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**MISCONDUCT AND POST-TRAUMATIC
STRESS DISORDER:
BALANCING THE PUBLIC TRUST AND ACCOMMODATION**

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I. Introduction

On October 4, 2012, *Bill 129*¹ underwent its first reading in the Legislative Assembly of Ontario. *Bill 129*, or as it is otherwise known “An Act to Amend the Workplace Safety and Insurance Act, 1997 with respect to Post-Traumatic Stress Disorder,” responds to a growing demand for fast-tracking benefits for front-line workers suffering from Post-Traumatic Stress Disorder (PTSD).

This private members bill has recently received some notoriety. Indeed, its timing coincides with a Toronto Star investigation² that chronicles stories of several Ontario Provincial Police (OPP) officers who brought a complaint to the Ombudsman of Ontario about how the OPP addresses ‘operational stress injuries,’ such as post-traumatic stress disorder. The Ombudsman’s office is expected to table a report about this complaint in the coming weeks.

While the focus of the Ombudsman’s report is likely to be overarching and include recommendations for better access to treatment and benefits, and increased cultural awareness, it is equally likely to fall short of addressing the impact of *Bill 129* on the police discipline process. Accordingly, this paper will examine what effect, if any, *Bill 129* may have on the police discipline process, as well as evaluate how a police service should address the misconduct of an officer suffering from post-traumatic stress disorder. Specifically, this paper illustrates the need for proper medical evidence to support a PTSD diagnosis, and the importance of establishing the nexus between the illness and the

¹ Bill 129, *An Act to Amend the Workplace Safety and Insurance Act, 1997 with respect to Post-Traumatic Stress Disorder*, 1st Sess., 40th Leg., Ontario, 2012.

² Curtis Rush & Liam Casey, “How the Ontario Provincial Police deals with Officers’ PTSD” *The Toronto Star* (5 October 2012), online: thestar.com <<http://www.thestar.com/news/gta/crime/article/1267533--how-the-ontario-provincial-police-deals-with-officers-ptsd>>.

misconduct. It appears that *Bill 129* will have very little impact on the manner in which the police discipline process is conducted in the short term. However, *Bill 129* is an indication that there is a fair measure of societal concern about PTSD and the approach taken by the *Bill* may influence the approach taken to this process in the future.

Nonetheless, the paper contends that misconduct arising from post-traumatic stress disorder or any other ‘operational stress injury’ must be assessed in light of the current legislative frameworks, notably the *Police Services Act*,³ and the *Human Rights Code*⁴ of Ontario. In other words, the misconduct of an officer suffering from post-traumatic stress disorder should be assessed in a manner consistent with the assessment of an officer affected by any other disability. These frameworks will be discussed in the sections that follow. But first, the paper will assess the proposed amendments to the *Workplace Safety and Insurance Act*⁵ and the meaning of post-traumatic stress disorder in the context of the *Police Services Act* and the *Human Rights Code*.

II. *Bill 129: An amendment independent of the police discipline process*

Among other things, *Bill 129* creates a rebuttable presumption in favour of an employee claiming benefits under the *Workplace Safety and Insurance Act*. Subsection 13 (2) of this legislative regime provides for this presumption and reads:

If the mental stress or accident arises out of the worker’s employment, it is presumed to have occurred in the course of employment unless the contrary is shown. If it occurs in the course of the worker’s employment, it is presumed to have arisen out of the employment unless the contrary is shown.

³ R.S.O. 1990, c. P-15.

⁴ R.S.O. 1990, c. H-19.

⁵ S.O. 1997, c. 16, Sch. A.

Thus, the *Workplace Safety and Insurance Act* provides that an employee claiming workplace safety and insurance benefits as a result of mental stress arising from his or her employment is presumed to have suffered such stress from said employment unless evidence to the contrary can be adduced. The reason that this presumption is important in the context of the *Workplace Safety and Insurance Act* is that benefits are payable to an employee only if the disability is related to employment. This contrasts with the general requirement set out in the *Police Services Act* and the *Human Rights Code* which requires an employer to accommodate an employee suffering from a disability whether the disability arises from employment or not. Therefore, this presumption will not affect the requirement of accommodation to the point of undue hardship relating to police misconduct. It is worth noting that subsections 13 (4) and (6) specifically capture post-traumatic stress disorder within the meaning of mental stress and define it as “an anxiety disorder that develops after exposure to a traumatic event or experience and may include symptoms such as flashbacks, nightmares and intense feelings of fear or horror.”

