An examination of mental illness in Canadian workplaces: A content analysis of trends and directions in Canadian arbitration case decisions.

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Abstract

An examination of mental illness in Canadian workplaces: A content analysis of trends and directions in Canadian arbitration case decisions.

By: Anne MacAulay

Mental illness has become one of the leading reasons for absenteeism in Canadian workplaces. Employers are challenged to become more aware, educated, and active about mental illness in order to assist employees with workplace accommodations. In the 2006 report by Kirby and Keon, stigma was highlighted as a significant barrier to progress in disclosure and handling of such cases. As a result, cases arise where employers, unions, and employees struggle to resolve situations requiring accommodation, with some ending up in arbitration to seek a third party ruling. To examine this phenomenon more closely, a content analysis of Canadian arbitration case decisions relating to mental illness both pre- and post- the Kirby and Keon report was conducted. The overall trend indicates that arbitration cases involving mental illness have more than tripled over the past 20 years. The preliminary findings from this study show that arbitrators are struggling in their assessment of the medical evidence, but they have made it very clear that the employer has a duty to gather medical information if a mental illness is suspected. Arbitrators in their case analysis are looking for a connection between the employees conduct and mental illness. The case decisions also show that employer practices are contributing to and/ or exacerbating an employee’s mental health disability.
Acknowledgements

This mid-life project could not have been completed without support along the way. While there are many who walked this path with me, I want to in particular, acknowledge my gratitude to the two young women in my life who inspire and encourage me the most, my daughters Alana and Emily; my sister Bernadine who has been, and is still an integral part in my completion of higher education endeavours; my advisor, mentor, Wendy Carroll, who taught me to not fear and pushed me to reach higher, and higher; and my colleagues and friends who were always willing to listen to me when work and school became overwhelming.
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CHAPTER 1: INTRODUCTION

“Out of the Shadows at Last”, a 2006 report from The Standing Senate Committee on Social Affairs, Science and Technology discloses an astonishing lack of understanding and acceptance for individuals who are disabled as a result of mental illness. Senator Michael J. L. Kirby, Chair of the Senate Committee, heard more than two thousand personal stories that indicate clearly that people in Canadian society fear mental illness, would rather it remain hidden, and when revealed, provides a reason to shun a person (Kirby & Keon, 2006). Negative attitudes about mental illness transcend all areas of society but are perhaps most profoundly experienced in the workplace. Work is important, not only for obvious economic reason, but also for its contribution to a person’s sense of self. In fact, research indicates that work is a significant factor in recovery from mental illness (Kirby & Keon, 2006) or in other words, work is therapy.

Despite legislative requirements, there is often a tension between employer and employee when it comes to the question of workplace accommodation because of a disability, especially mental illness. In adjudicating disputes where mental illness is a factor, arbitrators are challenged by the gap in what is known about integrating employees with mental health issues into the workplace. While disability management and return to work programs for the physically disabled employee are well researched (Hatcher, 2008), little is known about best practices for accommodating individuals with mental illness (Kirby & Keon, 2006).

The natural characteristics of mental disability present employers, unions and arbitrators with challenges requiring work and effort to resolve. If the shame of mental
illness continues to be a dynamic in the workplace the monetary costs will grow as will the personal cost of lost opportunities for individuals with a mental health disability.

Effective organizations align policies and work practices with organizational goals that are intended to promote maximum employee performance (Millmore et al., 2007). Understanding how arbitration decisions contribute to better work practices for employees who have a mental health disability is crucial. Human resource advisors in organizations draw on arbitration decisions to develop policy and establish work practices. The Global Business and Economic Roundtable on Addiction and Mental Health found that “management practices or behaviours can either precipitate or aggravate mental health problems in the workforce” (Kirby & Keon, 2006, p. 182). That being the case, arbitrators have a pivotal role to play in the development of best management practices to mediate the stigma of mental health issues in the workplace.

The economic costs of mental illness due to lost productivity in the workplace and the increase health care costs are significant in Canada (Peters & Brown, 2009). While there is some indication in the literature that organizations are paying closer attention to diversity management (Millmore, Lewis, Saunders, Thornhill, Morrow, 2007), there is a disparity in the efforts to address the needs of an employee who is disabled as a result of mental illness. To bring the issues related to mental health disability to the attention of Canadian society was a central goal of the Kirby Keon report. The Committee report made it clear that there is a need for an ongoing focus on the issues that excluded those with a mental health disability from the workplace. Examining the arbitration decisions will show the issues that are contributing to the discord between an employee with a mental health disability and the employer. The review will also provide evidence of
whether there has been any change in work practices that contribute to the inclusion of employees with a mental health disability in the workplace.

The purpose of this study is to review arbitration case decisions for trends and directions that have influenced and shaped the ways in which we deal with mental illness cases in the workplace. Arbitration case decisions help to identify and influence workplace policies and practices. A content analysis of arbitration case decisions over the last twenty years was conducted to provide insights about how employer best practices have evolved and where the gaps in understanding of mental illness continue to present the greatest challenge.

Mental Illness in Canadian Workplaces

It has been estimated that annually about 10 percent of the working population in Canada has a mental disorder. While this creates an obvious social concern, there are significant economic considerations as well. The productivity losses related to mental illness are estimated at 17.7 billion annually. This economic liability related to mental illness has caught the attention of many employers (Dewa, Hoch, Carmen, Guscott,& Anderson, 2009). Studies such as the one conducted by Dewa and colleagues (2009) have examined the cost effectiveness of collaborative mental health care programs for people with mental health disorders. In this particular study, it was found that there could be significant savings related to more people returning to work, and less people transitioning to long term disability benefits. A collaborative approach to return people to the workplace involves not only health care providers but also requires employer’s attention to create workplaces that are healthy and inclusive for those with a mental health
disability. To that end, it is important to understand employers’ efforts to develop best practices for accommodating persons with mental disability.

It has been almost 25 years since the introduction of human rights statutes that forbid discrimination on the grounds of “disability” or “handicap” (Lynk, 2008). Employers’ understanding of the accommodation duty is evolving as new legal responsibilities are formed in case law. The duty to accommodate is a legal obligation that is derived from applicable human rights legislation and rulings of the Supreme Court of Canada (Lynk, 2008). Arbitration decisions should be consistent with the legislation (Lynk, 2008). However, the challenge of duty to accommodate lies in the defining of what constitutes a disability. The arbitrator must find that an impairing condition amounts to a disability. If a grievor is not found to be disabled, or perceived to be disabled, then the arbitrator will not find that discrimination has occurred, and the employer’s legal obligation to accommodate is not triggered (Lynk, 2008).

Much of the literature and legal precedent on the duty to accommodate pertains to physical disability. This review analyses how arbitrators assess the mental health information and evidence presented to them in the arbitration process. This factual information forms the basis for the arbitrator’s determination of a disability triggering the duty to accommodate. Insights gained from this review will reveal whether or not gaps in knowledge of mental illness continue to present challenges in accommodating employees who have a mental health disability.

Research Overview

Arbitrators’ decisions have a direct bearing on two of the three key work barriers identified by the Kirby and Keon report (2006). Specifically, individuals with mental
health issues may experience discrimination from their employer and co-workers, and they require flexible work arrangements that the employer is either unwilling to provide or does not know how to provide it (Kirby & Keon, 2006). The consideration of a workplace accommodation demands that the key work barriers be recognized and removed by employers.

Duty to accommodate involves employer actions that increase the presence of employees with disabilities in the (Lynk, 2008). The duty to accommodate is also about efforts to ensure an employee has every opportunity to remain in the workforce. Employers, unions, labour and human rights tribunals in Canada agree that every effort, short of undue hardship, must be made to accommodate an employee who falls under the protection of human rights legislation. Work accommodation may be required for reasons of religion, race, and gender. However, most often accommodations are sought after because of either physical or mental disability. While both disabilities fall on the list of protected ground of human rights legislation, mental illness presents the greatest accommodation challenge (Lynk, 2008).

Over time employers, have become more informed about what they need to do to ensure that their workplace is inclusive for employees because they have been told by the courts, human rights tribunals, arbitration boards and arbitrators when their actions have been discriminatory. When it is found that they have acted in a discriminatory way, they are ordered to accommodate the employee they have wrongly treated. For example, employers now understand they need to consider religious differences and respect that a day other than Sunday may be a day of rest. Further, employers now recognize as a result of past arbitration decisions that their work site must be accessible to an employee who uses a wheel chair and they accept that special equipment may be required for employees
who have a sight or hearing disability. These types of accommodations are tangible and seemingly easier for employers to understand.

This study will explore the question of why employers misapply the human rights legislation for accommodation when confronted with an employee with a mental health disability. Kirby and Keon’s report (2006), and Lynk’s (2008) review of cases on duty to accommodate highlight that issues related to mental health present the greatest challenges not only for employers, but also the judicial/quasi judicial bodies that must review the actions an employer has taken against an employee. Viewing arbitration case decisions pre-and post-Kirby and Keon report will reveal how employer practices in accommodation may have changed over time. The examination will also illustrate how arbitrators are responding to and assessing the specific issue of accommodation for persons with a mental disability.

The research technique of content analysis is an appropriate method to examine the text in arbitration decisions for observed phenomena of where discrimination leads the employer to ignore a duty to accommodate. Arbitration case decisions will be selected through a process and those selected will be closely read to explore the developments in how accommodation is handled in the workplace and how arbitrators are dealing with the human rights legislation as it relates to a mental health disability. What happens in the employer and employee relationship preceding their conflict will be explored through a systematic reading of arbitration case decisions. The analysis will also look at what happens to the relationships between the people who communicate with one another: employers, employees, unions and arbitrators and will be examined to understand what enables or prevents an accommodation.
In a unionized workplace, it is arbitrators and arbitration boards who oversee and decide if an employer has been discriminatory in their failure to provide an accommodation for an employee who has a mental health disability. If arbitrators do not find that the mental health issue constitutes a disability, there will be no requirement for an accommodation.

