 2 at para. 5). In addition, the court agreed with the union's submission that the matter be remitted to a new arbitrator. The employer, however, took the position that the matter ought to have been remitted to Arbitrator Lucas, and filed an appeal of the direction to find a new arbitrator. The appeal was subsequently dismissed in 2009 (*Elk Valley Coal Corp. v. United Mine Workers of America, Local 1656*, 2009 ABCA 407). Rather than re-arbitrating the matter, the union appears to have decided to file a complaint with the Alberta Human Rights Tribunal on the employee's behalf. In its complaint, the union alleged that the employer terminated the employee "for drug addiction" (*Bish v. Elk Valley Coal Corporation*, 2012 AHRC 7 at para. 1). Before the tribunal, the union argued that the employee's substance use disorder "was a factor in the [employer's] refusal to employ" the employee (para. 98). It argued that the employee "should have been assessed, given the opportunity for treatment and put back to work" (para. 101). The union took the position that the employee should not have been terminated; rather the employee "could have been disciplined" and "subject to a Last Chance or Rehab Agreement, which would have terms and conditions subjecting him to random drug testing" (para. 101). The tribunal dismissed the union's complaint in 2012. The decision of the tribunal to dismiss the complaint was affirmed by the Alberta Court of Queen's Bench (*Steward v. Elk Valley Coal Corp.*, 2013 ABQB 756) and the Alberta Court of Appeal (*Stewart v. Elk Valley Corp.*, 2015 ABCA 225) before the union appealed to the Supreme Court of Canada.

the circumstances that led to her dismissal" (para. 56). Citing a previous decision, the panel noted that "it cannot be inferred that a disability like alcohol addiction has any bearing on a serious act of misconduct in the absence of evidence to that effect" (para. 57).

Another federal public service case involving allegations of fraud resulted in a similar outcome. In *McNulty v. Canada Revenue Agency* (2016), 272 L.A.C. (4th) 261 [*McNulty*], an employee with an alcohol use disorder was terminated after she forged several medical certificates and was dishonest regarding absences related to her health condition. The employee grieved her termination, alleging discrimination based on mental disability. A panel of the Canada Public Service Labour Relations and Employment Board rejected the employee's allegation, due to a lack of evidence establishing a connection between the employee's misconduct and her alcohol use disorder. Specifically, the panel found "no expert evidence that alcohol dependency would remove any inhibitions or control that the grievor should otherwise have had with respect to the actions she undertook to acquire the leave by fraudulent means" (para. 188). As a result, the panel determined that the employee had "not established a *prima facie* case of discrimination on the prohibited ground of disability" (para. 189).[15]

The nexus question was also examined in a number of BC decisions issued during the past year, including *Francescutti v. Vancouver (City)*, 2017 BCCA 242 [*Francescutti*]. *Francescutti* was an appeal of a judicial review decision setting aside the Tribunal's dismissal of a complaint under section 27(1)(c) of the *Code*. The case involved an employee with a mental disability who was terminated for taking a jacket from an office at his workplace and then lying to his employer about doing so. The employee complained to the Tribunal, which dismissed the complaint based on a lack of evidence establishing a nexus between the employee's mental disability and his misconduct (see paras. 20-21). The Tribunal's decision was set aside by the Supreme Court of British Columbia on judicial review. However, it was subsequently restored by the BC Court of Appeal. The court of appeal determined that the Tribunal's decision was not patently unreasonable, finding ample support for the Tribunal's "conclusion that there was no reasonable prospect that [the employee] could establish at a hearing that his mental disability was linked to his termination, and thus could not establish a *prima facie* case for discrimination" (para. 70).[16]

D. Safety

Mental disability cases are sometimes decided against a backdrop of (real or perceived) safety issues in relation to people with mental health and substance use disorders (see *e.g. Trimac Transportation Services v. T.C.U.* (1999) 88 L.A.C. (4th) 237; *Shuswap Lake General Hospital v. BC Nurses' Union*, [2002] B.C.C.A.A.A. No. 21 (QL); *Gordy v. Oak Bay Marine Management*, 2004 BCHRT 225; *Gichuru v. Law Society of B.C.*, 2009 BCHRT 360; *C.E.P., Local 30 v. Irving Pulp & Paper*, 2013 SCC 34 [*Irving*]). Several decisions published during the past year fall into this category.

