Illness and Absenteeism

A Manual for Human Resource Personnel, Union Representatives and Labour Relations Practitioners

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Continuing Monthly Supplement for Illness and Absenteeism

This supplement is a companion to the *Illness and Absenteeism* looseleaf manual.

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The Supplement contains a unique, searchable index that is based on the principles and concepts found in the Supplement rather than on a simple indexing of key words used. That has the distinct advantage of better directing the reader to the relevant concept that is being considered.

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Chapter 1 Balancing Privacy and Workplace Interests

1:102 Right to Intrude on an Employee's Privacy [See Page 12 of Manual][1]

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[1] **Right to Intrude on an Employee's Privacy**

In *Canadian Bank Note Co.* (2012), 222 L.A.C. (4th) 293 (Surdykowski), the arbitrator commented that **unless fettered by legislation or a collective agreement provision, an employer retains the management right to require reasonably necessary medical information:**

> An employer has the management right to implement workplace management policies, including policies concerning attendance and absenteeism management. An employer has the management right to question suspicious absences or information provided by an employee to justify an unauthorized absence. So long as it does not constitute harassment, it is not unlawful for an employer to ask an employee for personal medical information in accordance with legislation and the collective agreement for legitimate workplace management and absenteeism control purposes.
>
> … In this jurisdiction, an employer bound by a collective agreement retains all of the management rights that a non-union employer has except to the extent that those management rights are fettered by the collective agreement, either expressly or by necessary implication – whether or not the collective agreement contains a management rights provision. However, neither a "boiler plate" management rights provision, nor the residual management rights theory entitles the employer … to demand even a first instance medical certificate in every case, without assessing whether one is reasonably necessary in the circumstances.

This case also comments on an employee's obligation to attend at work and the need to justify an absence irrespective of whether sick leave benefits are being claimed.

In *North Simcoe Muskoka Community Care Access Centre*, 2014 CanLII 72997 (ON LA) (Stout), the union grieved the **employer's practice of circulating absence reports** to all staff, stating that such violated confidentiality and encouraged bullying and harassment in the workplace. The employer contended that the matter was inarbitrable in that it related to an absenteeism reporting process that did not form part of the collective agreement.

The employer's practice was to require employees who were to be absent to call in and leave a message indicating their absence, their team (there were 14 teams throughout the province) and the reasons for their absence. The report that was compiled and circulated set forth the employee's name, their team and the fact that they would be absent for the day. No reason was provided for the absence.

The union contended that there was no reason for the email to be circulated beyond the team where the absence(s) occurred.

The grievance was dismissed. Assuming, but not deciding that he had jurisdiction, the arbitrator commented that the employer had a valid business reason for its conduct, and that it did not act

unreasonably or unfairly in the circumstances. The information that was communicated was innocuous and did not convey any confidential or personal private information.

See also Section 7:202 of the *Illness and Absenteeism* manual and this supplement.

2. An Intrusion Upon Privacy Must Be Reasonable

In *R. v. Cole*, 2012 SCC 53, the Supreme Court of Canada concluded that there is a **reasonable expectation of privacy in files stored on an employer-issued computer**.

This decision was released on October 19, 2012. The Ontario Court of Appeal decision is considered at page 476 of the *Illness and Absenteeism* manual.

The Supreme Court decision is also considered in much greater detail in section 12:503 of this Supplement.

In this particular case, a school technician, while performing maintenance activities on the teacher's computer, discovered a hidden folder that contained nude photos of a female student. These photos had been copied from another student's computer using the remote network access privileges that had been granted to the teacher to view student files. The teacher had not brought the existence of the photos to the employer's attention.

The issue was considered in the context of an appeal involving a criminal prosecution for possession of child pornogrsphy.

The Court of Appeal held that the teacher "had a reasonable expectation of privacy in the informational content of the laptop, but that this expectation was 'modified to the extent that [the teacher] knew that his employer's technician could and would access the laptop as part of his role in maintaining the technical integrity of the school's information network.' It concluded that "the search and seizure of the laptop by the principal and the school board was authorized by law and [was] reasonable. The disc containing the photographs was thus created without breaching s. 8 [of the *Charter* [the right to be free from unreasonable search and seizure]. And since [the teacher] had no privacy interests in the photographs themselves, he had no legal basis to attack the search and seizure by the police of the disc to which they had been copied."

The Court of Appeal however excluded from admission into evidence, in the teacher's criminal prosecution, the laptop and a disc containing the teacher's temporary internet files on the basis that the teacher "had a reasonable continuing expectation of privacy in this material, and its seizure by school authorities did not endow the police with their authority. Nor could the school board consent to the search by police." The police search of this material was therefore held to be a violation of the *Charter.*

The Supreme Court of Canada upheld the Court of Appeal's decision that the teacher had a reasonable expectation of privacy in his employer-issued work computer, and that the search and seizure by the police of the laptop and the disc containing the temporary internet files was, in the absence of a search warrant, unreasonable within the meaning of s. 8 of the *Charter*. It disagreed however with the Court of Appeal's conclusion that the unconstitutionally obtained evidence should be excluded. The Supreme Court of Canada held that "the admission of the evidence

would not bring the administration of justice into disrepute. The breach was not high on the scale of seriousness, and its impact was attenuated by both the diminished privacy interest and the discoverability of the evidence. The exclusion of the material would, however, have a marked negative impact on the truth-seeking function of the criminal trial process." The Supreme Court therefore declared that the evidence unlawfully obtained by the police should nevertheless have been admitted at trial. Abella, J. of the Supreme Court dissented on the basis that the trial judge had acted reasonably in excluding the evidence pursuant to s. 24(2) of the *Charter*.

The decision stands for or reiterates the Charter principles that are set forth in s. 12:503 of this Supplement. The decision is also considered further in s. 12:304 of the Supplement.

In Saskatchewan Government and General Employees Union, 2015 CanLII 28482 (Ponak), the arbitrator decided that **employee emails on an employer's email server** were to be treated as private and inadmissible even though the employer's use policy explicitely stated that they were not private and could be accessed by the employer.

The employee, who was employed as a Labour Relations Officer for SGEU, was terminated after he allegedly became a known associate of a motorcycle club, and, while employed, breached the SGEU's Information and Technology Policy and its Code of Conduct.

The employee had access to a substantial number of government work places where he was responsible for representing union members. He interacted with managers who supervised the employees he represented. Many of these worked in Correctional Services.

Immediately prior to his termination, the SGEU was advised by one of its elected officials that the employee had been involved in a bar fight while wearing "biker patches." The employee denied that he was affiliated with a motorcycle club. The SGEU then learned from the Ministry of Justice that a police force had informed it that the employee was believed to be involved in an ongoing criminal investigation and that, effective immediately, he was being denied access to all provincial correctional facilities. The SGEU immediately arranged to review all emails that were sent or received through the union's computers. Upwards of thousands of emails were reviewed that day, with the focus being on the attached photos rather than the contents of the emails. The photos satisfied the SGEU that the employee was a member of a motorcycle group and that he had lied about his affiliation. He was immediately terminated.