Organization of this thesis

The remainder of this thesis unfolds in chapters that provide the background and findings from this study. In Chapter 2, a review of the pertinent literature relating to mental illness in the workplace will be discussed along with an overview of arbitration decisions that inform duty to accommodate. Chapter 3 provides the approach to the study and the process used for the content analysis to identify cases for inclusion in the analysis. Chapter 4 sets out the findings from the study, first revealing the descriptive statistics from the content analysis and then presenting the trends and directions found as a result of the review of the arbitration cases. The final chapter summarizes the study findings followed by a discussion about the findings, limitations of the study and future research.
CHAPTER 2: LITERATURE REVIEW

In this chapter, literature related to mental illness in the workplace is reviewed. The connection between mental illness and duty to accommodate as well as the guidelines arbitrators follow in making case decisions is presented.

Mental Illness

The sections that follow explore the literature on the effect mental illness has for the employee and the consequences it has for the workplace. The terminology used to describe the extent of an employer’s duty to accommodate is expanded upon and the key role arbitrators have in shaping best practices for the workplace accommodations for employees who have a mental disability is also introduced in this chapter.

*Mental Illness in Canadian Workplaces.*

The Kirby and Keon (2006) report noted the absence of definitive statistics on the frequency of mental health issues in the workplace. However, disability claims associated with mental illness have over taken claims for cardiovascular disease as the fastest growing category of disability costs in Canada (Kirby & Keon, 2006). As a result, the issue of mental illness is receiving attention by many organizations and agencies. For example, the World Health Organization (WHO) estimates that mental illness accounts for four of the top ten leading causes of disability in the workplace (Peters & Brown, 2009). According to the Health Insurance Association of America, insurance claims for mental disorders doubled between 1989 and 1994 (Kirby & Keon, 2006). “In Canada, short- and long-term disability related to mental illness accounts for up to a third of claims and about 70 percent of the total costs,$15 to $33 billion annually”(Kirby & Keon, 2006, p. 177). This statistic indicates that employees who could be working are not; they
have left the workplace or they have been dismissed by the employer. Kirby and Keon’s report provides us with valuable evidence to support a conclusion that employee absence from the workplace results most likely due to ignorance on the part of employer. The employer does not know how to identify when an employee needs support and / or the employer unknowingly engages in discriminatory work practices.

Employers often first recognize mental health issues when an employee takes an action that warrants the consideration of discipline (Kirby & Keon, 2006). Recent court rulings as outlined in Lynk’s (2008) work highlight that employers in some cases ought to be aware of the connection between an employee’s behaviour and the presence of a mental illness. In the Albright Cleaners Ltd. case, the human rights tribunal found “that it was already apparent to the employer, when it dismissed her, that she was suffering from a mental disability. Instead of firing her, the tribunal ruled that the employer should have sought to accommodate her” (Lynk, 2008, p. 56). This ruling is a clear signal to employers that before they proceed down a path that leads to discipline there must be a thoughtful consideration of whether there is a disability that requires an accommodation.

The episodic nature of mental illness creates challenges when accommodating employees who have a mental disability. Unlike many employees with physical disabilities, they may have periods when they are completely well and do not need an accommodation (Kirby & Keon 2006, Lynk, 2008). Employers must have a proactive approach to support an employee who has a mental health disability. This approach begins with having work practices that support a healthy work environment. Beyond a healthy work environment employers have a responsibility to be educated about how a mental health disability may affect an employee’s performance, and just as they know they must alter the height of a desk for someone who has a wheel chair, they must also
know how to alter the workplace to accommodate an employee with a mental health disability

*Mental illness and the Duty to Accommodate*

The broad notion of duty to accommodate is well understood by the courts, human right tribunals, arbitration boards and arbitrators. However, its application in the workplace is fraught with challenges. A duty to accommodate is triggered when an employee is not able to perform the duties of their job due to a disability. The employer has a responsibility to ensure that the workplace is a free as it can be of barriers for the employee who has a disability.

Employers are often in awe of the “effort” that is required of them to integrate an employee with mental illness issues back to the workplace (Hatchard, 2008), and inevitably come into conflict with employees who require an accommodation because of a mental disability. Although employers have a primary responsibility in making every effort to accommodate an employee, they share this effort with the employees and the unions who represent them. Unresolved disagreements often go to arbitration for resolution. Arbitrators are guided by the decision of the courts, human rights tribunals and other arbitration case decisions. They look to these decisions to determine the threshold for the amount of effort required of all the parties in an accommodation. Table 1 reviews the seminal points of reference set by the Supreme Court that should guide arbitrator decisions.
Table 1: Guidelines for Canadian Arbitrators as Identified by Lynk, 2008.

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<tr>
<td>As a fundamental human right, the duty accommodation must be a central consideration in all Canadian workplaces.</td>
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<tr>
<td>Collective agreement rights, although respected must be waived if they unreasonably prevent an accommodation request.</td>
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<tr>
<td>Although the employer has the greatest responsibility, the union and the employee requesting the accommodation also share a legal responsibility to ensure the success of an accommodation request.</td>
</tr>
<tr>
<td>The threshold for undue hardship is high, especially for large employers. Accommodations measures must be taken unless it is impossible to do so.</td>
</tr>
<tr>
<td>Employers and unions must be responsive to the different ways an individual employee can be accommodated.</td>
</tr>
<tr>
<td>Employers may need to modify what they would consider standard requirements, i.e., requirements to lift, number of breaks allowed.</td>
</tr>
<tr>
<td>Unless there are significant business impacts, courts, arbitrators and human rights tribunals will not discharge the employer’s obligation to accommodate an employee who falls under the protection of human rights legislation.</td>
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These guidelines are broad in scope but specific in that the duty to accommodate is an effort that must be undertaken to the point of “undue hardship.” The concept of accommodation to the point of undue hardship means that employers can expect that they
will have to accept some hardship. They cannot expect to continue in a status quo employment relationship with an employee with a disability.

The Supreme Court in the Central Alberta Dairy Pool case (Lynk, 2008) listed six significant factors that relate to undue hardship. These factors include financial cost, impact on the collective agreement, issues with employee morale, interchange ability of the workforce and facilities, size of the employer’s operation, and safety (Lynch, 2008). The guidelines are clear on how arbitrators are to discharge a case where there is a diagnosis of a disability and employers can anticipate that they will be required to accept some hardship in the factors as outlined in Central Alberta Dairy Pool. This list is not exhaustive and as result each new court and arbitration decision has the potential to expand the employer, union and employee understanding of duty to accommodate.

Although employment law is evolving on the matter of employee rights to accommodation, the Kirby & Keon (2006) report provides ample evidence of a society that continues to have discriminatory employment practices in cases relating to mental illness. This discrimination may be an indication that there remains an ambiguity for employers and arbitrators concerning mental illness. It suggests that those who have a mental illness are not being recognized as having a disability, and therefore do not have the protection of human rights legislation that would require a work accommodation be considered for their circumstances.

*The Stigma of Mental Illness*

For an accommodation to be considered, the employer must be aware or be told that one is needed. Disclosing a mental illness presents a number of risks for an individual from potential ridicule and negative attitudes from co-workers (Hatcher, 2008) to a reluctance from the employer to adjust work practices, leading to potential job loss
Both of these issues lead to significant challenges when dealing with employees with mental illness, ultimately leading to unintended consequences that discriminate against the employee in the workplace.

Research conducted into co-worker reactions to accommodations for employees with mental illness suggest that there can be adverse reactions when there are perceived inequities. For example, Peters and Brown (2009) conclude that co-workers are less supportive of an accommodation that involves longer or more frequent breaks for the employee with a mental illness. This reaction is believed to relate to the perception that more flexible breaks will create more work for others. Further, Peters and Brown propose that there is an onus on employers to match employees with mental illness with a job that best fits their need for variable breaks. Although the intent of accommodation is to equalize opportunity for a person with a disability, the prevalence of this attitude that accommodations are unfair is well documented in social psychology literature. For example, a 2008 study with 134 undergraduate students indicates that the fairness perceptions were lowest when a person with a disability received an accommodation and excelled in performance (Paetzold, Garcia, Colella, Ren, Triana, & Ziebro, 2008). This reaction by co-workers is concerning as the work schedule is highlighted in the Kirby report as being a key barrier to back-to-work practices to assist individuals with a mental disability to re-enter the workplace.

Reluctance by the employer to adjust work practices are an employment barrier for employees with a mental health disability. Through their work policies and procedures, employers set the standards employees can expect in a workplace. If the employer does not model a flexible approach then co-workers will be equally rigid in their expectations of a fellow employee who may have a disability. These practices tend
to exclude those with mental illness and/or make it difficult for them to return to work following a period of disability leave.

The lack of ‘mental illness literacy’ among employers, employees, unions, and supervisors means that mental health issues are not being identified in a timely manner (Kirby & Keon, 2006). When a lack of understanding leads to a dispute, an arbitrator is called upon to assess the circumstances and evaluate the employers’ actions in relation to the employee who is disclosing that they have a mental health issue.

Arbitration Decision Influence

Duty to accommodate is a significant human rights responsibility and should be commonplace in Canadian workplaces. Employers, unions and employees seeking accommodation all have a legal responsibility for ensuring the success of an accommodation request (Lynk, 2008), but it is judicial and quasi-judicial bodies such as arbitration boards and arbitrators who hold the parties accountable in the event of a dispute.