This amendment is not only an acknowledgement of the seriousness of post-traumatic stress disorder, but also of the difficulty facing many sufferers when applying for benefits under this statutory regime. In that regard, the proposed amendment is beneficial to all Ontarians and in particular, those serving in front-line positions. Yet despite this advancement, this amendment is limited in scope. *Bill 129* applies to workers only when they are claiming benefits under the *Workplace Safety and Insurance Act*. Thus while the amendment may influence other aspects of employment, it is completely independent of the process involving police discipline. Accordingly, when assessing its duty to accommodate a police officer with post-traumatic stress disorder, a police services board

is required to adhere to the provisions of both the *Police Services Act* and *Human Rights Code*. These provisions include but are not limited to an analysis of the term “disability” under these two statutory regimes. Section 10 (1) of the *Human Rights Code* of Ontario defines “disability,” among other things, as a “mental disorder.” The Ontario Human Rights Commission’s *Policy and Guidelines on Disability and the Duty to Accommodate*⁶ goes even further. It stipulates that “disability should be interpreted in broad terms... [p]rotection for persons with disabilities under the [*Human Rights Code*] explicitly includes mental illness...”⁷

While post-traumatic stress disorder is captured under “disability,” medical evidence of the disorder is required in order to compel an employer to accommodate. Such medical evidence is usually obtained through an employee’s psychiatrist or clinical psychologist whose diagnosis is informed by the *Diagnostic and Statistical Manual of Mental Disorders* (DSM-IV).⁸ The DSM-IV provides comprehensive diagnostic criteria for the assessment of post-traumatic stress disorder. The manual reads:

A. The person has been exposed to a traumatic event in which both of the following were present:

(1) the person experienced, witnessed, or was confronted with an event or events that involved actual or threatened death or serious injury, or a threat to the physical integrity of self or others

(2) the person’s response involved intense fear, helplessness, or horror. Note: In children, this may be expressed instead by disorganized or agitated behaviour

⁶ Ontario Human Rights Commission, *Policy and Guidelines on Disability and the Duty to Accommodate* (Toronto: Ontario Human Rights Commission, 2003).

⁷ *Ibid.* at 6.

⁸ American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders*, 4th ed. (Washington: American Psychiatric Association, 2000).

B. The traumatic event is persistently re-experienced in one (or more) of the following ways:

(1) recurrent and intrusive distressing recollection of the event, including images, thoughts, or perceptions. Note: In young children, repetitive play may occur in which themes or aspects of the trauma are expressed.

(2) recurrent distressing dreams of the event. Note: In children, there may be frightening dreams without recognizable content.

(3) acting or feeling as if the traumatic event were recurring (includes a sense of reliving the experience, illusions, hallucinations, and dissociative flashback episodes, including those that occur on awakening or when intoxicated). Note: In young children, trauma-specific re-enactment may occur.

(4) intense psychological distress at exposure to internal or external cues that symbolize or resemble an aspect of the traumatic event.

(5) physiological reactivity on exposure to internal or external cues that symbolize or resemble an aspect of the traumatic event.

C. Persistent avoidance of stimuli associated with the trauma and numbing of general responsiveness (not present before the trauma), as indicated by three (or more) of the following:

(1) efforts to avoid thoughts, feelings, or conversations associated with the trauma

(2) efforts to avoid activities, places, or people that arouse recollections of the trauma

(3) inability to recall an important aspect of the trauma

(4) markedly diminished interest or participation in significant activities

(5) feeling of detachment or estrangement from others

(6) restricted range of affect (*e.g.*, unable to have loving feelings)

(7) sense of a foreshortened future (*e.g.*, does not expect to have a career, marriage, children, or a normal life span)

D. Persistent symptoms of increased arousal (not present before the trauma), as indicated by two (or more) of the following:

(1) difficulty falling or staying asleep

(2) irritability or outbursts of anger

(3) difficulty concentrating

(4) hypervigilance

(5) exaggerated startle response

E. Duration of the disturbance (symptoms in Criteria B, C, and D) is more than 1 month.

F. The disturbance causes clinically significant distress or impairment in social, occupational, or other important areas of functioning.

Specify if:

Acute: if duration of symptoms is less than 3 months

Chronic: if duration of symptoms is 3 months or more

Specify if:

With delayed onset: if onset of symptoms is at least 6 months after the stressor

Although the definition of “post-traumatic stress disorder” provided for in *Bill 129* may appear broad and overly-inclusive when compared with the definition provided for in the DSM, the Act’s definition may be expected to have limited applicability in the context of a police discipline hearing. After all, mental health practitioners are guided by medical science and research, such as the DSM when making a diagnosis, not legislation.

In addition to providing medical evidence of the disability, the employee must also demonstrate a causal link between the impugned conduct and the disability itself. *Bill 129* may permit a presumption that PTSD is related to employment in the context of an application for benefits, but it does not address the issue of whether the PTSD was related to any alleged misconduct. This requirement to provide medical evidence of a disability and demonstrate a nexus between the disability and the misconduct will be discussed in turn, below.

III. Proof of disability and nexus

In order for a disability to be a factor in the assessment of penalty for police misconduct, there is first an onus on the employee to establish proof of disability and to demonstrate a nexus between the conduct at issue and the disability in question. Without a nexus, there is no obligation to accommodate or to mitigate a penalty.

Where a disability has been established, the employer has an obligation under human rights law to accommodate the employee. In order for an employer to terminate a disabled employee for disability related misconduct, the employer would have to demonstrate that the employee cannot be accommodated short of undue hardship. Undue hardship may be reached where the public duties and responsibilities of the statutory office negate the usefulness of the officer.

i. Proof of disability

In order for a disability to be considered a mitigating factor, a police officer must provide clear evidence of the disability.⁹

⁹ See *Nothing infra* note 16.