The employee's union, Unifor, objected to the employer's attempt to introduce emails between the employee and his wife that had been obtained by searching the employer's email server.

The SGEU had a detailed Information Technology policy that stated that the SGEU's computers were to be used solely for SGEU business; that messages were neither confidential nor private; and that all files or messages were the property of the SGEU.

The arbitrator found that the emails were not admissible on the basis that the privacy rights of the employee outweighed the business needs of the employer. His reasoning is by no means flawless.

On the issue of privacy of the email system, the arbitrator first noted:

> On its face, [the] policy leaves little doubt where the Employer stands with respect to use by its employees of its email system. The IT system and anything on that system belongs to the SGEU and is meant for work purposes only. While not outright banning the use of

> the system for incidental personal purposes, employees are put on notice that personal use is at their peril as nothing on the system should be viewed as confidential or private and may be accessed by the Employer. This policy goes a long way towards reducing any reasonable expectation of privacy that an employee may have.

The arbitrator however went on to state, without providing a sound rationale, that the policy did not extinguish an expectation of privacy, for there was some allowance in the policy for incidental personal use, even if indirectly, as personal use is 'neither explicitly denied or explicitly approved,' and that it was almost impossible to conceive that some personal use would not occur.

The arbitrator then asked, given that some incidental personal use would be likely to occur, whether the SGEU could "still claim the right to examine these emails at will?" He concluded that they could not:

> Regardless of what its policy says, the answer must be no. Employees do not automatically lose any right to privacy simply because they happen to send or receive a personal email on the employer's email system. *Cole* [R. v. Cole (2012) SCC 53 (CanLII)] is clear in this regard when it says that written policies are not determinative of a person's reasonable expectation of privacy. Neither is ownership as long as it is unreasonable to expect that no personal emails will find their way onto a business email system (*Cole* paragraph 51).

[It should be noted that in *Cole*, the Supreme Court of Canada found that while the employee had a reasonable expectation of privacy in files kept on his-employer-issued work computer, that expectation was modified by the fact that the employee knew that the employers information technologists would access the computer to maintain the school's information network. Note further that the primary issue there was whether information on the employer's computer could be accessed by the police without a warrant, and if so, whether it was nevertheless admissible in a criminal proceeding pursuant to section 24 of the *Charter*. The *Cole* decision is considered in sections 1:103, 12:304 and 12:503 of the *Illness and Absenteeism* manual and its supplement.]

Arbitrator Ponak in SGEU concluded that an employer may however, in certain cases, examine employee emails on an employer's server:

> This does not mean that an employer never has the right to examine an employee's personal mail that is found on an employer's server, especially when it has clearly served notice that it can and will do so. However, the examination of personal emails, which is properly characterized as a search of information that may be highly personal and sensitive, is subject to the *Doman* tests. The search must be reasonable in the circumstances and carried out in a reasonable manner. As well, while not necessarily the last resort, a search that is very intrusive on privacy ought not to be the first resort either, especially if reasonable alternatives exist to acquire the information being sought.

The arbitrator accepted that "probable cause" existed for an investigation of the employee, but carrying out a search of the email system would require "a high degree of justification and the absence of reasonable alternatives." He commented on the fact that some of the emails were from the employee's wife and that such communications between husband and wife are by definition, "the most intimate and personal of all communications." He also considered that it was relevant that some of the communications were found in the employee's deleted items, for in the

arbitrator's view, this further signaled "that these emails were not intended to be viewed by others."

In conclusion, the arbitrator stated:

> I am satisfied on balance that this degree of intrusion into the Grievor's emails was a violation of the Grievor's reasonable expectation of privacy in communications between himself and his wife. It constituted an unreasonable search that cannot be justified given the facts at the time it was conducted. These emails are therefore inadmissible as evidence in this arbitration.

The reasons make no reference to decisions, including one from the Supreme Court of Canada, that have held that evidence that is relevant is generally admissible even thought it was improperly obtained. Those decisions are considered in section 12:400 of the *Illness and Absenteeism* manual and its supplement.

See also *R. v. Spencer, 2014 SCC 43 (CanLII*, where the Supreme Court of Canada issued a decision that considered the interaction between section 7 of the *Personal Information and Electronic Documents Act* (Canada) *(PIPEDA)* and the protection against unlawful seizure as set forth in the Canadian *Charter of Rights*. This case is discussed briefly in sections 12:304 and 12:503 of this Supplement.

In *Ontario (Government and Consumer Services)*, 2016 CanLII 17002 (ON GSB) (Anderson), **the union objected to the introduction into evidence of emails and other files on a USB data key that was found in the workplace.** The union stated that the USB key did not belong to the employee, but even if it had, the employer's examination of its contents constituted a violation of the employee's privacy rights, including rights under the *Charter of Rights and Freedoms*. The union therefore sought a ruling that the USB key and all evidence derived from it should be ruled inadmissible.

The union's objection to the admissibility of the USB key and its contents was dismissed.

In *Ontario (Community Safety and Correctional Services)*, 2015 CanLII 90137 (ON GSB) (Briggs), the union grieved that the employer had electronically posted **sensitive information of a private and confidential nature (regarding employee workers' compensation claims) on the public drive of the institution's computer network**. The adjudicator concluded that there had been a breach that lasted for a matter of days. The employer notified affected employees and reported the breach to the Privacy Commissioner of Ontario, the office of the Chief Information and Privacy Officer and the Ministry's Freedom of Information and Protection of Privacy Office. It also requested that the Correctional Services Investigation Unit conduct a comprehensive in vestigation into the circumstances of the incident. The investigation failed to determine who was responsible for that breach. The parties accepted that the breach was inadvertent.

The employer conceded, on a without prejudice basis, that the adjudicator had jurisdiction to make findings and award damages under the *Freedom of Information and Protection of Privacy Act*). The adjudicator followed the reasoning of Arbitrator Sims in *Government of Alberta*, (2012), 221 L.A.C. (4th) 104 (Sims). She found that the documents did not fall within the stated exceptions to *FIPPA* and upheld the grievance. She remitted the matter back to the parties to agree on damages for those grievors who were employed at the time that the grievance was filed.

2:301 Arbitral Treatment of Various Conditions [See Page 19 of Manual][3]

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[3] Arbitral Treatment of Various Conditions

Continuing pain: *Brewers' Distributor Ltd.* (2011), 208 L.A.C. (4th) 274 (Keras). This case commented on the concept of "hurt versus harm" in the context of a workers' compensation matter. See also *Canada Revenue Agency*, 2013 PSLRB 60 (CanLII) (Richardson) (considered in section 14:410 of this Supplement), where the adjudicator considered whether the employee's pain constituted a disability. See also medical conditions (continuing or chronic pain) and *Toronto (City)*, 2017 CanLII 17350 (ON LA) (Parmar)

PTSD (post-traumatic stress disorder) was found to render the employee's conduct to be non-culpable in *Riverview Hospital* (2011), 214 L.A.C. (4th) 113 (Burke). That case is considered in s. 15:204 of this Supplement.