Arbitration case decisions document in great detail the factors that lead to the impasse between the employer and the employee. The story of the impasse is reported on from the perspective of the employer and from the perspective of the employee. Medical evidence is presented that either supports or disputes a diagnosis of mental illness. Arbitrators analyze the information presented and have the authority to direct an employer to reinstate a dismissed employee as well as direct the terms and conditions of a return to work plan.

Arbitration case decisions can illuminate discriminatory and unfair work practices. It is unmistakable from the literature that there is a great deal to be uncovered
on the issue of mental illness in the workplace (Hatcher, 2008, Kirby & Keon, 2006, Lynk, 2008, 2006, Peters & Brown, 2009, Paetzold et al. 2008). Employers do not know how to manage the episodic nature of mental illness and often mistake the symptoms of mental illness as an indicator of poor work performance. Employers do not know how to balance flexible work arrangements with getting the work done, what to consider fair treatment for an employee with a disability, and how to balance perceptions of inequities from other employees.

Disputes between employers and employees that reach the level of arbitration are about significant issues. The employer is holding on to their right to manage the workplace and the employee along with the union is making a statement that a particular management practice is discriminatory or unfair. This content analysis of arbitration case decisions is important as it will offer an interpretation of the decisions. Arbitration case decisions are routinely reviewed by the legal profession, but there is no evidence of a social science review that examines their content for discriminatory practices. There is a gap in knowledge of how to include those with a mental health disability in the workplace. The study of mental health disability is complicated and as shown in Kirby and Keon’s 2006 report, it is a topic that is under researched. Studying the information that is conveyed in arbitration case decisions will not only add to our knowledge, it will identify other areas of discord where more study is needed.

This examination of arbitration case decisions will reveal the issues leading to disputes between employers and employees and progressive changes in relation to mental illness in the workplace. Looking at the arbitration case decisions from a pre-Kirby and Keon time period and a post-Kirby and Keon timeframe Lynk, 2008, will give us
information about how awareness of mental health as an issue in the workplace has change.

Successful arbitration case decisions, meaning the employee was successful, will provide knowledge about where work practices need to be changed. These case decisions set the best practice standards for employers. The arbitration case decisions will highlight the types of information arbitrator’s view as pivotal for their analysis as well as provide some insight into how they assess what they consider as relevant information for their case decision.
CHAPTER 3: METHODOLOGY

Arbitration case decisions provide the foundation for setting direction for the ways in which organizations handle situations. In this study, an analysis of the issue of duty to accommodate for reasons of mental disability is conducted using arbitration case decisions relating to mental illness. The purpose of the analysis is to determine the trends and direction of arbitration case decisions and the ways in which employees with mental health disabilities are dealt with through the arbitration process.

Research Framework

This research study uses a qualitative approach using a descriptive content analysis. The purpose is to examine the content of arbitration case decisions to determine trends and directions. In particular, this study examines arbitration case decisions to gain insights about what the employer states about the employee, what the union presents as a response, and how the arbitrator assesses the divergent opinions on the issue that brought the parties into disagreement.

Workplace equity issues such as race and gender are reported to be well studied while equity issues related to disability have comparably fewer studies and the area of mental health disability has received the least attention of all (Kirby & Keon, 2006; Hatchard, 2008; Peters & Brown, 2009). Arbitration case decisions give us a window to view how employees with mental illness are being perceived by the employer, the union and the arbitrator. The arbitration case decisions provide evidence about how mental health disability is understood in particular work situations, shows where arbitrators are
challenging employers to examine their work practices, and shines a light on arbitrators’ understanding of mental illness.

This research illuminates trends and directions in arbitration case decisions as well as examine the case decisions for evidence of an increased understanding of mental health. The study also examines how employers are accommodating employees with mental illness and whether there has been any change in how arbitrators are exercising their authority to increase the acceptance of employees with a mental health disability.

Case Selection Criteria

A content analysis is conducted by examining arbitration case decisions both pre-and post-Kirby and Keon to identify trends and directions that influence the way in which mental illness cases are dealt with in the workplace.

Search Procedure

Using a Canadian arbitration law database (Quicklaw), searches were conducted to determine which cases should be included in the study. Central to guiding the decision for cases for inclusion in the study is the definition of mental illness. The concept of mental illness also referred to as mental disease or mental disorder, according to American Heritage Medical Dictionary (2007), can pertain to any number of the different psychiatric conditions, usually characterized by impairment of an individual's normal cognitive, emotional, or behavioural functioning, and caused by physiological or psychosocial factors. There is little consistency in the medical community on how mental illness is defined and an operational definition is difficult to find (Ruggeri, Leese, Thornicroft, Bisoffi, & Tansella, 2001). The clinical definition of mental illness can have a narrow scope when using criterion like such as treatment duration of two years or more,
the presence of non organic psychosis and a Global Assessment of Functioning (GAF) of less than 70 (Ruggeri et al., 2001). Although this definition will be used to guide this study, a broader definition of mental illness is used to determine cases for inclusion. For example, some cases for inclusion may have a general diagnosis of depression/ anxiety and some diagnoses were made by general practitioners (GP’s). All cases relating to this definition were identified for inclusion and further categorized as pre (cases before the Kirby report was issued in 2006) and post (cases after the Kirby report).

The search process to determine which cases would be included in the study was a two step process. In the first step, a broad search of the Quicklaw database was conducted using high-level search terms. The second step of the search process was to further examine the arbitration cases to determine the fit for cases with mental illness in Canadian workplaces using the following criteria:

1. The case had to focus specifically on the subject of an employee who had a mental illness, as opposed to a disability as a result of an addiction.

2. The case had to illustrate that the attributes of mental illness contributed to the grounds cited for the grievance going to arbitration or they were cited as an aspect in the arbitration award.

3. The case had to connect some concept of mental illness that was diagnosed by a qualified medical practitioner, as contributing to the discord between the employee and the employer.

4. A final decision on the grievance had to be rendered. For example, cases that were heard solely on jurisdictional issues were excluded from this research.
Research Summary

The outcome of this research will provide Human Resource (HR) practitioners, arbitrators, and unions insights about how these decisions are influencing directions with respect to workplace accommodations for employees with mental illness. The examination of these cases are reviewed to understand the progress in integrating employees with mental illness into the workplace since the introduction over 25 years ago of human rights statutes that forbid discrimination on the grounds of disability. The study of arbitration case decisions contributes to an area that is underrepresented in research literature, and points to areas where further study is needed to fill a gap in our understanding of how mental illness impacts individuals and their work.
CHAPTER 4: FINDINGS

Arbitration cases in Canadian workplaces were used to examine differences in decisions pre- and post-Kirby and Keon’s (2006) “Out of the Shadows at Last” report. Searches for arbitration decisions were conducted using the legal database Quicklaw with a focus to find cases of employees with mental illness. The cases included for the analysis were examined using a framework that identified matters like the jurisdictions and grounds for the grievance, observations of the employees work record, when the diagnosis of a mental illness was know, arbitrators case decision rationale, as well as jurisprudence noted in the case decision.

Case Inclusions

The case selection criteria as outlined in chapter three involves two steps and each step in this process is guided by a broad definition of mental illness but does not included cases where alcoholism or drug addiction is the primary diagnosis, or where brain injury is the origin of the illness. Appendix A fully details the analysis frame work for this study.

Case Selection Results

There were two steps to the process to identify arbitration cases and then a determination of the number of cases for inclusion in this study. In step one, cases in the database that were specifically Canadian arbitration decisions were included but Human Rights Tribunal and Supreme Court decisions were excluded. The key search terms used in this step included “psych” or “mental”. This search resulted in 290 cases pre-the Kirby decision and 110 cases post. Decisions from Quebec are not represented in the analysis because decisions reported in French were not available in the database used for this
study. A review of this initial search revealed that a number of cases did not fit the first search criteria for the following reasons: 1) the search parameters caught cases that dealt with employees who work with persons with "mental disabilities", but did not deal with the issue of employee’s mental illness itself. 2) the case was a duplicate or summary of another case in the list 3) case actually dealt with physical disability with reference to "mental or psych (truncated) illness" from another case or statute. This refined the relevant cases to 55 pre- and 37 post-Kirby and Keon report. As a result of conducting the second search criteria, the cases for inclusion were determined to be 33 pre-and 27 post-Kirby and Keon report (See Appendix B).

Descriptive Statistics

The pre–Kirby and Keon arbitration case decisions in this research represent the timeframe from 1990 to March 30, 2006. Nineteen of the pre-Kirby and Keon arbitration case decisions were in Western Canada, only 8 in Ontario and the remaining 6 in Atlantic Canada. The post-Kirby and Keon case decisions represent the timeframe from March 30 2006 to December 31, 2009. The 27 arbitration case decisions reviewed from that timeframe are equally divided between Western and Eastern Canada, 13 case decisions each and 1 from Atlantic Canada. As one would expect, the pre-Kirby and Keon period covers a larger time span and has more cases to report. However, when compared to post-Kirby and Keon it is apparent that arbitration case decisions related to mental illness are increasing in Ontario, going from 18 decisions in the 16 years pre-Kirby and Keon years to 13 decisions in the three and half years after the Kirby and Keon report. Figure 1 shows a full breakdown of the number of case decisions by jurisdiction both pre-and
post-Kirby and Keon’s report. Figure 1: Arbitration Case Decisions by Eastern, Western and Atlantic Jurisdiction

Public sector arbitration case decisions outnumbered private sector decisions in both timeframes. In total, including both pre-and post-Kirby and Keon, there were 35 arbitration case decisions from the public sector and 25 from the private sector. Western Canada accounts for the majority of the private sector case decisions, while most of the public sector case decisions are in Ontario and the Atlantic region. Figure 2 provides an illustration of the pre-and post-Kirby and Keon arbitration case decisions, broken down by sector and jurisdiction.