The onus rests on an employee seeking accommodation to show a disability in order to trigger the duty to accommodate.

In *Brampton (City) v. A.T.U., Local 1573*,¹⁰ the grievor claimed that the city was required to accommodate his psychiatric disorder by transferring him from bus driving duties to maintenance duties. The arbitrator reviewed human rights case law which established that a complainant had a duty to raise a *prima facie* case of discrimination and applied it to the employment context, holding at paragraph 31:

... The individual, or his Union, must make the first moves. Before an employer is required to respond, the individual must prove that he has a disability; that he cannot perform his old job (in whole or in part) by reason of the disability; and what abilities he retains to perform other duties the employer may reasonably have available. In most cases the individual will have to produce medical evidence sufficient to allow the employer to match the abilities of the individual with the demands of a job. It is only when the employer is in receipt of the necessary information that the duty to respond reasonably, within a reasonable time, arises. In my view, when alleging discrimination, the Union bears the onus of proving how and when it arose. It must make a case for the employer to answer.

The required evidence is not just the opinion of the employee, or advocacy on the part of the employee's treatment professionals, but must withstand arbitral or judicial scrutiny as to objective legitimacy. In *Canada Safeway (Madole)*,¹¹ the employee was discharged due to theft from the retail store at which she was employed. The employee offered

¹⁰ 1998 CarswellOnt 5660 (*Barrett*).

¹¹ *Canada Safeway Ltd. and B.C.T., Loc. 252 (Madole) (Re)*, (2002) 113 L.A.C. (4th) 385 (Smith) [*Canada Safeway*].

evidence from her psychologist, who suggested that the thefts were linked to the employee's psychological state, including post traumatic stress.

The employer offered the evidence of a doctor who had reviewed the psychologist's report and outlined a number of weaknesses of the report, including: (1) the report was based on a positive rapport between the therapist and the employee, rather than being an objective assessment; (2) the report was not compliant with ethical guidelines for forensic psychologists with respect to assessments; (3) a number of elevated scores in the psychological testing suggest that the issue of reliability should have been more thoroughly canvassed by the therapist; (4) there were problems with the interpretation given to certain psychological testing scores by the therapist; (5) the therapist failed to consider whether the emotional upset observed was a result of getting caught stealing, as opposed to underlying emotional problems; (6) the therapist accepted certain background facts without any objective confirmation; (7) the therapist had assumed the role of an advocate, rather than an assessor; and, (8) the therapist's diagnosis of post traumatic stress should be questioned on the basis of the therapist's further statement that the condition had improved markedly in a short time.

The arbitrator concluded that the evidence was not sufficient to demonstrate the alleged disability and its relation to the misconduct, observing at page 406-407:

[...] while there was objective evidence that the Grievor was and had experienced stress and emotional upset, the bulk of Ms. Yasenik's assessment as to the Grievor's mental state and response was based on the Grievor's self-reporting, and the usual approach to testing such self-reporting may have been lacking.

[...]

Further, while the report was prepared prior to her assuming a therapeutic relationship with the Grievor, her evidence was given after she entered such relationship and the inherent bias which then exists is a matter of concern. [...] While I have no reservations about Ms. Yasenik's good faith, candour and sincerity, it is extremely difficult to continue to apply the objective eye of the independent expert when your role has switched to counsellor, and advocate.

A similar outcome was reached in *Canada Safeway (Houle)*¹² where the grievor was terminated due to recurrent episodes of non-compliance with the company's Attendance Policy. The union led medical evidence in the form of testimony by a clinical psychologist that the grievor suffered from an adjustment disorder and exhibited symptoms of PTSD which together constituted a mental disability in sufficient degree to render the grievor's conduct non-culpable.¹³

In response, the employer also had a clinical psychologist testify to the effect that the union's psychologist's report and opinion "was that of an advocate; something well short of a traditional forensic assessment and...insufficient to establish a diagnosis of PTSD; and, insufficient to establish that the grievor suffered from a non-culpable mental illness at the relevant times."¹⁴

The union in this case conceded that the medical evidence tendered was insufficient to establish that the grievor suffered from a medical disability sufficient to trigger the company's duty to accommodate; the arbitrator agreed.¹⁵ The arbitrator continued by assessing whether the medical evidence presented was sufficient to establish that the grievor's misconduct arose from a disability. The arbitrator found that it was not:

¹² *Canada Safeway Ltd. and U.F.C.W., Local 401 (Houle) (Re)*, 111 C.L.A.S. 199, 2012 C.L.B. 14208.

¹³ *Ibid* at para. 60.

¹⁴ *Ibid* at para.64.

¹⁵ *Ibid* at para.84.