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15 Similarly, in *Shandera v. Deputy Head (Correctional Service of Canada)*, 2017 PSLREB 26, a panel of the Canada Public Service Labour Relations and Employment Board found "no evidence of a linkage or nexus" between the grievor's mental health condition and the alleged theft, by the grievor, of employer property (para. 300). The grievance was dismissed.

16 The nexus question was also considered (and answered in the negative) in *Wenta v. Trolar Management (1987) Ltd. (c.o.b. Taylor, Tait, Ruley and Co.)*, 2016 BCHRT 199 and *Garley v. Parksville Bottle & Recycling Depot*, 2017 BCHRT 180 at paras. 45-46.

1. Random Drug Testing

A couple of high-profile decisions from the past year involved random drug testing in a safety context. The first was the judgement of the Ontario Superior Court of Justice in *Amalgamated Transit Union, Local 113 v. Toronto Transit Commission*, 2017 ONSC 2078 [*TTC*].

TTC was a decision on an application by the union representing Toronto transit employees for an interlocutory injunction restraining the implementation of the random drug testing component of the employer's "Fitness for Duty" policy until completion of a multi-year arbitration concerning the overall validity of the policy. The Ontario Superior Court of Justice dismissed the injunction motion, on the basis that the union had not demonstrated that its application met the criteria set out by the Supreme Court of Canada in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311. Specifically, the court in *TTC* was not satisfied that the union and its members would suffer irreparable harm if the injunction was denied (see para. 93). Notable reasons for the court's decision included the following:

(1) At paras. 65-68, the court reasoned that, if the union is ultimately successful at arbitration, any employee whose privacy has "been 'wrongfully' infringed by random testing" can seek damages for breach of privacy, based on "the considerations in awarding damages outlined in [the Ontario Court of Appeal's decision in] *Jones v. Tsige*."[17]

(2) The court rejected the union's submission regarding "possible reputational damage" associated with attending a random drug test (see paras. 69-70).

(3) The court rejected the union's argument that random testing would "permanently damage the relationship between employees and management" (see paras. 71-74).

(4) In response to the union's concerns regarding the "risk of false positives," the court reasoned that wrongful termination "due to a proven false positive would…be compensable in damages" (see paras. 75-81).

(5) On the evidence, the court was not persuaded "that instituting random drug and alcohol testing creates the likelihood of psychological harm" to transit employees (see paras. 82-91).

(6) The court rejected the union's argument "that random testing raises an issue of embarrassment and humiliation." Specifically, the court was not persuaded by the union's concerns "that employees who are not impaired at work may be embarrassed or humiliated by testing positive due to drug consumption outside of the workplace." According to the court, evidence of irreparable harm "must be clear and not speculative" (para. 92).

Moreover, on the evidence, the court found that the balance of convenience, taking into account the public interest, favoured not granting the injunction (see paras. 95-156).[18]

Suncor Energy Inc. v. Unifor, Local 707A, 2017 ABCA 313 [*Suncor*] was another recent case in which a court considered competing interests related to random drug testing and ruled in favour of

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17 *Jones v. Tsige*, 2012 ONCA 32.