Figure 2: Public Sector v. Private Sector Case Numbers
The arbitration case decisions were also examined by jurisdiction and disposition of the cases such as did the grievance succeed or was the grievance dismissed. The arbitration case decisions that succeeded outweigh those dismissed in both pre-and post-Kirby and Keon timeframes for both jurisdictions. In the pre-Kirby and Keon arbitration case decisions, 22 of 33 succeeded with 13 decisions succeeding in Western Canada, six in Ontario and the remaining three are in Atlantic Canada, and more specifically, in Nova Scotia. In the post-Kirby and Keon timeframe, 19 of 27 arbitration case decisions succeeded, with more successful in Ontario and Atlantic Canada than in Western Canada. There are nine arbitration case decisions where a grievance succeeded in Western Canada compared to nine in Ontario alone, plus one from the Atlantic Canada. Figure 3 provides a breakdown of the number of arbitration case decisions by jurisdiction and disposition.

Figure 3: Case Disposition - Denied or Succeeded
Arbitration Case Decisions by Sex of the Grieving

The arbitration case decisions were further reviewed by the sex of the grievor and by the disposition of the award. The pre-and post-Kirby and Keon arbitration case decisions were proportionally similar when examined by the sex of the grievor and disposition. The review revealed that grievances that succeed have a ratio of 2:3, dismissals are 1:3, and the ratio of male to female grievors is 1:2 for both time selections.

In the pre-Kirby and Keon arbitration case decisions, 22 of the 33 grievances succeeded either in whole or in part. The remaining 11 grievances were dismissed. In the 22 cases that succeeded, 14 of the grievors were male and eight were female. Of the 11 dismissed grievances, seven are male grievors and four are female. The post-Kirby and Keon arbitration case decisions showed that 18 of the 27 cases succeeded in whole or in part and the remaining nine were dismissed. There were 19 male grievors and eight female grievors. Twelve of the male grievors were successful and six female grievors were successful, while seven male and two female grievors had their grievances dismissed. Figure 4 illustrates the number of case decisions identified by gender and disposition of the case decision.

Figure 4: Grievances by sex and disposition
The grounds for grievances generally fall into three categories, including dismissal for inappropriate behaviour such as violence or threats of violence, theft, insubordination, inappropriate sexual conduct, dismissal due to inability to perform the duties of the position, and dismissal because of absenteeism. Ninety-seven percent of the pre-Kirby and Keon arbitration case decisions fall under these three main categories. Of these arbitration case decisions, 12 pertained to dismissal for inappropriate behaviour, eight were related to an inability to perform the duties of the position, and ten were associated with the grievors absenteeism. The remaining three arbitration case decisions are grievances that were filed because one grievor wanted to rescind a resignation, another grievance related to the denial of unpaid sick leave, and the final one was a grievance filed by the union because the employer crossed union bargaining lines in their effort to accommodate an employee. Seventy percent of the post-Kirby and Keon arbitration case decisions arose from grievances on the same three grounds as in pre-Kirby Keon arbitration cases. Eight arbitration case decisions pertained to dismissal for inappropriate behaviour, six are related to an inability to perform the duties of the position, and five are associated with the grievors absenteeism. The eight arbitration case decisions that were not based on the aforementioned grounds arose out of constructive dismissals, resignations, grievances on the denial of extended sick leave, one related to the disqualification of long term disability, and a grievance where the employee disputed the employers’ investigation of his alleged behaviour.

Trends

Arbitration case decisions are, in some respects, as distinctive as the circumstances of individual grievors and their respective employers. There are, however,
reoccurring themes and the arbitration case decisions are reflective of the legal context as it relates to resolving disputes between employees and employers. This examination of arbitration case decisions reveal a number of trends worth noting and signal implications for employers and employees. These trends include an increase in the number of arbitration case decisions related to mental health, a continuance of employees with positive work records being dismissed, and losses for grievors in cases even where an arbitration case decision results in success for the grievor.

*Increase in cases*

Most notable in the number of arbitration case decisions by jurisdiction is the increase in the number year-over-year. The overall trend indicates that arbitration case decisions involving mental illness have more than tripled in the past 20 years. The pre-Kirby and Keon timeframe spans 16.5 years and resulted in 33 cases for this study. The post-Kirby and Keon timeframe covers three and a half years and resulted in 27 cases for inclusion in this study. As an average, the pre-represents two cases per year (with and obvious increase over time) and the post-averages eight per year. Although the arbitration case decisions per jurisdiction remained relatively constant, the Ontario jurisdiction did show the sharpest increase in the number of awards, going from eight awards pre- to 13 post-Kirby and Keon. The arbitration case decisions per year began to consistently increase in 2003 with the largest growth occurring between 2006 and 2007 from four cases per year to nine cases per year (more than doubling).

In this analysis, 60 arbitration case decisions are reviewed with 68 percent of those decisions pertaining to grievances filed by males. Eight of the years represented in this study have no grievances filed by females. However, it should be noted that the
trend in the last two years of arbitration case decisions in this analysis shows a proportional increase in grievances filed by females, especially since 2007 (See figure 5). Figure 5: Trend in case decisions by sex of the grievor

Positive Employment Record

Sixty-six percent of the grievors in the pre-Kirby and Keon arbitration case decisions and 74 percent of the grievors in the post-Kirby arbitration case decisions are shown to have employment histories that are characterized by an initial period of positive employment feedback followed by a negative period with issues that lead to their dismissal. For example, in the case Canada Safeway Ltd. v. U.F.C.W., Loc. 401(1992) the employee was employed from 1974 until 1988. For the first 11 years of his employment with Safeway, there are no notable performance issues recorded by the employer. Changes in the store services led to the closure of the area he had worked in from 1980-85. Although the grievor continued to have employment with Safeway, his ability to do the work deteriorated and he was dismissed. In another example, the grievor in the Province of Manitoba (Department of Family Services and Housing ), v. Manitoba Government Employees’ Union( 2009) case was, prior to her dismissal, a 26 year
employee who was recognized as intelligent and well respected for her work. These are
two examples of employees who had long-standing good performance records with their
employers prior to the incident leading to the grievance and consequently the arbitration
case. Through this analysis 42 cases reveal the same type of positive work history of the
grievor prior to the employer disciplinary action.

*Success still involves loss*

Although 22 of the 33 pre-Kirby and Keon arbitration case decisions succeed, the
grievors in all but two of the cases had to accept some form of loss. A number of
grievors were reinstated, but had a lengthy suspension (up to one year) to serve and all of
them were without wages from the time of the dismissal to the time of the arbitration case
decision. Further, compensation was not awarded by the arbitrator in the decision
rendered. For many grievors, a successful grievance did not mean returning to work. For
some, the dismissal was set aside and the reinstatement meant they could apply for long-
term disability or others were reinstated and put on an indefinite suspension or unpaid
leave. One grievor returned was returned to work with a demotion. In another case
Maple Leaf Foods and United Food v. Commercial Workers International Union Local
401 (2004), the grievor, who had their grievance succeed, was awarded six months pay in
lieu of reinstatement because, in the opinion of the arbitrator, it was not in the interests of
either the employer or the grievor to have her return to the workplace.

Success in 18 post-Kirby and Keon, as in 22 pre-Kirby and Keon case decisions,
did not mean the absence of loss. The majority of the employees who return to work
reinstated without wages and benefits from the time of dismissal to the outcome of the
grievance hearing or had some form of an imposed lengthy suspension up to one year.
Three of the reinstatements were for purpose of long-term disability and they did not return to work.

Although success did not always mean a return to work and losses were experienced, there is an emergence of arbitration case decisions that increase employer accountability. In five arbitration case decisions there is some consideration for compensation. For example, one grievor was reimbursed for time lost, another grievor who had a sick leave application denied had that time reimbursed and another grievor was reinstated with no loss of seniority and accrued service for pension and vacation purposes. In yet another arbitration case decision, the arbitrator deferred the outcome for the grievor to the parties to resolve. In this case, the grievor was not reinstated, and the issue of damages was referred back to the parties. Finally, in addition to the contemplation of compensation for the grievor, the arbitrator in Zettel Manufacturing Limited v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (2006) concluded that the employer may be obligated to consider lowering its individual employee production requirements in order to accommodate a long-term employee with a mental disability.

These examples show that arbitrators are recognizing the consequences for an employee who is wrongly dismissed and that they will hold the employer accountable and can require that an employer reimburse the grievor for his or her losses. Beyond compensation, an arbitrator can compel the employer to accept a different standard or level of performance from an employee with a mental disability.

*Struggle with medical evidence*

Although each arbitration case decision examines a unique set of circumstances, there are some shared characteristics pre-and post-Kirby and Keon about the medical
evidence in the decisions where arbitration cases succeed and when they are dismissed.

In seven of the 22 pre-Kirby and Keon arbitration case decisions where the grievor succeeds in his or her grievance, the arbitrator has indicated the success was due in part to the fact that the employer did not know of the disability because the medical evidence of a disability was not presented until after the dismissal. In two of those cases, the arbitrator stated that the employer should have inquired as to the nature of the employees difficulties or that they ought to have known based on the employees’ behaviour that the employee needed assistance. Four case decisions referred to the acceptance of a diagnosis of mental illness as a disability and as such the grievors behaviour was not considered to be blameworthy. Another two decisions introduced the concept of a hybrid analysis, meaning there needs to be a disciplinary response to the behaviour, but there is an acknowledgement of a disability that needs to be examined through a human rights analysis. A further two indicate that the employer did not meet the test of undue hardship in their duty to accommodate the grievors disability.

In eight of the 11 pre-Kirby and Keon arbitration case decisions where the grievance was dismissed, the arbitrator was either not satisfied with the medical evidence of a mental disability or was not convinced that the diagnosis of mental disability was causally linked to the grievors conduct. Beyond not being satisfied with the medical evidence or understanding how it is connected to the grievors conduct some arbitrators question the validity of the medical information.

