

Examining the Causal Link between Disability and Discipline

An Arbitrator's Perspective

Barry B. Fisher
Barrister, Arbitrator & Mediator
393 University Ave., Suite 2000
Toronto, Ontario
M5R 1E6
Tel: 416 585 2330
barryfisher@rogers.com
www.barryfisher.ca

Years ago I arbitrated a case involving a night shift brewery worker who was caught stealing two cases of beer from the plant, dropping them behind a bush at the local Tim Horton's and then picking the beer up after work while on his way home. He was discharged for theft. He did not contest the actual incident, but explained that he was, at the time, an untreated alcoholic. Subsequent to his discharge he had gone through a recovery programme and presented himself at the arbitration hearing as recovered alcoholic. He did not claim that at the time he committed the theft that he was intoxicated. To buttress his claim of alcoholism, which the employer disputed, the grievor explained that for the last ten years, he would routinely take 10 or so beers a night from the plant and go spend an hour or so in the back of a transport truck and drink them while on shift.

I accepted that the grievor was, at the time of the incident, an untreated alcoholic. I accepted that he had now gone through a successful recovery programme. However, I upheld the discharge because there was no evidence led that linked his alcoholism to his actions of stealing. In other words, he did not steal because he was an alcoholic, he stole because he was a dishonest alcoholic who found it more cost effective to steal his beer rather than pay for it. His problem was therefore not his addiction, but his dishonesty.

The Union seemed to believe that as long as they could prove that the grievor was an alcoholic, no blame, or lesser blame, would be attributed to his act of theft. However, they failed to establish any connection between the disability and the culpable act, and therefore I found that the two issues were distinct and unrelated.

In this paper I wish to review a few other arbitrators' decisions where the interplay between the disability (usually either a mental illness or an addiction) and disciplinary conduct occurs. I am especially interested in the following issues:

- Did the Arbitrator consider medical evidence of the disability?
- Did the Arbitrator consider expert medical evidence as to any linkage between the disability and culpable conduct?
- If the answer to Q 2 is no, then what did the Arbitrator rely upon to determine if there was a casual link between the disability and the culpable conduct?
- If there is a finding that the disability and the culpable conduct were casually linked, how did that affect the outcome of the case?

TDS Automotive v CAW, Local 222
2005 CarswellOnt 1494
{2005}L.V.I. 3544-8

In this 2005 case, Arbitrator Howard Brown had a case involving a production operator with 8 years service. The grievor had an elbow injury which required accommodation. The Company transferred her to a job which met the required accommodations. This placement was done by a joint Union Management Modified – Accommodation Committee. She was first suspended and then terminated for failing to follow directives which lead to excess errors in her work. The Union’s position was that the grievor’s actions were related to her disability and that she should have been further accommodated.

In dismissing the grievance, Arbitrator Brown said as follows:

The fact of an on-going injury does not insulate an employee from the expectation by an employer of the reasonable performance of the job requirements when placed and as here, accommodated in a job which satisfies the medical restrictions applicable to the employee. If there is a further causal connection between the difficulties alleged to be experienced in the job and a disability, the employee has the responsibility to bring that to the attention of supervision and request relief. Here, the Grievor, having the decision of the Modified Work Accommodation Committee could have but did not request any reconsideration by the Company or Union representatives to her detriment. The concern of Mr. Carman as to her ability to satisfy the tasks of the job was raised by him and answered in the affirmative by that Committee. To the point of termination, Ms. St. Pierre said that nothing had arisen about degree for his sore arm, while working at this job and I have accepted that evidence.

The union led no medical evidence in this case so it appears that the Arbitrator accepted the decision making process of the Modified Work Accommodation Committee, who presumably did have medical information before it. The Arbitrator went on to find that there was no linkage between her elbow injury and her unacceptable error rate and thus analyzed the issue of the appropriate disciplinary response on traditional grounds as if the grievor had no disability.