In *Telus*, 2012 CanLII 47553 (AB GAA) (Smith), the arbitrator concluded that a **Dependent Personality Disorder**, as defined in DSM IV, did not constitute a disabling condition where little individual initiative was required in the employee's position.

In *Corporation of the City of Windsor*, 2012 CanLII 69051 (ON LA) (Snow), the arbitrator concluded that the employee's responses in times of stress "generally followed a similar pattern." The grievor narrowed his thinking and focused on the issue causing him stress to the near exclusion of all else. [His doctor] described this as dissociation, but [he] clearly stated that the grievor did not have "**dissociative disorder**" and he agreed that dissociation was a symptom and not a diagnosis of an illness or disorder."

The arbitrator commented the fact that the employee had **anger management issues** did not mean that he had a mental disorder. Although he might be considered to be somewhat dysfunctional, that in itself does not constitute a disability:

> Many people respond to problems in a healthy and productive way. Some people do not respond in a healthy manner and their responses are sometimes referred to as "**dysfunctional" responses**." In these terms, the grievor's responses to many problems can be viewed as dysfunctional, but I cannot conclude that the evidence of a dysfunctional response, even of frequent dysfunctional responses, is evidence of a disability under the *Code* and, in particular, I am unable to find that the evidence that the grievor made dysfunctional responses to many of the stressful personal situations which he confronted demonstrates that the grievor had a mental disorder.

In *Canadian National Railway Company*, 2014 CHRT 16 (CanLII) (Garfield), the adjudicator accepted that the employee suffered from "**anxiety related disorders**" that included the symptoms described as "panic attacks, heart palpitations, nausea, vomiting, and PTSD symptoms." Opinions tendered by the employee's examining physicians suggested that by the time the employee's disability benefits had expired, his condition would not have prevented him from returning to work "if his **work-related issues** were sorted out."

The employer challenged that view and the arbitrator agreed. The employee testified that he needed to heal in order to return to work. But as the arbitrator noted, what the employee was

seeking "in order to heal" was the discipline and possible dismissal of two other employees, an acknowledgement that the employer was wrong in having initiated surveillance to determine his out-of-work activities, and an apology and compensation for his losses. "Without this, there would be no healing and without the healing …there would be no successful [Return to Work]." The employer was found to have mounted a successful BFOR/accommodation defence, and accordingly, the complaint was dismissed.

In *Cape Breton Regional (Municipality)*, 2014 CanLII 27761 (NS LA) (Richardson), an employee of 34 years was suspended for one day and demoted from the position of working foreman to that of utility service. He alleged harassment contrary to the *Code*.

The employee had, unbeknownst to the employer, been diagnosed with an **anxiety disorder** some eight years earlier. After having been advised of the suspension and demotion, the employee went to see his family doctor. He was given the following note: "Off work for medical reasons – indefinitely at present." The employee then went on sick leave. A further medical certificate, provided after five days of absence, stated that the employee was suffering from "anxiety disorder – recent exacerbation of chronic anxious state." That same doctor provided the following statement in support of the long term disability application that the employee made approximately four months after he began his sick leave: "[primary diagnosis] anxiety disorder … possible social anxiety d/o panic disorder without agoraphobia."

On the **relationship between "anxiety" or "stress" and harassment**, the arbitrator commented:

> **… in my opinion, the [employee] needed more than simply the fact that he suffered from chronic anxiety, and more than the fact that he had been suspended for a day and demoted, to establish harassment or indirect discrimination – or to establish that he was off work for nine months because of it. There are several reasons for this conclusion.**
>
> First, there is the fact that the [employee] was able to work since 2003 (when he was diagnosed with chronic anxiety), notwithstanding the conduct of management that he complained of, and notwithstanding several prior disciplinary actions against him, without time off due to anxiety. Such evidence supports a conclusion that the [employee] had a reasonably robust tolerance for any stress he experienced in the work place – whether from management or the job itself. It does not explain why the stress associated with another bout of discipline would suddenly be too much.
>
> **What direct evidence there was about the nature and extent of the [employee's] anxiety disorder – and more importantly, the extent to which it interfered, if at all, with his ability to work – came from the [employee] himself. And this evidence was at best weak.** He testified at one point that he woke up in sweats, and couldn't sleep at nights, but he did not clearly link those episodes to the suspension and demotion. Nor did he explain what it was about his anxiety disorder that was different in the period in question from the years before. After all, the [employee] had the disorder since 2003. He was able to work, albeit with the assistance of medication and counselling from time to time. He served as a working foreman, a position that no doubt carries with it some stress during the period 2003-2011 without any apparent difficulty. One may accept that the meeting with his supervisors in December 2011 perhaps brought with it more stress than he might normally experience in his job, but even if so, there was no evidence to support a conclusion that the increase in stress lasted for more than a day or two – and no

> explanation for how or why any increased stress level would have lasted only as long as he had sick leave and Employment Insurance benefits to draw upon. Nor was there any explanation for why this disciplinary episode would have so exacerbated his anxiety as to cause him to go off on sick leave for nine months when previous episodes had not.

In *Cape Breton Regional Municipality*, 2014 CanLII 14638 (NS LA) (Richardson), the employee alleged that the employer had failed to accommodate his inability to perform his position of working foreman. He contended that as a result of the **job-related stress** that he was suffering, he should have been accommodated in the position of heavy equipment operator (one that he had previously performed) rather than be placed on sick leave.

In addressing the issue of stress, the arbitrator stated:

> **… not all conditions that have an impact on an employee's work are in and of themselves "disabilities" that trigger a duty to accommodate. Whether a mental or physical condition can be considered a "disability" will depend on the impact of that condition on an employee's ability to perform the essential duties of his or her occupation.** A cold has an impact on work ability but it is not a disability. An employee's loss of their little finger may be a disability if he or she works as a violinist, but not if they work as a labourer. So, to take another example, **stress, whether work-related or not, is not in and of itself necessarily a disability. Stress of some sort is a part of everyday life. However, it is also clear that at some point and in some cases the by-products of severe stress – depression, anxiety and the like – can become debilitating because of their impact on an employee's ability to reason or to act.**
>
> … the [employee] told his Employer that he was "disabled" because of stress from performing the essential duties of his job as a working foreman. If he was in fact disabled then he was entitled, as of right, to have the Employer consider whether he could perform his own job with suitable accommodations or, if not, whether he must be transferred to some other job in order to accommodate his disability.
>
> **However, triggering the duty to accommodate does not mean that the employee gets to determine as of right what the accommodation is or, more particularly, the job into which he or she might be accommodated. An employee who alleges that he or she has a disability is not entitled to self-diagnose. This is particularly true in cases involving mental or emotional conditions that by their very nature affect the employee's ability to perceive the extent and impact of their condition. An employee suffering from such a disability is not the most accurate or most objective assessor of what he or she can do. All the more reason then that in such cases the decision as to whether the condition is a disability and, if so, the nature of the accommodation that is necessary to enable the employee to work must depend upon the observations and assessments of objective observers and experts.**

The grievance was dismissed.