[85] That said and although I accept Mr. Block's description of the Grievor's history of life, work and personal stressors; I am persuaded that none of these stressors rendered Mr. Houle disabled or unable to perform his obligations under the Policy throughout the times relevant to this grievance. There is simply insufficient evidence before the Board to conclude otherwise. Even if I accept Mr. Block's suggestion that, at the time of dismissal, the Work Boot Issue had earlier "reactivated PTSD sequelae" based upon self-reported information some 6 months following the termination of Mr. Houle's employment; that information does not establish a disability or an inability sufficient to excuse, explain or justify Mr. Houle's failure to notify the Company of his childcare problems on June 28th, 2009.

[86] Similarly, even if I accept Mr. Block's evidence that Mr. Houle had actively demonstrated *symptoms* of PTSD as late as June 17, 2007, being the date of his last treatment session with Mr. Block, I am persuaded that symptoms themselves do not establish either a disorder or a disability. I accept Dr. Sirota's evidence on this point.

[87] As a result, there is simply no persuasive evidence that the Grievor suffered from a disability or medical condition sufficient to render his conduct non-culpable on June 28th, 2009.

In *Nothing and Ontario Provincial Police*,¹⁶ Constable Nothing was involved in an incident of playing "Russian roulette" with his service firearm. One of the grounds of appeal to the Commission was that the penalty was excessive, given his evidence of alcoholism and rehabilitation. The Commission observed at page 5:

Constable Nothing did not testify at the original disciplinary proceeding. A witness was called by the Appellant to establish both treatment and cure of alcoholism. The transcript of the evidence of this witness reveals little more than a lack of familiarity with the details of the officer's stay and treatment. Furthermore, the witness indicated that he was unable to disclose information about Constable Nothing, in the absence of a release. Such release was not provided.

¹⁶ *Nothing and Ontario Provincial Police*, March 15, 1996 (O.C.C.P.S.) [*Nothing*].

Consequently, the Commission found that there was no clear evidence of either alcoholism or successful treatment.

In *Walker and Peel Regional Police Service*,¹⁷ the police officer stole money from a woman's purse while in a bar. He pleaded guilty to a charge of discreditable conduct and was dismissed from the force. He appealed the penalty to the Commission, arguing that dismissal was excessive. One of the grounds he relied upon was a handicap relating to problems with alcohol and gambling. There was a report before the Hearing Officer from an agency that provided alcohol and drug assessment and treatment, and the Commission accepted new evidence of a further report from the agency at the appeal. The report indicated that the officer had attended counselling sessions, an 8-week "psycho-educational" group and was participating in a weekly maintenance group. The report suggested that the officer had been abstaining from gambling and had reduced his alcohol intake. The Commission observed at page 9:

These efforts are certainly to Constable Walker's credit. That being said, there was no medical evidence presented to either the Hearing Officer or to us that would clearly support the conclusion that Constable Walker has a problem with either the abuse of alcohol or gambling that would qualify as a handicap for the purposes of the application of mitigating principles.

ii. Nexus between the disability and the misconduct

Disability will not necessarily be a factor in all proceedings involving the discipline of disabled employees. Disability only operates as a consideration where there is a nexus established between the disability and the conduct at issue.

¹⁷ *Walker and Peel Regional Police Service*, November 6, 2000 (O.C.C.P.S.) [*Walker*].

Ceyssens¹⁸ introduces this topic as follows:

Misconduct may involve a handicap within the definition found in human rights legislation. The most prominent handicaps found in misconduct cases are alcoholism, depression and post-traumatic stress disorder, all of which constitute handicaps for the purposes of human rights legislation. Medical evidence in support of disability must establish a “clear” connection between the medical condition and the disability in question.

The case law is clear: in order for a disability to be considered a mitigating factor, there must be clear evidence of the disability and of a nexus with the misconduct.¹⁹

The Alberta decision of *Malish and the Edmonton Police Service*²⁰ demonstrates the necessity of showing a nexus between the handicap claimed and the misconduct under consideration. *Malish* was an appeal from a presiding officer’s disposition of termination based on four counts of misconduct.

The police officer alleged that it was improper for the Presiding Officer to require a “nexus” between the alleged handicaps and the misconduct under consideration. The Law Enforcement Review Board (the “Board”) determined that it was not unreasonable for the Presiding Officer to take the approach he did, weighing the issue of whether there was any demonstrated connection between the alleged handicap and the misconduct complained of.

The Alberta Court of Appeal refused leave to appeal, observing that the Presiding Officer did not weigh the issue of the handicap in the context of culpability; rather, the police

¹⁸ Paul Ceyssens, *Legal Aspects of Policing*, looseleaf (Saltspring Island: Earls court Press) vo1. 1 at page 5-217.

¹⁹ See *Malish*, *infra*.

²⁰ *Malish and the Edmonton Police Service*, February 22, 2005 (Alta. L.E.R.B.), leave to appeal refused [2005] A.J. No. 1441 (C.A.) [*Malish*].

officer had pled guilty and, therefore, the only question was the effect of the handicap on the disposition. The Court determined that the Board was not in error in finding that the Presiding Officer's decision was reasonable. The Court observed at paragraph 11:

Therefore, the Presiding Officer had to decide what weight to attach to the evidence of the applicant's condition. The degree of linkage or the nexus between the applicant's condition and his actions were relevant to that determination. It is in this context that the Presiding Officer's references to nexus, awareness, and rationality were made. The Presiding Officer found no nexus and that affected his assessment of the weight of that mitigating factor.