18 Throughout its judgement, the court noted that the union did not cross-examine three of the employer's key witnesses (see paras. 38, 49, 51, 138). The employer, on the other hand, appears to have cross-examined the union's witnesses (see paras. 73 and 87).

the employer. *Suncor* was an appeal of an Alberta Court of Queen's Bench decision to quash a 2014 arbitration award. The case related to the introduction of random drug testing by a mining company in 2012. The union representing some of the company's employees grieved the new random testing regime. Following "a lengthy [i.e. 23 days], technical and complex arbitration involving significant evidence [i.e. 19 witnesses, including four experts, and hundreds of exhibits] and extensive [i.e. 188 pages] oral and written submissions" (para. 3), the majority of the arbitration panel allowed the grievance, finding that the employer's drug policy, "in its present form, as it applies to random drug and alcohol testing, is an unreasonable exercise of the Employer's management rights" (para. 348). The Court of Queen's Bench quashed the majority's award in 2015, and ordered that the matter be remitted for a fresh hearing by a new panel. The court identified several flaws in the majority decision, including "that the majority erred by only considering the evidence that demonstrated substance abuse problems *within the bargaining unit*, and ignoring the evidence of substance abuse problems *within the broader workplace*" (*Suncor* at para. 22, emphasis added). The union appealed, and on September 28, 2017, the appeal was dismissed by the Alberta Court of Appeal.

To dispose of the matter, the appeal court only addressed the suggestion, by the majority of the arbitration panel, "that it should only consider evidence demonstrating a drug or alcohol problem *within the bargaining unit*" (para. 38, emphasis in original). According to the court of appeal at para. 49, this "was not a minor or inconsequential evidentiary misstep…that was unlikely to have any impact on the outcome" of the case:

> The heart of the…[balancing of interests analysis from the Supreme Court of Canada's decision in *Irving*]…is an inquiry into whether there is sufficient "evidence of enhanced safety risks, such as evidence of a general problem with substance abuse in the workplace"...The key question in this arbitration was whether there was sufficient evidence of a substance abuse problem in Suncor's Fort McMurray operations to justify random drug and alcohol testing, given the privacy concerns inherent in such random testing. Rather than considering whether there was evidence of a problem in the workplace, the majority [of the arbitration panel] asked only whether there was evidence of such a problem specific to bargaining unit employees. By unreasonably narrowing the evidence that it considered when deciding the issue, the tribunal majority effectively asked the wrong question, and therefore applied the wrong legal test.

2. BFOR/Accommodation

Safety considerations were raised not only in drug policy cases decided during the past year, but also in individual discrimination matters involving findings related to workplace accommodation issues and *bona fide* occupational requirements, or BFORs.

For instance, in *Gill v. British Columbia (Ministry of Public Safety)*, 2016 BCHRT 208 [*Gill*], the complainant, a person with a mental disability who worked at a pre-trial correctional centre, alleged that his employer "had failed to fulfill its duty to accommodate him, in particular by not placing him in one of two available positions" (para. 2). The employer, on the other hand, took the position that it had "determined that it could not fulfill its duty to maintain the safety of its staff and the inmates by taking the risk of returning" the complainant to work. The Tribunal member decided to dismiss the complaint under section 27(1)(c) of the *Code*, finding that the employer had "filed

sufficient material to convince me that, if this complaint went to a hearing, it would establish a BFOR" (para. 33).[19]

In contrast to *Gill*, the Tribunal in *M v. V Gymnastics Club*, 2016 BCHRT 169 [*VGC*] declined to dismiss a complaint involving safety considerations. In *VGC*, the complainant was a gymnastics coach who used marijuana for therapeutic purposes. Despite positive performance reviews and a lack of any formal complaints or allegations or observed problems with her work, the complainant was suspended without pay and put on medical leave for safety reasons, pursuant to the employer's "zero tolerance" policy and pending receipt by the employer of a medical report from an "addictions specialist" establishing that the complainant's use of marijuana did not pose a risk to the children and youth that she taught. The Tribunal found that the complainant had "provided evidence that she has disabilities [including mental disabilities], she has the adverse impact of being prevented from working and the two are related because [the employer] claims that she could not work due to her method of treatment of her disabling medical conditions" (para. 52). Given the lack of justification evidence presented to the Tribunal, it denied the application to dismiss the complaint against the employer.