In *Capreit Limited Partnership, 2015 HRTO 1658 (CanLII) (Pickel)*, **the employee alleged that her manager and co-workers had harassed her, and that the employer had then dismissed her after she had informed it that she needed to take a leave from work for medical reasons**. The employer denied that it had been guilty of harassment and stated that its decision to terminate the employee had been solely related to the employee's unsatisfactory performance. **The**

employer adduced evidence that its decision to terminate the employee had been made five days before the employer became aware of her need for a medical leave.

In dismissing the claim, the adjudicator noted that "the Code's harassment protections are specifically linked to the grounds referenced in s. 5(2) of the [Ontario Code]. Therefore, **in order to make out a claim of harassment under the Code, it is not only necessary to demonstrate harassment but the harassment must have been based, at least in part, on one of the grounds of discrimination listed in s. 5(2) of the Code. Therefore, in order to make out a claim of harassment under the Code, the [employee] must not only establish that she was subject to harassment during the course of her employment [but] must also establish that any harassment she experienced was, at least in part, because of her disability."**

The employee testified that she had suffered from a disability (epilepsy) throughout the course of her employment, and that she had on several instances advised the employer that she had "personal and health issues." The adjudicator accepted however that **the employer was not aware of the employee's medical condition until the employee suffered an attack/seizure five days after the employer had made its decision to terminate her employment.** The employee's disability and her need to take time off for medical reasons were not factors in the employer's decision to terminate her employment.

In addition, the adjudicator commented that **even if the employer had been unfair or unreasonable in its assessment of the employee's performance, that assessment did not amount to discrimination or harassment under the Code. There was no evidence that the employer's response to the employee's performance was due, even in part, to the employee's disability or any perceived disability. The issue was not whether the employer's assessment of the employee's performance was correct, but whether the employee's disability was a factor in the employer's termination decision.**

The complaint was dismissed.

In *Canada Post Corporation*, 2017 CHRT 8 (CanLII) (Thomas), the employee contended that she had been harassed in her employment. **The adjudicator set forth the Canadian Human Rights Commission's approach to determining whether harassment has occurred:**

> **The Tribunal has attempted to define harassment as any words or conduct that are unwelcome or ought reasonably to be known to be unwelcome, related to a prohibited ground of discrimination, that would detrimentally affect the work environment or lead to adverse job related consequences for the victim. Harassment usually denotes repetitious or persistent acts, although a single serious event can be sufficient to create a hostile work environment … In the context of harassment based on disability, the Tribunal has held that the key is to examine whether the conduct has violated the dignity of the employee from an objective perspective such that it has created a hostile or poisoned work environment …**
>
> **In the context of alleged harassment that is not sexual in nature, the Tribunal has considered whether or not comments about one's disability are relevant to or consistent with the legitimate operations and business goals of the employer. If they are, such comments may not constitute harassment. On the other hand, derogatory comments or unnecessary questioning about a disability are irrelevant and**

> **extraneous to the safety, operations and business goals of the employer. Such conduct, where it is humiliating or demeaning, can constitute harassment …**

The adjudicator cited with approval the following passage from *International Longshoremen's and Warehousemen's Union, Local 502* 2015 CHRT 21 (CanLII):

> Every act by which a person causes some form of anxiety to another could be labelled as harassment. What offends one person may not offend the next person at all. Furthermore, none amongst us are perfect, and we are all capable of being, on occasion, somewhat thoughtless, insensitive and perhaps even outright stupid. Does this mean there can never be any safe interactions between people? The question is not so much whether one is offended or feeling humiliated, but by what objective measure can we define harassment, so that people everywhere know exactly how to conduct themselves to avoid it
>
> **I do not think that every act of foolishness or insensitivity in the workplace was intended to be captured under section 14 of the *CHRA*. Harassment is a serious word, to be used seriously and applied vigorously when the occasion warrants its use. To do otherwise would be to trivialize it. It should not be cheapened or devalued in its meaning by using it to loosely label petty acts or foolish words where the harm, by any objective standard, is fleeting.**

The adjudicator also considered the jurisprudence regarding an employer's obligation to investigate human rights claims. He referenced *Canada (Employment and Immigration Comm.)* (1988) 10 C.H.R.R. D5683 (CHRT) at para. 41611:

> Although the *C.H.R.A*. does not impose a duty on an employer to maintain a pristine working environment, **there is a duty upon an employer to take prompt and effectual action when it knows or should know of employees' conduct in the workplace amounting to racial harassment … To avoid liability, the employer is obliged to take reasonable steps to alleviate, as best it can, the distress arising within the work environment, and to reassure those concerned that it is committed to the maintenance of a workplace free of racial harassment …**

The adjudicator stated that "Included in this duty to mitigate is an examination of the steps taken by a corporate respondent to investigate, make findings and impose a resolution." He then reviewed the evidence in the context of *Laskowska*, 2005 HRTO 30 (CanLII) where the adjudicator had established a three part test to evaluate an employer's duty to investigate. Here, the employee had been uncooperative and had refused to provide detailed particulars of her allegations. In the result, the adjudicator concluded that the harassment complaint had not been substantiated.

In *Metro Ontario Inc.*, 2017 CanLII 30380 (ON LA) (Chauvin), **the arbitrator dismissed an employee's complaint of harassment.** In doing so, he relied on the following passage from *Motor Coils Manufacturing*, [2015] O.L.A.A. No. 263 (Manwaring), where the arbitrator had stated:

> The objective approach also means that the opinion of the employee alleging harassment that the course of conduct was belittling, patronizing or condescending does not establish that there was harassment. **Harassment is not proven simply because an employee**

> **takes offence at something that was said or done. There must be evidence that, from an objective standpoint, the alleged harasser knew or ought to have known that the course of comment or conduct was vexatious and would be unwelcome.**
>
> **… the challenge in harassment cases is to distinguish between, on the one hand, the normal abrasiveness of daily life in the workplace including personal animosity and personality conflicts and, on the other hand, harassment** … In *British Columbia v. B.C.G.U.* (citation not given), arbitrator Laing said at para. 248
>
> > There is one more dimension that should be addressed … harassment is a serious subject and allegations of such an offence must be dealt with in a serious way, as was the case here. The reverse is also true. **Not every employment bruise should be treated under this process. It would be unfortunate if the harassment process was used to vent feelings of minor discontent or general unhappiness with life in the workplace, so as to trivialize those cases where substantial workplace abuses have occurred.** The first responsibility of people in the workplace is to work out their own differences for themselves, if they can. If they cannot, and the threshold test of serious actions with significant consequences is met, this process can and should be invoked where harassment is legitimately believed to have occurred. Otherwise, the process could itself be used as a means of obtaining vengeance against petty irritants or trivial concerns.
> >
> > In my opinion, these cases establish that **the harassment process should not be used to deal with personality conflicts, personal animosity or dissatisfaction with an individual's management style.** A supervisor may be incompetent, irritating, annoying or frustrating. He or she may be abrasive or overly assertive. His or her management style may drive employees nuts but the fact that employees do not like the management style of a supervisor does not mean that his or her conduct amounts to harassment.