This case demonstrates the importance of establishing that a true nexus exists between the handicap and the misconduct complained of.

In *Domtar Inc. v. I.W.A. – Canada*²¹, the employee was disciplined for falsification of records and unreported absences from work and was terminated for an assault on a supervisor. The grievor offered medical reports of his treating physician which indicated that the grievor recognized that the incidents that precipitated his dismissal were a result of his psychological state of depression. The company presented medical evidence contradicting the position of the employee that his misconduct at work was the result of a state of depression. The arbitrator reviewed the authorities with respect to a disability and observed at paragraph 133:

The authorities canvassed above are clear that although the Company bears the onus of proof in a disciplinary case, where the Union suggests that the grievor's conduct was the result of a disability, it must establish with credible evidence both that the

²¹ *Domtar Inc. v. I.W.A.-Canada, Local 2995*, 2003 CarswellOnt 4915 (Tims) [*Domtar*].

griever was disabled at the relevant time, and that there was a “causal connection” between the alleged disability and the conduct giving rise to discipline.

The case of *Kelly and Toronto Police Services*²² demonstrates that where reliable evidence of nexus is presented it can be relied on in disciplinary proceedings to mitigate penalty. The case involved an undercover officer who was investigating mid-level cocaine projects and began to suffer from a substance abuse problem and post-traumatic stress. In addition to being charged criminally, Constable Kelly was charged with four counts of misconduct contrary to the *Police Services Act*. These charges resulted in a hearing before a Hearing Officer who imposed a penalty of termination. This decision was subject to appeal to the Ontario Civilian Commission on Police Services which overturned the decision of the Hearing Officer and ordered Constable Kelly’s reinstatement. The Chief of Police appealed the OCCPS decision to the Divisional Court which upheld the decision of the OCCPS.

In making its finding that Kelly’s disability could be accommodated without undue hardship, the OCCPS stated:

“It is clear that Constable Kelly has been an exemplary officer whose misconduct was clearly out of character and, as confirmed by medical experts, his actions were no doubt contributed to by a series of distressing personal and work-related events.”²³

²² *Kelly and Toronto Police Services*, *infra* at note 33.

²³ *Ibid.* at para 76.

The Divisional Court confirmed that “this was a reasonable finding on the evidence”.²⁴

In *Krieger v. Toronto Police Services Board*,²⁵ the officer suffered from undiagnosed PTSD resulting from an altercation with a suspect. Five weeks after this incident, the officer was involved in another altercation resulting in an investigation of professional misconduct. The officer was terminated despite the existence of medical evidence demonstrating that his misconduct was a product of his undiagnosed PTSD.

In their decision to reinstate the police officer, the Ontario Human Rights Tribunal observed that the Board “had reason to believe that the conduct that led to the applicant’s suspension – and ultimately his termination – was caused by a disability.”²⁶

This shows that in the face of medical evidence proving that the misconduct is connected to a disability, there is a corresponding obligation for this evidence to be considered as a potential mitigating factor, especially in the absence of evidence to the contrary.

IV. The human rights context: accommodation to the point of undue hardship

Where both a disability and nexus are established, human rights obligations come into play.

The Ontario *Human Rights Code* prohibits discrimination on the basis of disability and prohibits reliance on a *bona fide* occupational requirement that would result in discrimination, unless to accommodate the affected employee(s) would amount to undue hardship. Sections 5 and 11 of the *Human Rights Code* provide as follows:

²⁴ *Ibid.*

²⁵ *Krieger v. Toronto Police Services Board*, 2010 HRTO 1361 (OHRT).

²⁶ *Ibid.* at para. 157.

5 (1) Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences, marital status, family status or disability. ...

11 (1) A right of a person under Part I is infringed where a requirement, qualification or factor exists that is not discrimination on a prohibited ground but that results in the exclusion, restriction or preference of a group of persons who are identified by a prohibited ground of discrimination and of whom the person is a member, except where,

- (a) the requirement, qualification or factor is reasonable and *bona fide* in the circumstances; or ...

(2) The Commission, the Tribunal or a court shall not find that a requirement, qualification or factor is reasonable and *bona fide* in the circumstances unless it is satisfied that the needs of the group of which the person is a member cannot be accommodated without undue hardship on the person responsible for accommodating those needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any. ...

Furthermore, section 47 of the *Police Services Act* specifically requires a police service to accommodate a police officer to the point of undue hardship, as follows:

47 (1) Subject to subsection (2), if a member of a municipal police force becomes mentally or physically disabled and as a result is incapable of performing the essential duties of the position, the board shall accommodate his or her needs in accordance with the *Human Rights Code*.