In the pre-Kirby and Keon timeframe for example, the arbitrator in Canada Safeway Limited v. United Food and Commercial Workers, Local 401 (2001) questioned the objectivity of the psychiatric evidence. The arbitrator in this case stated that “he [meaning the psychiatrist] is the treating psychiatrist who must have as his primary focus
the successful treatment of the grievor. To that extent, some of his responses during cross-examination revealed that he was acting more as an advocate, than an objective observer. Such detracts from the strength of his evidence” (p. 15). In another pre-Kirby and Keon arbitration case decision, the District of Ucluelet v. Canadian Union of Public Employees, Local 118 (2000), the arbitrator rejected the psychiatric evidence that the grievor quitting his job was a function of his illness. Although the psychiatrist providing the evidence had been treating the grievor for 16 years, he had not met with the grievor for several months prior to his quitting his job and had made his assessment after the incident at the workplace occurred. Comments from the grievor’s general practitioner (GP) were considered to be more reflective of the incident in question as he had met with grievor and the grievor said he was happy he had quit his job. In the arbitration between Canadian Union of Postal Workers v. Canada Post Corporation Re: Nova Local, CUPW (2002) there was a diagnosis by a psychiatrist indicating that the grievor was suffering from anxiety depression triggered by the pressure of being put between workers and management. The arbitrator in this case ruled that the diagnosis of anxiety depression was not a mental disability for the purposes of the Human Rights Act because the grievor had no previous history of a pattern long-term depression. These pre-Kirby and Keon arbitration case decisions are examples of where the arbitrator is not only questioning the professional opinion of the medical community but is also assuming responsibility to assess that anxiety depression in not a mental health disability.

The post-Kirby and Keon arbitration case decisions also highlight the distinctive circumstances of individual grievors and their respective employers as did the pre-Kirby and Keon arbitration case decisions. However, there is more analysis around duty to accommodate. Four successful grievances cite the employers’ failure to make reasonable
efforts to accommodate the grievors. Seven arbitration case decisions illustrated the arbitrator’s acceptance of the medical evidence as relevant to understanding the grievors conduct. And finally two decisions introduce the acceptance of a diagnosis of temporary disability as meeting the standard for protection under the human rights legislation.

Where the decision was to dismiss a grievance in the post-Kirby and Keon timeframe, all nine grievances were dismissed because the arbitrator was either not satisfied with the medical evidence of a mental disability or was not convinced that the diagnosis of mental disability was causally linked to the grievors conduct. Although the debate about medical evidence continues in the post-Kirby and Keon timeframe there are examples of arbitrators asking for an independent medical assessment and examples of arbitrator’s acknowledgement of the doctor’s advocacy role.

IVACO Rolling Mills 2004 LP v. United Steelworkers, Local 7940 (2008) case decision is about a grievor seeking reinstatement following an eight year absence. Two previous attempts at a return-to-work had failed and the employer in this situation was refusing to allow the return due to occupational health and safety issues. Here again the issue of the attending physician being in the role of advocate was argued. “The Employer further stated that the family doctor had become an advocate for the grievor and had in fact lost the objectivity required for the medical evidence to be considered as unaffected by either personal feeling or medical bias” (p.4). The arbitrator in this case ordered a third party psychiatric assessment to be completed prior to the grievor returning to work.

In yet another case between Frito-Lay Canada v. United Steelworkers of America and its Local 461(2007), the core issue was whether the employer properly rejected the medical documentation. The employer proposed that it was not objective because the doctor was advocating on behalf of his patient. While the arbitrator agreed the doctor
was advocating for his patient, he concluded the doctors’ advocating was “based upon his medical expertise and experience and assessment of what would be in the grievor's best interest toward recovery, and that he was not merely doing the grievor's bidding” (p17).

The grievor’s doctor in the case Imperial Tobacco Canada Limited v. Bakery, Confectionery, Tobacco Workers and Grain Millers International Union, Local 323T

Imperial Tobacco (2007) was also characterized by the employer as an advocate for his patient and as a result the medical evidence was suspect. The arbitrator in this case was in a position of deciding between two diametrically opposed diagnoses by two psychiatrists.

Of the 60 arbitration case decisions, 67 percent examined from pre-and post-Kirby and Keon illustrate that the grievors mental health status was not a consideration of the employers until the grievance was filed. The psychiatric evidence about the connection between to the diagnosis of mental illness and the grievor’s behaviour comes under arbitrator scrutiny in both pre- and post-Kirby and Keon arbitration case decisions.

The issue of the doctor as an advocate is found more often in pre-Kirby and Keon arbitration case decisions and it leads to questions about the validity of the medical evidence. The medical evidence is still suspected to have this bias in the post-Kirby and Keon timeframe but the employer advances the issue and arbitrators are responding by seeking an independent opinion, or the advocacy role is acknowledged and the evidence is accepted as the medical expert opinion. The post-Kirby and Keon arbitration case decisions explore the medical evidence in greater detail and there is a greater emphasis on determining the connection between the employee’s mental health disability and the behaviour that brought them into conflict with the employer.
Directions

Although it was anticipated that this study would identify a number of arbitration case decision directly related to mental illness as jurisprudence, such was not the case. There is not any one central theme in the success or dismissal of a grievance but there are some emerging patterns. Arbitrators are looking for more information to inform their analysis before drawing connections between an employees’ behaviour and a mental health disability. The pre-Kirby and Keon arbitration case decisions very clearly highlight that the employer has an obligation to inquire as to an employee’s state of mental health and the post-Kirby and Keon case decisions continue this emphasis with greater analysis about whether they have properly considered a duty to accommodate. In the post-Kirby and Keon case decisions arbitrators are identifying employers as a negative contributor to an employee’s mental health.

Duty to inquire

Arbitrators and arbitration boards state that the employers, before issuing a dismissal, have a duty to inquire into the nature and extent of an employee’s medical condition. Arbitrators have ruled that where there are signs or symptoms of an underlying medical condition that may be influencing an employee’s conduct, the employer must inquire about the condition and offer the employee an opportunity to seek assistance. A mental disability does not excuse inappropriate behaviour, but the employer must consider whether the disability contributed to or triggered the grievors’ behaviour.

Although this direction was not present in all of the arbitration case decisions both pre- and post-Kirby and Keon, there are a number of case decisions that highlighted the duty to inquire. For example, the case between Canada Safeway Ltd. v. U.F.C.W., Loc.
401(1992) sets out the employer’s duty to inquire about any underlying issues that may be affecting an employee’s performance. “This finding, we recognize, asks a great deal of Safeway, when we in effect require it to pursue an issue which an employee has not. The fact which makes this demand fair is the mental disability the grievor has” (p.18). In another case, the arbitor in Maple Leaf Potatoes v. United Food and Commercial Workers International (2004) referring to Canada Safeway (1992 ) similarly rules: “The employee's actions were so bizarre that the employer ought to have realized something was wrong and attempted to ascertain the state of his mental health” (p. 22). And in another similar example from post-Kirby and Keon, Province of Manitoba (Department of Family Services and Housing) v. Manitoba Government Employees' Union (2009), the arbitrator determined that the employer ought to have paused and explored the possibility of a mental health issue because of the grievor's behaviour.“Both legal counsel (sic) agreed that the Grievor's conduct was bizarre. I agree and given my views as to the bizarre nature of her actions, there was a need to pursue accommodation before proceeding with termination” (p.47). These arbitration case decisions clearly show the onus on the employer for duty to inquire, and in particular, the 1992 Safeway arbitration case decision was precedence setting in this regard.

To meet the test of duty to inquire, arbitrators expect employers to ask for medical information. Arbitrators also provide guidance as to what the employee is reasonably expected to provide. The analysis in several successful post-Kirby and Keon awards pays particular attention the employers and employee concern about medical information. In British Columbia Public School Employers' Association/ Board of School Trustees of School District No. 28 v. British Columbia Teachers' Federation/Quesnel District Teachers' Association (2008) the arbitrator found that the employer did not have enough
information to deny the extended medical leave request of the grievor. Further to that, it
was found that “it is incumbent upon the Employer to request in clear and unequivocal
terms exactly what information it needed, not voice suspicions” (p.14). In another 2008
award, British Columbia Public School Employer's Assn. (School District No. 36
(Surrey) v. British Columbia Teacher's Federation (2008), the arbitrator clearly stated
that the law and past practice allow the employer access to private medical information
within the limits of what is reasonable to answer their particular concerns. In this case
the arbitrator found that the employer asked for more medical information than was
necessary for a decision to be made on the employees request for extended medical leave.
The arbitrators in these last two decisions on medical information relied on the so-called
"trilogy" of policy grievances that set the stage for a standardized medical certificate to be
included in the collective agreement and then described what information could be
included on that form.

The arbitration case decisions set out the standards that employers are expected to
follow. Employers have a responsibility to inquire about an employee’s mental health
before making decisions that will lead to discipline. This duty to inquire is balanced by
arbitration case decisions that put a limit on what an employer needs to know about an
employee’s mental health disability. It is a balance that respects an employee’s right to an
accommodation and their right to privacy.

*Employers identified as a negative contributor*

Examples of the connection between the workplace and the grievors’ illness
appear in six of the post-Kirby and Keon arbitration case decisions, but none are more
poignant than Paula Drew v. Canadian National Railway Company (2009). Ms Drew, the
grievor was a 17 year employee with CN in the Mac Yard until she left work in 2004
because of a major depressive episode. She had endured constant verbal abuse from her superiors. The arbitrator found that she was constructively dismissed because of the poisoned work environment, and referred the issue of damages back to the parties. If they could not agree on the damages to be awarded, the issue was to be referred back to arbitration for a decision. In another case decision, the British Columbia Public School Employer's Assn. (School District No. 36 (Surrey) v. British Columbia Teacher's Federation (2008), the psychiatrist diagnosed the grievor with anxiety disorder and panic attacks, depression related to stressful situation at the school. These arbitration case decisions demonstrate that arbitrators identify employers contribute to the impact and disabling effects of an employee’s mental health issues. Arbitrators are sending employers a clear signal that they have responsibilities beyond providing and employee with employment- they have a responsibility to provide their employees with a healthy workplace.