In *George Brown College of Applied Arts and Technology*, 2017 CanLII 40984 (ON LA) (Bendel), **the employee grieved that she had been harassed and bullied by her former manager.** The union sought a total of $50,000 in damages from the employer. The arbitrator found that even on the view of the evidence that was most favourable to the grieving employee, there was no basis for concluding that the employer had violated the collective agreement.

In *Toronto (City)*, 2017 CanLII 79287 (ON LA) (Goodfellow), **the employee alleged that the following written comment constituted harassment:**

> **Let me know when you figure out your job and I'll assist, as usual.**

The arbitrator found that the comment, while completely inappropriate, did not rise to the level of harassment:

> … As the City acknowledged at the hearing, the manager's email was not appropriate. City counsel described it as "sarcastic" and "less than constructive". I would go further. I would describe it as demeaning amd belittling and, I would add, not excused by the tone or content of the [employee's] prior email. However, as a single "one off" remark, even one that was made in writing and copied to the [employee's] manager, I am not persuaded that it rises to the level of "harassment".

In *Best Western Strathmore Inn*, 2015 AHRC 6 (CanLII) (Luhtanen), the employee's doctor "put her" on sick leave for **stress, depression and insomnia**. She alleged that after speaking with the employer, her employment was terminated that same day and she was forbidden to return to the employer's property.

The employer argued that the employee "suffered from the normal stress of a general manager's position" but contended that her condition did not amount to a mental disability. The medical note that the employee provided simply stated that she would be off work until further notice. She was prescribed sleeping medication and anti-depressant medication at her initial appointment, and arrangements were made for her to return in one week for a follow-up assessment.

The adjudicator concluded that the employee's condition constituted a disability and that the employer perceived her to have a disability. The adjudicator considered whether there was a nexus between the employee's mental disability and the adverse impact (i.e. her termination.)
The employer was upset that the employee was leaving the operation in "an absolute mess" and advised that if she had needed time off, she should have spoken to the employer and made arrangements to take steps to alleviate the stress (in an orderly fashion). The termination was found to be discriminatory.

The employee was on Employment Insurance medical benefits for two months, and then remained on unpaid medical leave for a further 10 months. The adjudicator considered that she employee would not have been able to work for the first two months after her termination, and consequently, no wage-loss benefits were awarded for that period. **Wage loss benefits were however ordered for the next three months, but were then discontinued at that point because the adjudicator felt that the employee could have, by then, mitigated her damages by finding another job.**

In *856660303 o/a Cover King Ltd.*, 2015 HRTO 1456 (CanLII) (Sanderson)**,** the adjudicator found that a **broken ankle** constituted a disability. The injury, "although temporary, imposed significant restrictions on [the employee], as she could not commute independently and she could not perform some of her key job duties for a significant period of time."

In *Securitas Canada Ltd.*, 2015 HRTO 1563 (CanLII) (Fellman), the employee was terminated shortly after advising his employer that he would require time off from work to undergo surgery. The purpose of the **surgery** was to provide pain relief from a medical condition of multiple pilonidal sinuses.

The employer contended that the employee's condition did not constitute a disability. In finding otherwise, the adjudicator stated that "a medical condition requiring surgery and an extended recovery time constitutes a disability" and that in the alternative, the employee's "need to be absent from [work] for a period of time and his possible need for modified work duties on return to work would be a perceived disability."

In *Method Integration Inc*, 2014 HRTO 1718 (CanLII) (Pickel), the employee alleged that his employer had failed to accommodate his **Attention Deficit Hyperactivity Disorder ("ADHD")**.

The employee was hired to craft software solutions for the employer's customers. He was unsuccessful in that regard, and his employment was terminated after three months. It was not disputed that the employee's performance was unacceptable, but the issue was "whether the [employee's] disability was a factor in his performance issues and, if so, whether he was capable

of performing the essential duties of his position with accommodations that would not cause undue hardship to the [employer]."

Within one month of his hire, the employee decided that he would commence medication that previously had been recommended to treat his disability. It was expected that it would take approximately six to eight weeks before the medication would begin to work. At the hearing, the employee's doctor testified that the employee had had substantial difficulty during much of his life. Medication was just the first step and that the employee would have to learn to approach things differently in order to get better.

The employee did not disclose his ADHD to his employer until six weeks after his hire, and by that time his performance had become a significant issue. At that point he did not request that the employer extend any accommodation for his disability, nor did he request accommodation at any point before his employment was terminated three months after his initial hire.

The employee's doctor testified that he would not have recommended that the employee apply for such a position. When questioned as to the nature of the accommodation that he would have recommended, the doctor advised that the employee's treatment was just commencing, and that "he needed to tinker with [the employee's] medication and get his mood and sleep under control before he could provide recommendations regarding specific accommodations that were likely to be satisfactory."

The adjudicator rejected the employer's assertion that consideration needed to be given to **whether the employee exaggerated or misstated his technical knowledge or skills at the time of hire**. Rather, the issue was whether the employee's disability "was a factor affecting his performance or whether his performance issues were instead wholly attributable to a lack of technical knowledge or technical skills." The answer to that question was to be determined by examining the specific performance-related examples that were relied upon by the employer.

After the employee disclosed his ADHD, the employee's manager conducted a "**google search**" to ascertain what he could do to ensure the employee's success at work. As a result of his research, he concluded that he should be communicating with the employee in person, rather than by email, so as to ensure that the employee understood his instructions. He also created a binder for the employee in which he was to place "cheat sheets" to remind him of the steps that he needed to take in various situations. In addition, the manager scaled back his expectations regarding the employee's ability to assume additional job responsibilities.

The adjudicator concluded that ten incidents of the employee's performance-related problems were, at least in part, linked to the employee's disability. One such example was the employee's "failure to try solutions before recommending them to customers." The adjudicator commented that the performance problems "all involved, at least in part, a lack of attention to detail, difficulties with maintaining focus and problems with working memory." She was satisfied that, based on the medical evidence, all of these difficulties were "**classic symptoms of ADHD.**" She stated that

> … the effects of the [employee's] ADHD were so significant and so closely intertwined with any deficiencies in his technical skills, that it was a **breach of the *Code* for the [employer] to simply terminate the [employee] without first considering the extent to which the [employee's] performance issues stemmed from his ADHD** and the extent to which they related to deficiencies in his problem solving skills.