**Canadian Union of Postal Employees v Canada Post
2004 [D.A.T.C. 385**

Arbitrator Hugette Gagnon had to deal with the discharge of an postal worker who threatened to kill both a co-worker and a supervisor at work because he could not cope with the level of noise and bickering in the sorting room. The grievor suffered from Bi-polar Disorder, but was under the active care of his doctor and was taking his medications as prescribed. Immediately after the incident the grievor presented management with an up to date letter from his doctor indicating that he was following his treatment regime, was not psychotic and was fit to return to work. Management wanted to move him to a different work area, but the grievor refused. He was then terminated.

At the arbitration hearing the Union led evidence from a different doctor than the one who was treating the grievor at the time of the incident, who testified that the grievor,

at the time of the incident, was in a state of decompensation (psychological imbalance caused by stress).

The Arbitrator preferred the evidence of the treating doctor over the expert hired after the fact. She had this to say about the relevance of his bi-polar disorder and the incident:

Just because a person suffers from a mental illness does not mean that all his “deviant” acts and gestures can be excused by his disease. When such a person is in a period of decompensation or loss of contact with reality, the disease will explain the behaviour, but, when his affect is stable, and his disease is “controlled” by medication, this person has to answer for his acts and gestures just like any other person. A person suffering from a mental illness... must make the effort to control his anger even if that is sometimes more difficult for him than for another person.

The Arbitrator found that the grievor’s refusal at the time of the incident to accept a transfer was affected by his disorder but since at the arbitration hearing he was now willing to accept a transfer to an accommodated position, she ordered him reinstated to an accommodated position without any back pay.

In this case there were two sets of medical opinions presented and the arbitrator chose to follow the opinion of the treating doctor. This evidence led her to find that there was no linkage to the making of the actual threat and his illness, and thus it was culpable conduct, but there was a linkage between his illness and his initial refusal to accept a transfer. As his present mental state now permitted him to see the wisdom of a transfer, she fashioned a remedy accordingly.

**J.S v Parks Canada Agency
Lancaster House Firefighters/Fire Services Employment Law News May/June 2004**

In this 2005 decision of Evelyne Henry of the Canadian Public Service Staff Relations Board, the grievor was permanently demoted because he was caught stealing gas 20 to 25 times in that year. The grievor’s psychologist gave an opinion to the employer at the time that the grievor was suffering from Post Traumatic Stress Disorder. The grievor attended at a psychiatrist chosen by the employer who did not find that the grievor had PTSD but did find that he was suffering from severe depression, which could lead to poor judgement. The grievor later obtained further medical opinions from his family doctor, a EAP psychologist and a psychiatrist, all of whom confirmed the diagnosis of PTSD.

Adjudicator Henry decided that whether the grievor had PTSD or severe depression, the medical evidence supported the contention that this illness caused his judgement to be impaired but not to the point that he did not know at the time that stealing gas was wrong, especially 25 times. The impairment did not change the fact that he was guilty of culpable conduct, but it was a factor to be taken into account when assessing the penalty. Citing other reasons not related to the issue of illness, she

substituted a lesser penalty and ordered him to repay the employer for the stolen gas and to continue with his medical treatment.

In this case the Arbitrator had a wealth of medical evidence, all of which tied the illness to poor judgment, thereby establishing a link between the illness and the dishonest conduct. The effect of this linkage was that it was a key factor in the Arbitrator's decision to lessen the penalty.

**Teamsters Local 31 v Vancouver Police Board
[2002] L.C.C. 4973**

Arbitrator Ron Davies had a situation where a civilian police employee with 18 years service stole a handgun and bullets from a police station for the purpose of committing suicide. She then took a leave of absence for a few months. Four years later she used the gun in an attempted suicide. The police attended at her home, seized the gun and then realized it had been stolen. She confessed to the theft but was allowed to remain at work. Approximately one year later she resigned but was put on disability benefits due to her mental illness. She was promised that if she recovered there remained a possibility of re-employment. Two years later, after having finally been diagnosed with bi-polar disorder, she recovered after taking proper medication and refraining from taking addictive substances. The Board refused to reemploy her and she filed a grievance. For arbitration purposes the Board did not rely on the resignation, rather it relied on the conduct of stealing the gun, its continued unlawful possession and the unlawful discharge of a firearm.