The connection between the employers’ actions and the employee’s behaviour and illness was also made by the union as a result of the medical opinion evidence, in Manitoba (Department of Family Services and Housing) v. Manitoba Government Employee (2009). The grievors’ doctor identified three major areas in which he felt the grievor's productivity and fulfillment could be enhanced in the workplace. These recommendations included: “1. a quiet work space; 2. that she had coaching and encouragement as opposed to critical scrutiny; 3. that she have time to process requests for information” (p. 20). In this case, the union claimed that the “Employer was aware of the Grievor's mental status and further that its method of dealing with her problems as a performance management issue, exacerbated her problems which led to her ultimate breakdown” (p.3). As you can see from the evidence in this case the medical community
gave concrete information for the employer to consider, however, they failed to do so and their actions compounded and made worse an existing mental health issue.

In two 2008 awards, the respective arbitrators also commented on the employers management of the circumstances that lead to the grievance. In the arbitration between British Columbia Public School Employer's Assn. (School District No. 36 (Surrey) v. British Columbia Teacher's Federation (2008 ) the arbitrator said ‘I think it is unfortunate that the parties were seemingly unable to communicate in a more direct and less bureaucratic manner. Perhaps if they had done so, this case would not have arisen‘ (p. 23). In the British Columbia Public School Employers' Association/ Board of School Trustees of School District No. 28 v British Columbia Teachers' Federation/Quesnel District Teachers' Association award, the arbitrator stated ‘The concerns it outlined in the July 2005 letter could have been worded more appropriately, less accusatory in tone and more directed to the real issue which was that the School District felt it had insufficient evidence of a medical condition warranting the leave‘ (p.14). These two arbitration cases exemplify rigid employer practices that contributed to the discord between the employer and the employee. The arbitrators very clearly brought this to the employers’ attention and said there are appropriate ways for employers to communicate to their employees.

Post-Kirby and Keon arbitrators are making note of the employer’s failure to appropriately communicate with the employee as a contributing factor in the discord between them. There is also recognition of the employer’s role in exacerbating the problem and arbitrators are drawing this out and making decisions that highlight the employer’s duty to care for their employees.
Nexus - the connection between illness and behaviour

Arbitrators in their analysis weigh the evidence related to mental illness from two perspectives. They first determine if the grievor has an illness that meets the criterion to be considered a disability and as a result a human rights analysis must be considered. Secondly, where a grievor is determined to have an illness, the examination addresses the question of culpability and as such do the presences of an illness explain the grievors conduct.

The first perspective for analysis is evident in all of the arbitration case decisions both pre- and post-Kirby and Keon, while the second analysis is evident in some of decisions where a grievance succeeds as well as where it is dismissed. The depth of the examination varies, but is present in seven pre- and ten post-Kirby and Keon awards.

The term ‘clear nexus’ first appears in a case decision from 2006. Prior to 2006, arbitrators were making reference to the connection between a grievors illness and their conduct, however, the rigor in the culpability analysis appears to increase with the introduction of the word ‘nexus’.

In the pre-Kirby and Keon awards where a grievance succeeds, the latitude in analysis ranges from the relaxed association between the psychiatric evidence and the behaviour of theft as illustrated in Seven Oaks School Division No. 10, v. Seven Oaks Teachers Association of the Manitoba Teachers (1990) case to an analysis that determines what is most reasonable. For example, the arbitrator in Washington Mills Electro Minerals Corporation V. Steelworkers of America, Local 4151(2003) award accepts the psychiatric evidence as the ‘most reasonable explanation’. The City of Surrey v. Canadian Union of Public Employees, Local 402 (2006) award refines this further the
arbitrator finds a ‘clear nexus’ between aspects of the grievor’s behaviour and his mental disability.

The concept of a ‘nexus’ between the grievor’s behaviour and his/her disability continues in the post-Kirby and Keon awards. The arbitrator in Canada Post Corporation v. Canadian Union of Postal Workers, outlines that it is “repeatedly stated in the law that there has to be a ‘nexus’ between the Grievor's offending behaviour and his disability (p.20). In Chinook Health Region v. Health Sciences Association of Alberta (2009), the arbitrator stated ‘’ as to the mental health issue, recent case law is consistent. Any disorder to be relied upon must be clearly proven and proven to be causally related to the employee's conduct. In the absence of a proven disorder or a causal connection, the employer's misconduct cannot be excused” (p. 27). Another arbitrator in his analysis also discussed an approach where the compelling personal circumstances that influence or explain misconduct can be viewed as a mitigating factor in determining a penalty. This circumstance is illustrated in Canada Safeway Ltd. v. United Food and Commercial Workers Union, Local 401 (2008) where the employee had her dismissal for theft set aside for a six month suspension because of such mitigating circumstances.

Arbitrators, however, also want to hold grievors responsible for their actions as in the Coca-Cola Bottling Company, Brampton v. National Automobile, Aerospace, Transportation and General Workers Union of Canada, Local 973 (2009) case, where dismissal was replaced with a 20 day unpaid suspension: “This is meant to send a message to the Grievor that even though his misconduct was in part caused by his anxiety and depression, he nevertheless still bears considerable responsibility for his act of punching Mr. Lemke” (p.20). Arbitrators have a double test for both employers and employees. Employers have a duty to ensure that their actions do not cause or
exacerbating an employee’s mental health issue and before they make a decision to
discipline they must inquire if they employee has a condition that may be contributing to
the issues of concern. The employee can expect that their disability will be considered as
a factor in any decision concerning discipline and they can expect consequences for
behaviour that is a violation of employer rules.

The issue of whether the grievor has a mental disability at the time in question is
also a factor in arbitrator analysis. This issue was the determining factor in upholding a
dismissal in Skytrain British Columbia Rapid Transit Company Limited v. Canadian
Union of Public Employees Local 7000 (2009). The arbitrator ruled “his [the grievor] is
not a case where there was significant evidence of mental illness at the material times” (p.
19). The arbitrator in Board of Governors of the Southern Alberta Institute of
Technology v. The Alberta Union of Provincial Employees - Local 039 (2008) also
determined the evidence did not establish that the grievor” had a disability during the
period commencing with her return to work in March 2003 up to the date of the position
abolishment in June 2003” (p.36). These arbitration cases decisions are examples of
where the arbitrator’s analysis is primarily focused on drawing a connection between the
behaviour and the employees’ mental illness.

*The Concept of Duty to Accommodate*

Arbitrators relied on jurisprudence for the central themes in their analysis and the
jurisprudence most often cited as it relates to mental illness cases are from Supreme
Court of Canada. As an example, factors used to assess ‘undue hardship’ in a duty to
accommodate arise out of a decision from the Supreme Court of Canada in Central
however, speaks directly to the issue of accommodation because of the employees’
disability as a result of mental illness. The arbitration decision expands the concept of accommodation further - “An employer's duty to accommodate a worker whose performance shortfalls are not the result of intentional, reckless or careless work choices is onerous but reasonable” (p.18). This case is referred to in only one arbitration case decision included in this study, but is cited by Lynk (2008) as being one of the leading cases for labour arbitrators.

Over the years, arbitrators continue to refine the concept of accommodation. The arbitrator in the Frito-Lay Canada v. United Steelworkers (2007) award expands on the analysis of the concept of accommodation to the point of ‘undue hardship’ and the grievors responsibility to assist and cooperate in the accommodation process. The arbitrator in this case was using the Policy and Guidelines on Disability and the Duty to Accommodate published by the Ontario Human Rights Commission as the reference point for undue hardship. The Commission sets forth a standard which specifies “rights are to be construed liberally and defences narrowly” (p.14). In this award, the individual nature of accommodation is highlighted and that the reasonableness of the actions of the parties and the accommodations offered are fact specific. The arbitrator in this award concedes that much of the legal precedent for disability cases relates to physical disability, thus, adding to the complexity of decision-making in cases where disability is a result of a mental disability.

Arbitrators in some cases challenge the employer’s narrow view of an employee’s behaviour. The arbitrator in Frito-Lay Canada v. United Steelworkers (2007) illustrates this objection to employer behaviour. The realness of the grievor’s panic attacks in was questioned by the employer. However, the arbitrator did not accept this focus, rather the focus was the “bona fide” nature of the effect of the grievor's apprehension on his mental
health and the physical consequences” (p.18). It was determined that that employer had not accommodated to the point of undue hardship, the grievor was ordered to be reinstated following an independent medical examination. A return to work plan with input from both the doctor and grievor was also ordered as well as any education of the workforce necessary to give the grievor the greatest chance for a successful return to the workplace. The arbitrator clearly found that there was not a reasonable effort made to accommodate the employee back into the workplace.

Summary of findings

The findings in this study of 60 arbitration case decisions span a 19 year timeframe and a review and analysis of the cases inform us about how those with a mental illness are treated in Canadian workplaces. While it has been 25 years since the introduction of laws that prevent discrimination on the grounds of disability, the case decisions included in this study portray an array of concerns. The doubling in the number of arbitration case decision indicates that those with mental illness have more awareness of their right to employment and they are taking their concerns to arbitration. The majority of arbitration case decisions result in success for the grievor, but the grievor still incurs significant emotional and financial costs as a result of the employers discipline action. This study highlights that grievors had productive work histories prior to the discipline action. Mental illness continues to be misunderstood in the workplace and the information from the medical community about the effects of mental illness is a matter of debate for the employer, union and the arbitrator.
CHAPTER 5: DISCUSSION AND CONCLUSION

The purpose of this study was to examine arbitration case decisions dealing with mental illness in Canadian workplaces. Such a review provides for an examination of the trends and directions that begin to inform the ways in which employers deal with mental illness in the workplace. Specifically, the content analysis reveals developments in applying duty to accommodate principles and the ways in which arbitrators, employers and unions describe the diagnosis of mental illness and employee behaviours.