The adjudicator concluded that the employee's evidence regarding lack of attention to detail, difficulties maintaining focus and problems remembering things was sufficient to demonstrate a link between his disability and the adverse impact he experienced as a result of the termination of his employment.

The adjudicator then considered whether the employer had met its evidentiary onus of making out a **defence under the *Code***. She concluded that it had not.

Section 17(1) of the Ontario *Code* effectively provides that **a right protected by the *Code* will not be considered to be infringed where an employee is incapable of fulfilling the essential duties or requirements of her position. Section 17(2) then provides that a person shall not be found to be "incapable" unless "the needs of the person cannot be accommodated without undue hardship on the person responsible for accommodating those needs …"**

The adjudicator stated that to avail itself of the "section 17 defence",

> **… the [employer] bears the evidentiary onus of showing not only that an [employee] is incapable of performing the essential duties of his or her job because of his or her disability, but that he or she is incapable of performing these essential duties even if accommodated up to the point of undue hardship. To show that an [employee] is 'incapable' of performing the essential duties of a position because of his or her disability requires something more than showing that an individual's disability is causing certain performance issues. It requires evidence of an [employee's] lack of capacity to perform the essential duties of his or her job.**

The adjudicator found that the employer had failed to establish that accommodating the employee's disability-related needs would have caused the employer undue hardship.

The employer relied on evidence given by the employee's doctor at the hearing in an effort to establish that it had met its substantive obligation to accommodate. The adjudicator referenced this testimony as "after-acquired evidence" and stated:

> I have serious concerns about [employers] being able to rely upon after-acquired evidence in circumstances such as the present. It is one thing if an [employer] seeks further medical information from an [employee's] doctor as part of the accommodation process and then seeks to rely upon the evidence from the examination and cross-examination of that doctor at the hearing. It seems to me more problematic for [an employer] to rely upon evidence provided by the [employee's] doctor at a hearing when it never obtained any information from the doctor, as required under the procedural component of the duty to accommodate, and therefore never considered, assessed or was even aware of the doctor's information at the relevant time.

The adjudicator's reasoning in that regard is somewhat strained. She stated however that the evidence of the employee's doctor, even if considered, failed to establish that the employee was incapable of fulfilling the essential duties of the job with accommodation short of undue hardship.

The adjudicator commented that the employer's failure to seek and obtain a prognosis from the employee's doctor left it in a position where it was unable to assess accommodation options short of undue hardship.

Given that the employee's medications were, in the adjudicator's view, likely to improve his functioning, she adopted, without a whit of medical evidence, the proposition that the employee would have been temporarily incapable of performing the essential duties of his position, with accommodation, until approximately three or four months after his termination, and that he would likely have been capable of performing his position without any ADHD related effects after that time. **Providing the employee with a leave of absence for three or four months would not have caused the employer undue hardship.** Having regard to those assumptions, the adjudicator denied the employee lost wages, vacation pay or benefits because the employee had obtained alternate employment by the time the "leave" would have ended.

The adjudicator did however award the employee **$10,000 as monetary compensation for damages for injury to his dignity, feelings and self-respect.** She also ordered that the employer retain an expert in human rights to assist it to develop and implement a comprehensive human rights policy and associated training procedures.

In *Toronto District School Board*, 2015 HRTO 1622 (CanLII) (Nichols), a student's litigation guardian filed a human rights complaint in which it alleged that the child's school division had failed to accommodate his multiple disabilities which included learning disabilities, **attention deficit hyperactivity disorder (ADHD)** and mental health disabilities which primarily manifested themselves as **anxiety and depression**. The complaint was upheld, with the adjudicator ordering **compensation for injury to dignity, feelings and self-respect in the amount of $35,000.**

A **colonoscopy** did not amount to an injury or illness that qualified for payment of sick pay under an employer's sick leave plan that limited payment to an inability to perform regular duties due to injury or illness.

In *MIC's Group of Health Services*, 2015 CanLII 65363 (ON LA) (Marcotte), the employer's sick leave and long term disability plan was stated to be equivalent to the **Hospitals of Ontario Disability Plan [HOODIP].** A HOODIP brochure provided that "For the purpose of the Sick Pay Benefit and the Long Term Disability Benefit, 'total disability' and 'totally disabled' mean … that you are unable to perform the regular duties pertaining to your occupation due to injury or illness …". The employer agreed that for the purposes of the award, the employee was totally disabled on the day that she underwent a colonoscopy, but it contended that the colonoscopy was an elective procedure that was not required. Her inability to attend at work on the day in question was not "due to injury or illness."

After having considered several **cases dealing with cosmetic or other elective surgery**, the arbitrator dismissed the grievance on the basis that the employee's stipulated disability was not due to an injury or illness. He also distinguished the case from those where an employee's elective surgery could be said to have caused an illness or injury:

> While the Union argued that the grievor's total disability was 'clearly related' to the medical procedure, that is not the test; the test is whether or not illness or injury caused the total disability. Since the grievor's total disability was not caused by injury or illness, I cannot find the grievor was totally disabled for purposes of eligibility to receive sick pay benefits under the 1980 HOODIP.

2:400 Conduct Inconsistent with an Illness [Page 29][4]

In *Emergency Medical Care Inc.*, 2015 CanLII 81820 (NS LA) (Richardson), a terminated employee with a history of excessive absenteeism, was reinstated subject to a Return to Work Agreement. He was terminated shortly thereafter for breach of that agreement. In considering whether the employee had a valid reason for his absence, the arbitrator stated:

> In my view **the question of whether the [employee] had a "valid medical reason" for his absence from work conflates two questions: did he have a "medical condition," and did that condition prevent him from coming to work**.

After considering dictionary definitions in the context of defining a "medical condition", the arbitrator stated:

> On balance, given the events that led to the RTWA, I think it is fair to say that **in using the term "medical condition"** the parties had in mind some physical or mental condition, whether internal or external in origin, that in [the] ordinary course could be expected to interfere with the [employee's] ability to show up for work when scheduled. In my opinion insomnia or diarrhea, either alone or in combination, could be considered "medical conditions" within the meaning of the term as used in the RTWA.
>
> This brings us to the second question, the answer to which is a little more difficult. **While the onus of establishing just cause for discipline lies on the Employer, the onus of establishing that the [employee] was absent for a valid medical condition lies with the [employee].** I say this because it is clear that he was absent on [the date in question.] If he could not establish the existence of a valid medical condition he would be taken to have breached [the applicable clause] of the RTWA, thereby entitling the Employer to terminate him for just cause.

The termination was sustained on the basis of the employee's failure to report to work. The arbitrator commented that while termination would not generally be considered to be appropriate for a "failure to report to work," the employer's decision to terminate in the particular circumstances of this case was reasonable.