The first issue was whether or not her conduct of stealing the gun, retaining it for four years and then unlawfully discharging the gun was culpable conduct. The Arbitrator defined the difference between culpable and non-culpable conduct based on whether "the grievor suffered from a condition which significantly impaired her ability to choose from refraining from engaging in misconduct". Although he had extensive evidence about the mental illness of the grievor that allowed the Arbitrator to decide that at the time of the original theft and at the time she attempted to commit suicide she was not culpable, he was troubled by the fact that in the intervening four years when she retained possession of the stolen gun she admitted to have periods of clarity and lucidity. The issue was therefore whether her continued possession of the gun was culpable conduct? He discussed this problem as follows:

Despite the grievor's admission that she experienced periods of clarity and lucidity, the evidence does not provide me with the ability to segregate her culpable conduct from her non-culpable conduct. The expert evidence in this case is sufficient to establish that bipolar affective disorder is a complex illness, and that the grievor suffered from it for an extended period of time. Despite her evidence of moments of clarity, I am unwilling to determine the limits of the illness without the benefit of further medical evidence. Very simply, I do not possess the expertise to determine when the grievor's capacity to make appropriate employment related decisions was not impaired by the illness.

After that comment, the Arbitrator concluded that the grievor's medical condition had to be treated as a whole and thus all of the conduct, including the unlawful possession of the stolen gun for four years, was considered non-culpable.

In this case the Arbitrator clearly relied on medical evidence to support his finding that there was such a strong link between the conduct and the illness that the conduct was non-culpable. In fact where the medical evidence was deficient, he was prepared to assume continuation of the grievor's incapacity. This almost looks like the Arbitrator expected the Employer to lead medical evidence of capacity when clearly the onus would normally be on the Union to prove incapacity. Having established that the conduct was non-culpable, the allegation of just cause was dismissed. This is one of the most dramatic examples of what can happen when a direct linkage between the disability and the conduct is established at an arbitration.

**Thompson Products Employee's Association v TRW Canada
[2002] L.C.C. 4490**

In this decision Arbitrator Bram Herlich was faced with the situation where a 12 year employee assaulted a co-worker at a Company social function. He was an alcoholic who was very drunk at the time of the assault. He had been through therapy in the past, stayed sober for a few years but had relapsed some months prior to the incident. Following his discharge, he had again gone to therapy and had remained sober and unemployed.

Arbitrator Herlich heard from the family doctor and psychotherapist.

With respect to the issue of the nexus between the handicap and the incident, Arbitrator Herlich had this to say:

It is now well established and was not disputed that alcoholism constitutes a handicap within the meaning of the Human Rights Code. Although Mr. LaScala (the supervisor) equivocated on the point in his evidence, neither was it disputed that the grievor is an alcoholic. I am also satisfied that but for the alcoholic stupor into which the grievor had immersed himself on the night in question, the unfortunate assault would likely have never happened. Similarly, there can be no question of the nexus between the grievor's alcoholism, and his consumption of alcohol on the night in question. Thus to the extent the grievor's discharge resulted from the assault and the assault resulted from the grievor's alcoholism, the grievor's discharge is because of his handicap. Of course, the Human Rights Code does not guarantee immutable job security for every alcoholic. An employer is not required to tolerate repeated workplace disruptions or safety hazards in order to meet its obligations under the legislation. An alcoholic employee who is incapable of performing or fulfilling the essential duties or requirements of his position may not to benefit from the protection of Human Rights Code. However, before determining that an employee is incapable it must be established that the needs and the employee can not be accommodated without causing undue hardship for the employer.

In deciding to reinstate without back pay, the Arbitrator expressly referred to the handicap and the impressive efforts the grievor had made to rehabilitate himself.

Thus Arbitrator did hear medical evidence but presumably relied on his own knowledge of intoxicated behaviour to find that there was a nexus between the handicap and the incident. The linkage between the disability and the incident clearly had some influence on the remedy; although the most important factor was that the grievor had remained sober for some 18 months and had undergone proper treatment.