Another noteworthy safety-related decision issued during the past year was the Federal Court's judgement in *Walsh v. Canada (Attorney General)*, 2017 FC 451 [*Walsh #2*]. In that case, the applicant, Jasyn Walsh, was an experienced seafarer with an alcohol use disorder and other mental disabilities. In 2010, Walsh applied for a Marine Medical Certificate attesting to his fitness to work as a seafarer. Transport Canada, however, refused to issue him a certificate, based largely on "the unwritten practice that an alcohol dependent applicant, not in verifiable sobriety and treatment, is ineligible for a Certificate" (*Walsh v. Canada (Attorney General)*, 2015 FC 230 [*Walsh #1*] at para. 27). Walsh subsequently reapplied for a certificate, which was granted in May 2012 "on the basis of evidence that [he] had stopped drinking and had begun treatment" (*Walsh #2* at para. 16), and pursuant to "an unwritten practice that an alcohol dependent applicant, who can provide verifiable evidence of sobriety and treatment, may be eligible for a restricted Certificate" (*Walsh #1* at para. 27). Consistent with this unwritten practice, Transport Canada issued a three-month provisional restricted certificate prohibiting "watchkeeping duties," on the condition that Walsh adhere to a two-year "monitoring program" involving quarterly reports from a physician regarding Walsh's "alcohol rehabilitation and…ongoing abstinence" (*Walsh #2* at para. 7). Transport Canada advised that the "no watchkeeping" restriction – which allegedly disqualified Walsh from "95% of all deckhand jobs" (*Walsh #2* at para. 1) – was "applied as a result of [Walsh's] past alcohol abuse problems," and "may be lifted after two years of confirmed abstinence" (*Walsh #2* at para. 7).

Walsh, who had been "in a verifiable state of sobriety and treatment for 8 months" (*Walsh #2* at para. 32), filed a complaint with the Canadian Human Rights Commission in June 2012. Four months later, Transport Canada granted Walsh an unrestricted certificate on the basis of a letter from Walsh's physician "reiterating that he was still attending counselling services and maintaining

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19 Although she granted the application to dismiss, the Tribunal member in *Gill* was critical of the employer's reliance on WorkSafeBC determinations to make its case. In its submissions, the employer stated that the employee "suffered from a workplace injury [and] thus the matter fell under the auspices of WorkSafeBC." The employer argued that it "fully complied with WorkSafeBC in trying to accommodate" the employee's return to the workplace, and that it was WorkSafeBC who determined that the employee "had a permanent medical condition and was unable to return to his pre-injury job." According to the Tribunal member, "the problem with this argument" in the context of a *Code* matter is that "determinations made by WorkSafeBC about whether an employee can return to a pre-injury job are not based on a human rights analysis of whether an employer has fulfilled its duty to accommodate which is the question before the Tribunal" (para. 30).

sobriety" (*Walsh #2* at para. 33). The Commission dismissed Walsh's complaint in 2014, reasoning that Transport Canada's unwritten rules regarding applicants with alcohol use disorders were justified and "accommodated seafarers with a history of alcohol dependence" (*Walsh #1* at para. 13).

Walsh applied for judicial review of the Commission's decision. His application was granted in February 2015, on the basis "that the Commission had failed to properly apply the third branch" of the "*Meiorin* test" (*Walsh #2* at para. 1), including failing to consider potential alternatives to the "no watchkeeping" restriction, such as a "no lone watchkeeping" restriction.