[4] **Conduct Inconsistent With an Illness (Medical Leave, Abuse of)**

An arbitrator upheld an unpaid suspension (for abuse of sick leave) where the employee had submitted an **illness claim for the same period for which her holiday request had been denied**. The employee's medical note was cursory, and she refused her employer's offer to be examined by an independent physician to verify her claim of illness. The arbitrator stated that the question was not the type of information that the employer was entitled to require, but rather, whether the employer was entitled to discipline the employee for abuse of sick leave. Neither the employee nor her doctor testified, and the arbitrator found that **employee's assertions** in correspondence with her employer "were **not made under oath or subject to cross-examination,** such that **they [were] not entitled to be given any weight as a rebuttal to the circumstantial evidence presented by the Employer** …" *Halifax Herald* (2012), 217 L.A.C. (4th) 222 (Kydd)

In *Toronto Community Housing Corporation*, 2012 CanLII 85556 (ON LA) (Snow), the employee, who was absent from work as a result of a workplace injury, was dismissed for **dishonesty regarding his medical condition.** The termination, which was based primarily on surveillance evidence, was upheld by the arbitrator.

In *Aviscar Inc.*, 2012 CanLII 22238 (ON LA) (Chauvin), the employee **failed to return to work after the expiration of a three-week benefit claim.** When management discovered that such was the case, it attempted to advise the employee that he must return to work, or if he alleged that he remained ill, he must provide a doctor's note to justify that claim.

Following several unsuccessful attempts to have the employee respond, the employer then terminated his employment.

The collective agreement provided that seniority would be considered broken where "… the employee fails to return to work on the completion of an authorized leave of absence unless such failure is due to provable sickness or reason satisfactory to the Company" or "is absent for three (3) consecutive days without notifying the Company of his/her absence."

The arbitrator concluded that the employee "**intentionally failed to return the phone calls to [his shift manager], and rather intentionally avoided having to talk to anyone at the Employer by leaving messages only** on the garage line, at a time when he knew that no supervisor would be present to answer the phone, so that he could leave only a cursory message that would go unchallenged by any supervisor."

The arbitrator found that the employee was in **violation of the reporting clause** in the collective agreement. In addition, the employee's "intentional and deliberate course of conduct, in the manner in which he **failed to return [his shift manager's] phone calls** and his **failure to comply with [his] instructions to provide information and a doctor's note**, also amounts to a pattern of repeated insubordination …"

The termination was upheld.

In *Mosaic Potash Colonsay ULC*, 2014 CanLII 23963 (AB GAA) (Hood), the employee was terminated for **alleged misuse of sick leave**. **After having been denied vacation leave, he obtained a medical note "and took sick leave for effectively the same time** as the denied vacation leave." The arbitrator concluded that the employee's conduct, in performing landscape work while ill, was not inconsistent with his illness, and he was reinstated with all lost wages and benefits. This decision is conidered in greater detail in section 17:200 of this Supplement.

In *Calgary (City)*, 2014 CanLII 17224 (AB GAA) (Casey), the employee and his wife owned a portable gelato cart. The employee had recently commenced a two month medical leave. The employer had cautioned him that he could not be **working elsewhere while on medical leave.** On the day in question, a fellow employee had observed him working the cart at a neighbouring Farmers' Market. His employment was terminated.

The terminated employee testified that the business was operated primarily by his wife, with him helping out on his off-days. On the day in question, he had been phoned by the young employee who was working the cart that day. He was advised that the employee was running short of change. He testified that he delivered change to the cart and that he remained in attendance while

the employee went to the bathroom. He was in attendance for approximately 20 minutes. His evidence was corroborated by the employee who was tending the cart.

In accepting that evidence over that of the "reporting" employee, the arbitrator noted that such employee had clearly been mistaken when she "observed" that the terminated employee's truck and trailer had been at the Market for an extended period of time. Her "erroneous conclusions about the truck and trailer may very well have affected the accuracy of her memory of how long she actually observed the [terminated employee] at the Farmers' Market. [If she] could be mistaken about the truck and trailer, she could be mistaken with respect to her other testimony on whether she observed the [terminated employee] serving gelato and how long [he] was at the Farmer's Market."

Nevertheless, the arbitrator found that by delivering the change and relieving the employee to take a bathroom break, the terminated employee was performing work for the gelato business. He stated:

> The fact that the duration and scope of the work was limited is germane to determining the appropriate penalty but does not change the conclusion that the [employee] did in fact perform work for the gelato business on [that day].

There was no dispute that the employee was suffering from a major medical condition that rendered him unable to work. The arbitrator concluded that "there was no just cause for termination", but in accordance with the earlier agreement of the parties, he referred the matter back to them to attempt to resolve the matter of remedy. They were directed to bring the matter back if they could not agree.

See also *Telus Communications Inc.*, 2013 ABQB 355 (CanLII) (Alta. Q.B.), where the employee had been **denied a one day leave of absence to play in a slo-pitch tournament**. He then texted his employer on the day of the tournament to say that he could not make it in due to unforeseen circumstances. The employee's manager attended at the tournament and observed the employee pitching. When confronted the next day, the employee stated that he had diarrhea and that he had gone to the tournament but not played. When confronted with the manager's observations, the employee stated that he had been pitching but not batting.

In quashing the award, the Court stated that the arbitrator had erred when he concluded that the employee's account of his illness was plausible. In reaching his conclusion, the arbitrator stated that the employer "had no evidence that [the employee] had not been sick during the night and early morning or did not have to use the washroom at the ball park …" The Court stated that "the arbitrator's approach to determining the question of the [employee's] illness was unreasonable. In essence, **the Arbitrator required the Employer to prove a negative**, namely that the [employee] was not sick. This places an unreasonable burden on the [Employer]."

In *Air Canada*, 2014 CanLII 31061 (ON LA) (Hayes), the employee had advised the employer that she was unavailable for work due to illness. At the same time, she was **working for another employer** and was **also believed to have travelled on a two week cruise for which leave had been denied.** The employer repeatedly requested medical information to justify the employee's prolonged absence but such information was not forthcoming.

Despite the employee's continuing denials, the union conceded at the hearing that the employee had indeed gone on the cruise.

In upholding the employee's pending termination, the arbitrator commented that:

> … if there is any conceivable medical justification for [the employee] **taking the cruise while claiming inability to work**, none was provided … If there is any possible medical explanation for her prolonged deceit, none was even suggested. Nor has there been any medical explanation as to how it is that the [employee] may work full time for someone else but not at all for Air Canada. All we have are the [employee's] assertions, [an employee] who, unfortunately, has shown that she **lacks credibility**.

In *Providence Continuing Care Centre*, 2015 CanLII 73550 (ON LA) (Jesin), the employee had been terminated for having **abused sick leave** in that he was **working for another employer while absent from work and receiving sick leave benefits**.

The employee contended that his absence from work was due to **situational stress** and that while he could not work for his employer, he was able to continue working elsewhere.