**J.D. v Treasury Board (HRDC)
Canada Public Service Staff Relations Board
Lancaster House Disability and Accommodation Reporter July/August 2004**

In this case Adjudicator Dan Quigley dealt with HRDC program officer with 20 years service who improperly interfered with a grant application by her then boyfriend so that he received preferential treatment. She suffered throughout this period from bi-polar disorder. Both the employee's psychiatrist and the Health Canada psychiatrist agreed that at the time she was going through a hypomanic episode rather than a manic episode. The distinction is an important one for a manic episode can include behaviour impulsivity and sexual and financial indiscretion, while a hypomanic episode, according to the DSM-IV, is not severe enough to cause marked impairment in social or occupational functioning. Furthermore the employer's medical officer had determined that the grievor's illness was not the type that blurred her ability to distinguish between right and wrong.

The Adjudicator found that the grievor's bi-polar disorder had contributed to her making impulsive decisions in her personal life but did not affect her to such a degree that she did not know that she was committing fraud. He said on the issue of nexus:

I see no direct link or nexus between the grievor's illness and her ability to appreciate the fact that her actions amounted to misconduct.

Notwithstanding the fact that he found no connection between her actions and her illness, he made it a condition of her reinstatement that she continue to receive proper medical treatment and periodically undergo fitness-to-work evaluations for a two year period.

This Adjudicator relied very heavily on the medical diagnosis in his analysis and found that there was no direct casual link between the illness and the actions. Having said that, when fashioning a remedy the Adjudicator referenced the illness and required the grievor to undergo ongoing medical treatment. Is this not contradictory?

**United Nurses of Alberta v Calgary Regional Health Authority
[2001] L.C.C. 3749**

In this decision, Arbitrator Francis Price dealt with nurse with 10 years service who took a dose of methadone that was intended for a patient. After taking the narcotic, the grievor continued to treat the patient, failed to properly chart the administration of methadone to the patient and then left the unit early without first advising the Charge Nurse on duty.

The grievor was suffering from Acute Adjustment Disorder with mixed disturbance of mood. At the time there was a moderate amount of impairment of function so that although he was able to distinguish between right and wrong, the moderate amount of impairment of judgement (GAF = 50) would affect the grievor's ability to concentrate and sort through all the necessary information in making a judgement call. This could lead to exercising poor judgement. The Arbitrator noted that the grievor was not a substance abuser nor was he an addict, as was the case in most of the cases cited at the arbitration.

In deciding to reinstate the grievor, the arbitrator made extensive reference to the medical evidence that was led at the hearing. The Arbitrator noted that the medical evidence was that at the time of the incident the grievor was under undue stress due to marriage problems and that he was not coping well the stress. His taking of the methadone that day was explained this way:

Dr MacKay (the treating psychiatrist) equated it to someone drowning in the North Atlantic, grabbing at whatever came by as a potential lifesaver. In the Grievor's case the "lifesaver" appeared in the form of methadone ..., and it appeared to him to be the only way he could get out of the psychiatric situation.

Ultimately the grievor was reinstated without back pay and subject to continuing to be under the care of the doctor for his illness.

Thus the Arbitrator had medical evidence before him, directly linked the illness to the incident and modified the remedy in light of the disability.

Conclusions:

1. It is critical to lead medical evidence both as to the illness or disability but more importantly as to how it related to the incident.
2. It is not necessary for the Union to prove that the handicap made it impossible for the grievor to be able to distinguish between right and wrong; rather it is sufficient that the Union show that the grievor's judgement was impaired by the disability.
3. It is important that by the time of the hearing that the grievor be in treatment and have made a complete recovery.

4. Whether it is relevant to the findings or not, arbitrators seem to like to order disabled grievors to continue under medical care, so it would seem prudent for Unions to volunteer this at the hearing.
5. The ability of employers to prove accommodation past the point of undue hardship continues to be a daunting one. The Employer is better off trying to negotiate a very strict last chance agreement, of course at all times respecting the human rights issues involved in those matters.