Pursuant to the court's direction, the Commission re-examined Walsh's complaint, dismissing it for a second time in 2016. Walsh again applied for judicial review, and again his application was granted. The court found that the Commission's determination that Transport Canada had met its obligations under the third branch of the *Meiorin* test was unreasonable. In reaching its decision, the court commented, in part, as follows at paras. 48-51:

> …it is not clear at all on what basis the Applicant was assessed in such a short period of time from being wholly unfit to being totally fit for Watchkeeping duties. In other words, why was the Applicant deemed fit for such duties at the mid-way point of the policy's two-year monitoring period instead of the full two years or at the 15 month mark or, for that matter, at the 8 month mark?...
>
> …there is no clear explanation on record as to what prompted Transport Canada to move, in a span of five months, from a zero-risk approach to a no safety-concern position in the case of the Applicant…
>
> …
>
> …the Respondent claims that the "No Lone Watchkeeping" is not a viable option for those with alcohol dependency due to the potential for impaired judgment issues…. However, this approach, which does not take into account the particular circumstances of each case, does not sit well with step 3 of the *Meiorin* test which discourages blanket accommodation refusals…This is especially the case here where the Applicant, shortly after being denied a "No Lone Watchkeeping" [restriction], was relieved of any restrictions regarding his ability to conduct Watchkeeping duties. In my view, there is a disconnect between these two sharply contrasted positions which lacks a rational justification in the circumstances of this case…

In the end, the Federal Court again remitted the matter back to the Commission for further reconsideration.[20]

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20 An additional case from the past year, which ostensibly involved safety considerations, was *Canadian Forest Products Ltd., Isle Pierre Division v. United Steelworkers, Local 1-424* (2017), 275 L.A.C. (4th) 1 [*Canfor*]. The grievor in *Canfor* was a cut-off saw operator with an alcohol use disorder. He had worked at the employer's sawmill since 1994. In 2011, "he was found to be impaired at work and he asked…[the] HR manager…for help" (para. 80). In consultation with his union, the grievor subsequently "agreed to enter residential treatment and returned to work in March 2012 under a Drug Monitoring Agreement and an associated Last Chance Agreement ("LCA")" (para. 2). The monitoring agreement mandated complete abstinence, frequent check-ins with a physician monitor, random urine screening, attendance at Alcoholics Anonymous meetings, etc. In October 2013, the grievor consumed alcohol at a family wedding, and subsequently "failed a drug test and admitted to a relapse" (para. 20). By agreement of the parties, he was eventually returned to work under another monitoring agreement and a second LCA. The grievor's obligations under the second LCA were not centred on job performance or workplace safety; rather, according to the employer, "the real commitment [under the second LCA] was to a recovery program" (para. 116). The LCA did not reflect the typical employment bargain, whereby an employer pays wages and benefits in exchange for work satisfactorily performed. Instead, in "exchange

III. Conclusion

> …stigmas…sometimes impair the ability of courts and society to objectively assess the merits of… discrimination claims (*Elk Valley* at para. 58, C. Gascon J., dissenting).

In this paper, I have reviewed mental disability cases from the past year, summarizing findings and legal reasoning of particular interest or significance. In general, the past year's decisions confirm long-standing legal principles related to, for example, the meaning of "mental disability" and the test for *prima facie* discrimination.

The decisions highlighted in this paper also serve as a reminder of the central importance of evidence in our adversarial system for resolving discrimination matters. As one arbitrator wrote in 2013, the resolution of legal disputes is meant to be "evidence-based, not faith or belief-based." Accordingly, "assumptions, unsupported presumptions, anecdotal or unparticularized evidence, and broad-based statistical inferential reasoning is typically 'not good enough' to satisfy the balance of probabilities onus of proof" (*Mechanical Contractor Association Sarnia v. United Association of Journeymen and Apprentices Of The Plumbing & Pipefitting Industry of the United States Canada, Local 663*, [2013] CanLII 54951 (ONLA) at para. 127). Many of the cases discussed above reflect this type of rigorous and discerning approach to fact-finding and decision-making.

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for continued employment, the grievor promised among other things to…attend at least three AA meetings per week and complete the 12 steps" (para. 116). In late-2015, the grievor breached the second LCA by failing to call in to the monitoring doctor's office and failing to advise the doctor of his upcoming vacation dates. The LCA expressly provided that failure to abide by any of its terms constituted just cause for dismissal; accordingly, the employee was terminated. The union grieved; however, at arbitration, the grievance was denied and the termination was upheld.