Summary of Findings

Kirby and Keon (2006) reported on the influence of mental illness for a person in the workplace. The findings in this study illustrate troubling work experiences for employees with mental illness as well as challenges arbitrators have in evaluating the information that is presented to them by the employer, employee and the union about cases of mental illness in the workplace.

*Increase in arbitration decisions*

The overall trend indicates that arbitration cases involving mental illness have more than tripled over the past 19 years. This trend is most likely due to the corresponding social trend relating to mental illness and an increased level of awareness and disclosure about mental illness in the workplace. In response to the Kirby and Keon report, a federal *Commission on Mental Health for Canada* was formed in March, 2007. The Commission, led by retired Senator Michael Kirby, specifically has mental health in the workplace as one of its’ key priorities. (Workforce Advisory Committee, Canadian Mental Health Commission)
The efforts to seriously address mental health issues for the entire population has in all probability brought a much greater awareness of mental health to employers, employees, union and arbitrators. As presented in Chapter 4, Figure 5 illustrates a substantive increase in arbitration case decisions about mental illness since 1990. The most notable increase in cases year-over-year occurs in 2007, with nine arbitration case decisions. In any single year prior to 2007, five was the largest number of case decisions. The increase in cases is an unmistakable call for employers to examine their work practices. It is also an obvious indicator that arbitrators must be educated about the nature of mental illness and the medical community has a significant contribution to make in the area of mental health education and awareness.

*Productive employees who became ill*

The arbitration case decisions demonstrate that many employees had positive work records prior to the incidents involving mental illness issues. The number of employees who had a productive work history prior to their dismissal ranges from 66 percent in the pre-Kirby and Keon timeframe to 74 percent in the post-Kirby and Keon timeframe. For some employees, their issue with mental illness was triggered by catastrophic event in the workplace such was the case for Caroyn Reid who worked for Coast Mountain Bus Company. She was harassed by a co-worker, subsequently diagnosed with anxiety, but was dismissed for excessive, non culpable absenteeism under the employers’ Attendance Management Program. The arbitrator in this 2008 case decision ruled that the employer did not have just cause to terminate the employee. This decision indicates that employers can be required to look beyond their workplace rules before deciding that discipline is the most appropriate response to employees’ behaviour.
Organizational restructuring contributed to other employees experiencing emotional distress that contributed to a pre-existing mental health disability and for others it initiated the emergence of a disability with a diagnosis of mental illness. In the case between Vancouver Island Health Authority (Campbell River Hospital) v. Hospital Employees' Union (2008), the evidence points to the organizational restructure awakening the employees’ illness. The employee experienced “old issues around low self esteem with sensitivity to criticism from authority figures” (p.22) this led to a diagnosis that included adjustment disorder with anxiety and depressed mood. In the arbitration between Canada Safeway Ltd. v. U.F.C.W., Loc. 401(1992) changes in the store services lead to the closure of the area where the grievor worked. These changes are linked in the arbitration case decision to an emergence of a mental health disability which affected the grievors’ ability to do the work which led to his eventual dismissal. These two examples vividly show that the workplace contributed to an employee becoming disabled by mentally illness. Arbitrators in post-Kirby and Keon are paying closer attention to this aspect and are bring this workplace issue out in their case decisions.

The arbitration case decisions also draw our attention to workplace management as contributing to the employees reduced productivity. This evidence is present in the Manitoba (Department of Family Services and Housing) v. Manitoba Government Employee (2009) case where the grievors doctor made specific recommendations to enhance the grievor’s productivity and fulfillment in the workplace. The employer in this case was aware of the grievors mental status but chose to deal with her conduct from a disciplinary perspective. This disciplinary approach in the view of the union contributed to her conduct in the workplace.
Medical Evidence

As in the two arbitration case decisions noted above some arbitrators are pushing employers to examine their work practices and to make inquiries to gain proper medical evidence before dismissing employees. But on the other hand arbitrators are also dismissing medical evidence in their case decisions.

Beginning with Canada Safeway Ltd. v. U.F.C.W., Loc. 401(1992) arbitration case decision, arbitrators are without a doubt telling employers that they bear an onus to inquire if an employee has an underlying health condition that is contributing to their conduct. When an employee's actions are out of the ordinary the employer ought to realize something may be wrong and attempted to ascertain the state of the employees’ mental health. In the case, Ontario Public Service Employees Union v. The Crown in Right of Ontario (Ministry of Northern Development and Mines) (2007), the arbitrator highlighted that the grievor’s behaviour of taking too many breaks, drinking too much coffee, and smoking too many cigarettes were signals that the grievor was not in a calm state.

The medical evidence additionally presents a number of challenges for arbitrators. It is obvious from the arbitration case decisions that arbitrators are most often confronted with conflicting medical views from the employer and union on the employees’ behalf. Kirby and Keon found that employers often do not know that an employee has a mental health disability. This review of the arbitration case decisions shows that the presentation of the medical evidence is often after the employee is dismissed and the employer in some instance is hearing of the grievors mental health issues for the first time. There is little consistency in the medical community on how mental illness is defined (Ruggeri et
al, 2001) and this no doubt adds to the disputes as to which view, the employers or the employees, is the most accurate.

The grievor’s doctor is also at times cast in the role of ‘advocate’ and this contributes to their evidence being suspect of containing biases. Doctors are professionals and they are the experts who must be relied upon for explaining how mental illness may influence an employee’s performance. Arbitrators must be cautious of going beyond the boundaries of their decision making ability in assessing medical information. Certainly, they can evaluate the creditability of medical information but it cannot be treated the same as information from the employer who is simply relaying events. Those in the medical community have a natural advocacy role for a person’s health; this is not a negative point. Arbitrators and employers cannot use this as a reason to suspect their information as being flawed because they view it as biased.

This issue is further complicated when the grievor’s diagnosis of mental illness is made by a general practitioner. The doctor who gave evidence on behalf of the grievor in Canada Post Corporation v. Canadian Union of Postal Workers (2009) case decision spoke directly to this issue. She stated that because of the “serious shortage of psychiatrists, she like all general practitioners (GP), have to deal frequently with these types of mental illness” (p.19). The medical evidence may also be suspect of containing bias because unlike a physical disability which is obvious to the observer, mental illness is often invisible. The GP in the aforementioned 2009 arbitration case decision further stated that “in this area of medicine, there is much reliance on the patient's self-reporting and that there was little collateral investigation done in the case of the grievor” (p.20). The psychiatrist who provided the independent medical examination in Frito-Lay Canada v. United Steelworkers of America and its Local 461 (2007) arbitration case decision
collaborates this view by stating that “Dr. Ozersky admitted that there is a degree of speculation in all psychiatric evaluations and no objective means of verifying the diagnosis” (p.14). While there is speculation and a reliance on patient self reporting, the professional opinion a doctor, including a GP, should have more creditability in the assessment of mental illness than the opinion of an arbitrator.

The furthermost challenge, however, is the arbitrators analysis on the question of culpability such as, does the presence of an illness explain the grievor’s conduct. It is apparent from the examination of earlier arbitration decisions from the pre-Kirby and Keon timeframe that arbitrators make an association between the grievor’s psychiatric illness and their conduct. Later decisions, in the post-Kirby and Keon timeframe, however, are placing a greater emphasis on whether the illness was present at the material times of the conduct that led to the employees’ dismissal.

The episodic nature of mental illness presents a significant challenge to this analysis (Kirby and Keon 2006, Lynk 2008). Further, it is evident from this examination of arbitration decisions that much of the legal precedent for disability accommodations continues to focus on physical conditions, far fewer cases concentrate on mental illness (Newman, 2007). Arbitrators and academics are pointing to the lack of information about the impact of mental illness for the employee and the employer. This adds to the complexity of assessing medical evidence and making decisions in cases where disability is a result of a mental illness because arbitrators draw not only on their own experiences but rely on other decisions to guide their analysis.

*Arbitrator decision latitude*

Arbitration is a judicial process, but the procedures followed are not as formal as what would be found as a matter of practice in a court. This is a positive aspect, as
arbitrators can make a decision to remain involved with a case and they can order this as part of the arbitration case decision.

The arbitration case decisions in this analysis demonstrate that arbitrators consistently struggle with medical evidence in their determination of whether or not an accommodation is warranted and reasonable. Hatchers (2008) study found that employers are often in ‘awe’ of what is required for an accommodation. Arbitrators have a role to educate employers about this duty and as indicated in the summary of the decision for Frito-Lay Canada v. United Steelworkers (2007) case, arbitrators have considerable latitude in what accommodation to the point of undue hardship can mean. The arbitrator in Shuswap Lake General Hospital v. British Columbia Nurses' Union (2002) highlights that the Supreme Court of Canada held that the term "undue" signifies that some hardship is acceptable, and that more than a "mere negligible effort" is required to satisfy the duty to accommodate. In Frito-Lay Canada v. United Steelworkers (2007) award, the arbitrator ‘ordered’ that a work plan be developed with input from not only the grievor but also the grievor’s doctor, and further stipulated that the workforce receive an education to increase the grievor’s success with a return to work program.