It is clear that where an employee offers proof of a disability and of a nexus the employer has a duty to accommodate that disability. The existence of human rights legislation does not mean that a person with a disability can never be disciplined or terminated, what it

does mean, however, is that under human rights legislation there is a duty to accommodate disabled employees up to the point of undue hardship – this duty exists in all employment contexts, including that of a police employer.

There is no general definition of what amounts to undue hardship; it must be determined upon a case by case basis. Accommodation should not amount to undue interference in the operation of an employer's business and undue expense to the employer. Some factors that have been identified include: financial costs; disruption of a collective agreement; problems of morale of other employees; interchangeability of workforce and facilities; size of the workforce; and, safety concerns. Undue hardship should not be considered to be a fixed point; it may vary from case to case or situation to situation: *Ontario (Human Rights Commission) v. Simpsons Sears Ltd.*, [1985] 2 S.C.R. 536; *Central Alberta Dairy Pool v. Alberta (Human Rights Commission)*, [1990] 2 S.C.R. 489; *Canada Post Corp. and C.U.P.W. (Reniak) (Re)* (1998), 73 L.A.C. (4th) 15 (Canada) (Ponak); *Syndicat des employes de techniques professionnelles & de bureau d'Hydro-Québec, section 2000 (SCFP-FTQ) c. Corbeil*, 2008 CarswellQue 6436, 2008 SCC 43.

The Supreme Court in *Syndicat des employes de techniques professionnelles & de bureau d'Hydro-Québec, section 2000 (SCFP-FTQ) c. Corbeil*²⁷ clarified the standard to be met for undue hardship and noted:

What is really required is not proof that it is impossible to integrate an employee who does not meet a standard, but proof of undue hardship, which can take as many forms as there are circumstances.²⁸

²⁷ 2008 CarswellQue 6436, 2008 SCC 43.

²⁸ *Ibid.* at para 12.

The court further noted that “the goal of accommodation is to ensure that an employee who is able to work can do so”²⁹ and “not to completely alter the essence of the contract of employment, that is, the employee’s duty to perform work in exchange for remuneration.”³⁰

Finally, the court held that “[t]he test is not whether it was impossible for the employer to accommodate the employee’s characteristics. The employer does not have a duty to change working conditions in a fundamental way, but does have a duty, if it can do so without undue hardship, to arrange the employee’s workplace or duties to enable the employee to do his or her work.”³¹ Where the characteristics of an illness are such that the proper operation of the business is hampered excessively even though the employer has tried to accommodate him or her, the employer will have satisfied the test for undue hardship.³²

Although the obligation to accommodate to the point of undue hardship also applies to the police employer, it must be emphasized that although disability is an important factor it does not trump all issues of public safety, public interest and administration of justice. Undue hardship may be reached where an officer has committed acts of misconduct that nullify the officer’s usefulness due to the seriousness of the acts alone and impact on the public trust.

In this regard, in *Ottawa Police and Hall*, the Commission stated as follows:

²⁹ *Ibid.* at para. 14.

³⁰ *Ibid.* at para. 15.

³¹ *Ibid.* at para. 16.

³² *Ibid.* at para. 18.

“The duty to accommodate must be assessed in light of individual employees and their employers. It is a shared responsibility. It also must take into account the essential requirements of the type of employment in question.”³³ (Emphasis Mine.)

Where the employer is a police service the essential requirements will differ based on overarching concerns of public safety. A relapse of a retail employee will not have the same effect as a relapse of a police officer who has access to weapons and is charged with the protection of the public.

In *Kelly and Toronto Police Services*³⁴, the Commission, in overturning a dismissal, stated “...we do not agree that Constable Kelly’s usefulness to the Toronto Police Service has been expunged or that he would forever be prevented from performing the full duties of his position as a police officer.”³⁵ In this decision, the Commission recognizes the interplay between undue hardship and the ‘usefulness’ test.

The Commission goes on in *Kelly* to state that:

“There is undisputed medical evidence that there is a low risk of relapse. His potential for rehabilitation has been recognized by his employer. Accommodation without undue hardship is possible.”³⁶

Although there is no hard and fast list of criteria of what will constitute undue hardship in *Willis and London Police Service*³⁷ the Commission offered the following comments on the obligations of a police employer in the context of the mental health disability at issue:

³³ *Hall and Ottawa Police Service*, December 5, 2007 (O.C.C.P.S.), aff’d 2008 CarswellOnt 7611 (Div. Ct.), leave to appeal refused April 3, 2009 (C.A.).

³⁴ *Kelly and Toronto Police Services*, May 16, 2005 (O.C.C.P.S.), aff’d [2006] O.J. No. 1758 (Div. Ct.).

³⁵ *Ibid.* at 15.

³⁶ *Ibid.* at 16.

³⁷ *Willis and London Police Service*, June 6, 1997 (O.C.C.P.S.).