The reintroduction of workplace audits appeared to precipitate the termination. They revealed that while other workers were all able to achieve the required 85% standard of task completion, the employee's performance was assessed at the 75% level. A process of monitoring the employee was implemented, with this leading to a further deterioration in his performance. The employee was stressed, partly because of taking on additional part-time work. He took sick leave for an eighteen day period, reportedly because he had undergone a difficult tooth extraction. Following his return, he worked, unsatisfactorily, for four weeks. After receiving further feedback, the employee left work on the basis that he was being harassed and was unable to work. The occupational health nurse concurred in his leaving.

Following a further discussion with the employer, the employee presented a medical note advising that he was suffering from **acute situational anxiety** and was totally disabled from work. His claim for disability benefits was approved on the basis of that note.

It was reported, approximately 1 ½ months later, that the employee had been seen working elsewhere. Surveillance was initiated, and the employer subsequently terminated the employee after confirming that the employee was working elsewhere.

At the hearing, the employee's doctor maintained his earlier opinion that the employee was disabled from working for his primary employer. The doctor did so even after being advised, and acknowledging, that he did not know that the employee had been working elsewhere when he arrived at that conclusion.

The arbitrator stated that the employee's **fraudulent claim of sick leave** and benefits put the "credibility of the [employee's] explanation of the events surrounding his claim of situational stress into question," and that his doctor's failure to reconsider his earlier opinion "must be considered in light of [the doctor's] candidly stated position that he was acting as an advocate for his patients …"

Although the Employer was required to accommodate the employee's disability to the point of undue hardship, it was not required to accommodate his overloaded work schedule by paying sick leave benefits while the employee worked at another job.

The termination was upheld on the basis that the employee had committed a **serious breach of trust and an abuse of sick leave**.

In *Gerdau Ameristeel - Whitby*, 2016 CanLII 16550 (ON LA) (Jesin), an employee of 10 years was terminated for having misrepresented the extent of his disability along with his medical restrictions. He requested and was provided with modified work that the employer later concluded had not been warranted.

The employee had suffered a workplace injury to his right arm. His injury was diagnosed as "tennis elbow." He was prescribed anti-inflammatory treatment and his doctor provided a functional abilities form (FAF) that set forth a number of restrictions, primarily in terms of lifting of weight (5 kilograms), lifting above shoulder height and repetitive twisting or bending of the elbow.

Complaints eventually came forward from other employees that **the employee was seen performing tasks beyond his restrictions outside the workplace. A firm was then retained to conduct surveillance. The resultant video led the employer to conclude that such was the case. The arbitrator stated that the employer had the right to conduct the surveillance, for it was all conducted in public places**. The arbitrator however expressed his concern that a small portion of the video inappropriately focused on the employee's wife.

The employee was confronted and was advised that he was being suspended pending further investigation. The next day the employee brought in a revised FAF from his doctor that stated that he was fit for full duties as of a date that was two weeks earlier. That conflicted with a FAF that his doctor had provided some two weeks prior to that date, in which the doctor advised that he would be functioning under restrictions for a period of six weeks.

The arbitrator concluded that the claim that the employee had fraudulently exaggerated his injury and his need for accommodation had not been made out. "The medical evidence is that tennis elbow is a difficult condition that is exacerbated by repetitive twisting and lifting. The evidences also establish[es] that although the pain associated with tennis elbow may be alleviated, it is a condition that can recur over a prolonged period of time, especially with a continuation of repetitive physical activity such as lifting and twisting."

Nevertheless, **the surveillance video established that the employee performed activities and moved objects that were beyond the restrictions set out in his modified work plan. The arbitrator commented that those restrictions had been established by the employee's doctor, and even though the employee was feeling better, he should not have been performing such work without clearance from his doctor. The activities performed "were also in breach of the [employee's] duty to avoid risk of reinjury." The arbitrator stated that he would have imposed a one week suspension for such conduct.**

In addition, the employee was less than candid once his activities were discovered by his employer. He was dishonest about the true scope of his activity. **The arbitrator distinguished this case from others where the dishonesty was designed to perpetrate a fraudulent claim of injury or illness. Here the claim was legitimate, and consequently, the employee's actions did not justify termination.**

The arbitrator reviewed the case law and concluded that this was not a case where damages should be awarded in lieu of reinstatement. He reinstated the employee with what was effectively

a six month suspension. The employee was to provide a current FAF setting forth the nature of any restrictions that remained.

The employee's claim for punitive damages was dismissed. In doing so, the arbitrator stated that **the awarding of punitive damages would be incompatible with the continued employment relationship.**

In *York University, 2017 CanLII 39857 (ON LA) (Gedalof)*, the employee, a university professor, was terminated after having submitted over 100 fraudulent benefit claims, most of which were for physiotherapy and massage therapy. **Approximately $6,000 in fraudulent claims were paid out before the university's benefits administrator discovered the employee's wrongdoing.** The employee subsequently took full responsibility for her actions, which she attributed to anxiety and panic attacks arising from her personal circumstances. The union conceded that the employee did not have a claim under the *Code*.

Both parties filed medical reports from separate psychiatrists, and they agreed that the arbitrator could rely on the reports without calling the psychiatrists to testify.

The question for the arbitrator was the appropriateness of the penalty. He relied on the analysis and factors set forth by arbitrator Arthurs in *Canadian Broadcasting Corp.*, 1979 CarswellNat 1023, 23 L.A.C. (2d) 227, stating that the decision provided a useful framework for assessing the appropriate penalty in breach of trust cases such as this. He concluded that while the employee had an excellent record and that the cost to her of discharge was undoubtedly heavy, **there was an ongoing concern with respect to her reliability as an employee in a highly trust-dependent position.** The termination was upheld.

In *Calgary Laboratory Services*, 2018 CanLII 37190 (AB GAA) (Moreau), **a 19 year employee was terminated for having submitted 76 false claims for massage therapy treatments over a period of 22 months.** The amount paid to the employee by the benefits carrier totaled $6,188.

The termination was upheld, with the arbitrator stating that what distinguished this case from others where employees were reinstated for similar offences was the fact that here the employee had not made an early admission of guilt, and that,coupled with her evasive testimony during the arbitration, reinforced the employer's view that the trust relationship was incapable of repair.

In *Suncor Energy Inc.*, 2018 CanLII 12195 (AB GAA) (Price), **the employee was terminated for having been improperly absent for eight calendar days; for having been repeatedly dishonest during the employer's investigation of his absence; and for having fraudulently applied for sick leave during this period.**

The grievance was upheld, with the arbitrator concluding that the employee "did not give just cause for for any form of discipline arising out of the events in this case, based on the Employer's grounds for the termination of repeated dishonesty and fraudulently applying for sick leave."

The employee was to be reinstated, with the arbitrator retaining jurisdiction with respect to lost wages and benefits should the parties be unable to agree.

The issue of fraudulent claims for sick leave benefits is also considered in section 17:201 of this supplement.