In the 60 cases reviewed for this analysis, one other case exercised similar latitude in ordering a return to work plan that required collaboration between the employer, the union, the employee and the employees’ health care provider, and that was the Canada Safeway Ltd. v. U.F.C.W., Loc. 401(1992) case decision. Arbitrators have the flexibility to remain involved with a case and have the authority to order return to work plans but only two arbitration case decisions exemplify this ability.

illustrated an expansion on the concept of duty to accommodate to include less productivity. The arbitrator concluded that the employer may be obligated to consider lowering its production requirements in order to accommodate a long-term employee with a mental disability. This forward thinking decision truly embodies the spirit of accommodation in that it removes a barrier for the employee with a mental disability who would otherwise be excluded because he did not meet the employers’ expectations for productivity. However this decision is not cited for this principle and therefore, has not yet influenced other arbitrators dealing with the impact of mental illness on performance or productivity issues.

Research Implications

The jurisprudence for the central themes such as the duty to accommodate, undue hardship, *bona fide* occupational requirement and hybrid analysis model has origins in judgments that are not related to mental illness. Certainly the principles from these decisions apply and are a strong foundation for arbitrators to base their analysis, but it is unmistakable from this review that the complexities of mental health issues present arbitrators with many challenges that exceed the scope of jurisprudence from cases not related to mental illness. Arbitrators acknowledge that in all accommodation cases the issues must be addressed from the perspective of the individual disability suffered by the grievor. Further the arbitrator in Frito-Lay Canada v. United Steelworkers (2007) elaborates that more than a "mere negligible effort" is required to satisfy the duty to accommodate ‘the reasonableness of the actions of the parties and the offers of accommodated work are fact specific’ (p.14). The reality that much of the legal precedent focuses on physical and not mental health conditions makes the arbitrator
analysis that much more difficult, and may contribute to the latitude demonstrated in arbitration case decisions and contributes to the gap in what is known about accommodation for employees with mental illness.

Arbitrators have the ability to tell the employers, employee, and union to be more creative, to seek out information from informed medical professionals as to what might work in the individual circumstances of the case. Medical professionals need to be told, as well, to be informed about the employer’s workplace. Some arbitrators have started down this road but a gap in knowledge and process remains.

The overall trend of arbitration cases related to mental illness tripling in the last 20 years means arbitrators will be making more decisions that will impact employees with mental illness. This research only examined cases where there was a diagnosis of mental illness and as such it is most likely reflective of society’s general increased awareness of mental health issues. It is also illustrates that mental illness continues, in many cases, to be very misunderstood in Canadian workplaces.

Those who have a mental health disability are often treated with the highest form of discipline, dismissal, to correct their conduct. In the 40 successful arbitration case decisions, 22 pre- and 18 post-Kirby and Keon, where the employers’ actions were determined to be wrong, all but five employees still experienced some form of loss. The implications of this are that work practices have not changed a great deal in the 25 years since the introduction of human rights legislation. Mental illness is still highly misunderstood and employees who have a mental disability are most likely to be discriminated against, even if it is unintentional.

The lack of consistency in diagnosis for mental illness is a considerable challenge for arbitrators, as is the understanding of the connection between illness and conduct.
The results of this review of arbitration case decisions are consistent with the literature on accommodating individuals with mental illness - little is known about the best practices (Hatcher, 2008, Kirby and Keon 2006). Arbitrators’ case decisions would potentially gain more consistency if the medical evidence related to mental illness focused on understanding the functional limitations, if any, that are related to the employee and their work.

This research confirms that Canadian work environments continue to misunderstand employees who experience mental illness. Their behaviour in some case decisions is characterized as bizarre, some of the grievors are shunned and avoided and others felt harassed by co-workers. Employers often misread the signs of mental illness and interpret the behaviour as misconduct. Barriers to work for an employee with mental illness will not be removed without further education for the workplace on mental illness.

This review of arbitration decisions illuminates employer behaviour as much as it clarifies how arbitration case decisions unfold. There is evidence in post-Kirby and Keon arbitration case decisions that the workplace is causing employees to become mentally ill. This finding is an important for future research so there can be an understanding of how this has been influenced. Employers and their human resource practitioners need to expect that the workplace shares a responsibility in preventing an employee from becoming disabled as well as ensuring that the workplace has the flexibility to accommodate employees with mental health disabilities.

Human Resource best practices must be grounded by research about the occupational requirements for employees with a mental disability. This study provides many case examples of where the needs of a mentally ill employee are not understood. Employers are not making progress in this area and are in fact treating employees with
mental illness unfairly. Employers cannot assume that their ‘normal’ workplace routines are a good fit for every employee. Employers must first accept accommodation as part of their everyday practice, and the practice must be embedded in the work culture. Employers need guidance and support from the medical community to achieve this goal. As well, medical professionals need to communicate with the employer and union in order to understand the workplace, the potential problems in the workplace, and the possible solutions within the workplace.

Limitations and Future Research

A number of strengths and limitations of this study must be taken into consideration when interpreting the content analysis results. This study is of Canadian arbitration decisions but does not include case decisions from Quebec. In addition, the legal frames for the provinces represented in the study are different, but this was not accounted for in this analysis. There should be further work in this area to determine how this impacts and influences the findings. Narrowing the scope of this analysis to arbitration decisions only, is strength of the research, however it does not allow for the examination of many of the cases that the arbitrators use as jurisprudence.

While the number of grievances has increased threefold, the success rate for the employees who file a grievance remains constant. This analysis has established that there are patterns in arbitrator decision making, but it has not examined the underpinnings of how arbitrators form their decisions. This element is important because arbitrator’s decisions have a direct bearing on two of the three key work barriers identified by the Kirby and Keon (2006) report. From this analysis of the arbitration case decisions, it is
unmistakable that employees with mental illness experience discrimination from their employer and co-workers. In reviewing the arbitration case decision analysis, it is also apparent that employers were either unwilling to provide or did not know how to provide the required flexible work arrangements. The arbitration case decisions provide information about the absence of awareness in the workplace about issues related to disability because of a mental illness. Understanding why this continues to be the experience for those who have a disability because of a mental illness is an important aspect in moving workplaces from where they are now to workplaces that can accept and work with all the differences that employees will present to them.

The preliminary findings in this study suggests stigmatized terms referring to the diagnosis and employee attributes about mental illness are still used by arbitrators, employers, unions and medical professionals alike. These references described employee mental illness diagnosis in terms such as handicap, breakdown and employee attributes in terms such as irresponsible, hostile, bizarre and vegetative. When considering stigma, attributes describing the individual are central. Future research examining the language of stigma in arbitration decisions will reveal how arbitration decisions either increase acceptance of or contribute to the stigma of mental health issues in the workplace.

Conclusion

The responsibility to create workplaces that support the diverse nature of the Canadian working population rests with many stakeholders, including employers, arbitrators, unions, and the medical community. Research in understanding mental illness and the best practices for education and awareness of how to deal with cases of mental illness in the workplace must continue. Along with research, employers, human resource
practitioners, and unions must commit to finding ways to integrate knowledge, awareness and acceptance of differences into their workplace culture. Legislators have made attempts to define disability; however, it is evident from this study that the question of what a disability is often a matter of interpretation. Arbitrators are left with the responsibility of determining whether specific mental illnesses are a disability and as such there are human rights issues to be considered and work accommodations to be required. The medical community shares in the responsibility of shaping societies understanding of mental illness and further has a fundamental role in identifying the best kind of support for employees who are dealing with mental illness.

This study of arbitration case decisions highlights many examples of divergent medical opinions concerning the employees’ diagnosis of mental illness. The adversarial nature of arbitration perhaps contributes to employers and employees presenting divergent views of how mental illness is defined. Nevertheless, cases will continue to arise where employers, unions and employees struggle to resolve issues and they will end up in arbitration seeking a third party ruling. Although arbitrators are not alone in the responsibility to lessen the stigma of mental illness in the workplace, their decisions in such matters do help to shape and influence workplace policies and practices. Arbitrators’ decisions are influenced by societal perceptions of mental illness, employers and labour unions and guided by expert opinions from both the legal and medical community and their decisions are as sound as the information that influences them.

Mental illness affects one in five Canadians or 10 percent of the working population (Kirby and Keon 2006, Dewa et.al 2008). As a society, we cannot continue to hide behind our ignorance of mental illness. The social and financial costs of not removing employment barriers will continue to increase and valuable employees will not
be in the workplace. Without further research discriminatory work practices will continue. The gap in our knowledge of mental illness will prevent us from achieving a collaboration that can make it possible that mental illness not become disability at work or a disability capable of accommodation.
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Appendix A: Arbitration Case Decision Analysis Framework

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<td>Grounds for the grievance</td>
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Appendix B: Reference list of case study inclusions

Content Analysis Inclusions Pre-and Post-Kirby Keon Report

Pre-Kirby and Keon Report

Retrieved from LexisNexis Quicklaw database.

British Columbia Public School Employers' Association /Board of School Trustees of
School District No. 73 v. British Columbia Teachers' Federation,B.C.C.A.A.A. 39

Calgary Regional Health Authority v. United Nurses of Alberta, Local 115,

LexisNexis Quicklaw database.

Canada Safeway Limited and United Food v. Commercial Workers, Local 401, A.G.A.A.

Canadian Postmasters and Assistants Association v. Canada Post Corporation, C.L.A.D.

City of Ottawa v. Ottawa-Carleton Public Employees' Union, CUPE Local

City of Port Coquitlam, v. Canadian Union of Public Employees Local 498,B.C.A.A. 108


HY Louie Co. Ltd. v. United Food & Commercial Workers' International Union,


Pizza Pops, a Division of Pillsbury Canada Limited v. United Food and Commercial Workers Union, Local No. 832, 2001.


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West Fraser Mills Ltd. v. United Steelworkers of America, Local 1-417, B.C.C.A.A.A.