We do not believe that Constable Willis received sufficient help from the London Police Force to cope with her mental disability, a service that should be available to all employees. Nor did it provide a supportive environment to prosper, or a reasonable period of time in which to recover from or control her mental disability so that it could be properly determined whether she could perform the duties of a police officer.³⁸

In *Krieger*, the Ontario Human Rights Tribunal found that there was “uncontradicted medical evidence of Drs. Swallow and Rootenberg...that the applicant’s PTSD was amenable to treatment.” The conclusion of the treating psychologist in this case was that the applicant could have returned to modified duties in early 2008 and that this conclusion was echoed in the notes of the Service’s reviewing physician at Medical Advisory Services. In the face of this evidence, and given that the respondents did not call any evidence that no such modified duties existed or would have resulted in undue hardship, the Tribunal found that the applicant could have been accommodated.

Moreover, the Tribunal held that there is a shared responsibility for identifying a mental illness. Indeed, this responsibility falls to both the officer and his or her supervisors. The Tribunal noted the following:

If a probationary officer with five months’ service is supposed to be on the lookout for a severe stress reaction in the wake of a life-and-death incident, then surely senior experience officer have an even greater obligation to recognize such a disorder when a junior officer on their watch appears to show symptoms of it.³⁹

³⁸ *Ibid.* at 11.

³⁹ *Supra* note 15 at para. 140.

An example of a termination of an employee suffering from PTSD can be found in *Correctional Service of Canada, Deputy Head and Sioui (Re)*.⁴⁰ In this case the grievor, a correctional officer, was terminated in April 2006 because had become permanently unable to work with inmates and carry a firearm and the employer's efforts to find him other work in the public service had been unsuccessful.

The grievor witnessed a violent altercation between an inmate and another correctional officer and also alleged an earlier incident where he was confronted directly by an inmate. Several psychiatrists diagnosed him with post-traumatic stress disorder. As a result of the PTSD, the medical authorities found that the grievor was unable to work safely as a correctional officer and to carry a firearm because he could not be counted on to react appropriately to the sudden, often violent confrontations with inmates which were endemic at this institution. In other words, the grievor posed a risk to his safety and to the safety of others.

The grievor sought to return to work as a correctional officer without inmate contact. The employer said it was impossible to avoid inmate contact in this institution, even in administrative positions. At the adjudication hearing of his termination grievance, the employer argued that it was impossible to deploy the grievor without inmate contact and without carrying a firearm. In short, the employer could not accommodate the grievor's functional limitations without undue hardship. Although the grievor himself insisted that he was able to return to his former position, this declaration was contradicted by the

⁴⁰ *Correctional Service of Canada, Deputy Head and Sioui (Re)* (2009), 184 L.A.C. (4th) 70, 97 C.L.A.S. 311, [2009] C.P.S.L.R.B. No. 44, 2009 PSLRB 44 (P.S.L.R.B.).

medical opinions. The arbitrator found that “the grievor’s position that he is able to return to his former position is based on self-assessment rather than on medical data.”⁴¹

Because post-traumatic stress disorder may be the result of an accumulation of events results resulting in a crisis, the proximate cause may arguably be either an earlier or later event. Inevitably, employees favour this diagnosis because it is incident-specific. It tends to rule out other factors important to the determination of causation.⁴² Therefore, it can be argued that all of an employee’s psychological problems arise from the alleged traumatic event and not from myriad other sources encountered in life.⁴³ Given this position and the potential for it to leave an employer in an unjust position, the proof of nexus is even more important in cases of post-traumatic stress disorder.

V. Disability is an explanation not a defence

In the context of police discipline, a disability is considered an explanation for behaviour not an excuse. It does not constitute a defence to misconduct where intent is not a required element of proof.⁴⁴

In *Ceyssens*, the author observed at page 6-142:

(b) Disability

Illness has become a prominent mitigating consideration in recent years. Most of the case law involves psychological conditions such as addiction (especially alcoholism), depression and anxiety disorders. Appellant tribunals have consistently concluded that illness does not ordinarily constitute a lawful excuse, although it may in appropriate cases explain

⁴¹ *Ibid.* at para. 85.

⁴² George Glumac, “*Post-Traumatic Stress Disorder: A Review of the Psychiatric Literature for the Legal Profession*” (1999) 21 *Advocates’ Q.* 336 at 337.

⁴³ *Ibid.* at 338.

⁴⁴ See *Spizziri, McCoy, Betts, Gulliver, Favretto, infra* and *Kelly, supra*.

particular behaviour and therefore serve as a mitigating consideration for penalty purposes. In the words of the Ontario Civilian Commission on Police Services, addiction “may not excuse inappropriate conduct, but can certainly explain it.

The Commission decision in *Spizziri*⁴⁵ involved a discreditable conduct charge based on a shoplifting incident. The officer was convicted of the criminal offence of theft, but raised a defence to the discreditable conduct charge based on psychiatric evidence. The evidence indicated that he was under significant stress relating to the fact that he had Hodgkin’s Disease and his father was seriously ill. The officer was found guilty of the discreditable conduct charge and was required to resign from the force. The Commission upheld the finding of guilt, but reduced the penalty to a reduction in rank. The Commission observed at page 2:

As noted above, we accept the evidence of Dr. Koladich and find that it explains, but does not excuse, the conduct of the constable. Accordingly, we uphold the finding of guilt.

In *McCoy*,⁴⁶ the officer appealed a conviction of discreditable conduct relating to shoplifting. The officer offered psychiatric evidence suggesting that he did not realize that he had removed the items from the store. The officer argued that the Hearing Officer erred in not accepting this evidence as going to his guilt on a charge of discreditable conduct. The Commission disagreed, noting at page 3:

We are unable to accept this argument. This charge arises as a result of an allegation of discreditable conduct, which conduct consists of the taking of the cribbage board and pegs without paying for them. At its best, Dr. Lalani’s testimony can be no more than an explanation of

⁴⁵ *Spizziri and Ontario Provincial Police* January 31, 1989 (O.P.C.) [*Spizziri*].

⁴⁶ *McCoy and Ontario Provincial Police*, April 28, 1989 (O.P.C.) [*McCoy*].

McCoy's conduct. We do not see it as a lawful excuse for that same conduct. We therefore find no error in the reasoning of Commissioner Garry such as would compel us to overturn his findings.

In *Betts*,⁴⁷ the officer appealed a penalty of demotion after pleading guilty to two counts of neglect of duty and one count of deceit. The officer claimed that the sentence was too harsh. The officer had provided a psychological report indicating that, at the time of the offences, he was under stress due to a previous physical injury he had suffered on the job. The Commission observed at page 5:

While the psychologist's report may in some measure explain constable Betts' behaviour, it does not excuse it, nor does it in the circumstances, reveal anything to support a lesser penalty.

In *Gulliver*,⁴⁸ the police officer beat up an electrical contractor who he mistakenly believed had stolen two rings from his home. He provided psychiatric evidence from his therapist. With respect to the impact of the report from the therapist, the Commission observed at page 5:

Constable Gulliver undertook counselling through the Employee Assistance Program of the Brantford Police Service. Psychometric testing indicated that he was moderately depressed with a borderline alcohol problem. While this might in some measure explain his behaviour, it cannot excuse it. ...

The Commission went on to determine that this evidence did not establish that the alleged condition was either a disability or a handicap.

⁴⁷ *Betts and Ontario Provincial Police*, June 19, 1997 (OCCPS) [*Betts*].

⁴⁸ *Gulliver and Brantford Police Service*, July 15, 1997 (OCCPS) (aff'd, unreported February 10, 1998 (Div. Ct.), summarized as J.R. #97-10 (OCCPS)) [*Gulliver*].

Similarly, in *Favretto*⁴⁹, the officer argued that he was in a state of “non-insane automatism” when he pointed the loaded firearm at his co-worker. The Commission observed at page 9:

Even had the Hearing Officer accepted the medical theory of Dr. Orchard, it would merely offer an explanation for Constable Favretto’s actions and not an excuse. The conduct of Constable Favretto on April 21, 1996 at the Still River Detachment was clearly and undeniably discreditable.

Note that this finding was made despite the fact that the officer was found not guilty of a criminal offence based on non-insane automatism.

In *Kelly*,⁵⁰ the officer became addicted to cocaine while acting as an undercover officer and was convicted criminally relating to use of cocaine. At page 12, the Commission noted “addiction as a handicap can be a significant mitigating factor. It may not excuse inappropriate conduct, but can certainly explain it.”

As evidenced by the above decisions, a disability will not excuse misconduct but rather will constitute a factor to consider in penalty.

VI. Conclusion

The existence of a disability is a relevant factor in assessing the appropriate discipline for misconduct. Where there is sufficient evidence of the disability and a nexus to the misconduct, an employer must attempt to accommodate an employee to the point of

⁴⁹ *Favretto and Ontario Povincial Police*, February 13, 2002 (OCCPS), rev'd 2003, CarswellOnt 4883 (Div. Ct), aff'd 2004 CarswellOnt 4221 (C.A.), application for leave to appeal dismissed 2005 CarswellOnt 1665 (S.C.C.) [*Favretto*].

⁵⁰ *Supra* note 33.

undue hardship. Undue hardship may be reached in circumstances where the conduct is so egregious that the public interest would warrant termination, or where there is no prognosis that the employee will be able to fulfill the essential duties of the job within a reasonable time. At this stage the officer's usefulness would be at an end.

The cases above lead to the conclusion that this process is no different in circumstances where the disability in question is PTSD. It remains true that where an employee has been diagnosed with PTSD, this will be a relevant factor in assessing what form of discipline is appropriate to the misconduct. However, it is still necessary for there to be sufficient evidence of PTSD and evidence of a connection between the PTSD and the misconduct in order for the disability to be considered mitigating. Also, where there is sufficient evidence of the existence of a disability and sufficient evidence of a nexus between the disability and the misconduct the employer's duty to accommodate will be engaged.

Where the duty to accommodate is engaged in the case of PTSD, undue hardship will likely not be reached in the face of evidence that the disability is amenable to treatment. However, where there is risk of future violent behaviour or evidence that the employee is no longer able to fulfill the essential duties of his or her position then the test for undue hardship may be met and termination may be warranted.