

2009

Lost in Translation?: The Disability Perspective in *Honda v. Keays* and *Hydro-Quebec v. Syndicat*

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Citation Details

Judith Mosoff, "Lost in Translation?: The Disability Perspective in *Honda v. Keays* and *Hydro-Québec v. Syndicat*" (2009) 3:1 McGill JL & Health 137-149.

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**LOST IN TRANSLATION?: THE DISABILITY PERSPECTIVE
IN HONDA V. KEAYS AND HYDRO-QUÉBEC V. SYNDICAT**

*Judith Mosoff**

Two recent decisions from the Supreme Court of Canada, Honda Canada Inc. v. Keays and Hydro-Québec v. Syndicat des employé-e-s de techniques professionnelles et de bureau d’Hydro-Québec raise concerns about the extent of human rights protections for employees with disabilities. In this comment the author argues that when disabilities do not fit neatly into a standard medical framework such as the conditions of chronic fatigue syndrome or mental illness, there is a tendency to disbelieve the employee, not take the individual seriously, or set out special regimes for confirmation. With a focus on the employment contract rather than discrimination, the author argues that an analysis of human rights obligations was virtually absent in the employment law context. In the labour law context, the Court gave no real guidance about the meaning of undue hardship. The author suggests that these cases do not reflect the broad vision of an inclusive workplace previously set out in Meiorin.

INTRODUCTION 138

I. DESCRIPTION OF THE CASES..... 139

 A. Keays and Honda Canada 139

 B. Ms. Laverrière, Syndicat des employé-e-s de techniques professionnelles et de bureau d’Hydro-Québec and Hydro-Québec..... 140

II. ANALYSIS OF THE DECISIONS.....141

 A. The Nature of the Disability Effects the Legal Outcome141

 1. *Disability as “Non-Mainstream”: A Hierarchy of Legitimacy*.....141

 2. *Specialized Regimes for “Non-Mainstream” Disabilities* 144

 B. The Duty to Accommodate and Undue Hardship in the Context of Employment Law and Labour Law 145

 1. *Disability Discrimination and Unjust Dismissal* 146

 2. *Undue Hardship and the Fundamental Nature of the Employment Contract*..... 147

CONCLUSION..... 149

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INTRODUCTION

Nearly ten years ago, in *Meiorin*,¹ the Supreme Court of Canada set the gold standard for understanding human rights obligations in the workplace. In *Meiorin*, the Court described the importance of human rights law to promote inclusion and to address systemic discrimination in employment. The Court held that a fitness standard for forest firefighters, developed in a male dominated work environment, discriminated against women. In addition, it provided employers with a rough operational definition for the duty to accommodate.² To claim that the duty to accommodate had been met, an employer would have to demonstrate that further accommodation was “impossible” without imposing undue hardship on the enterprise.³

Thus, over the last decade, employers have been bound by an extensive duty to accommodate employees who were protected by human rights law. However, the two cases that are the subject of this comment, *Honda Canada Inc. v. Keays*⁴ and *Hydro-Québec*⁵, call into question the expansive vision of human rights where employees with disabilities are concerned.

While the heart of the *Meiorin* decision was the recognition of the importance of legal rules to promote an inclusionary workforce, the present cases raise questions about how far an employer needs to go to accommodate employees with disabilities. Statistics on labour force participation by people with disabilities are revealing. According to a recent Statistics Canada report, for those between the ages of 25 and 54, the prime working age range, 49.7% of people with disabilities were working compared to 83.5% of the non-disabled population.⁶ People with mental disabilities fared particularly badly. Of Canadians with psychological illnesses, 45.2% participated in the workforce while only 32.7% of persons with developmental disabilities participated in the workforce.⁷ In 2001, just 40% of women aged 15 to 64 with disabilities were part of the Canadian work force compared to 69% of women in this age range without disabilities.⁸ Given the significance of employment in our society, for reasons of economic security, social recognition and feelings of self worth, the extent of an employer’s obligation to accommodate is a pressing question for people with disabilities.

Both *Honda* and *Hydro-Québec* involved employees who were fired because of absenteeism that stemmed from their disabilities. Mr. Keays had chronic fatigue syndrome (CFS) while Ms. Laverrière had a variety of physical problems as well as several psychiatric diagnoses including personality disorder. Mr. Keays sued Honda for wrongful dismissal when he was fired because he refused to see another doctor about his condition. Ms. Laverrière filed a grievance under a collective agreement after she lost her job following a long period of disability-related absenteeism. Ultimately, the Supreme Court of Canada found that neither employer had discriminated against their respective employee.

In my view, both decisions stray from the view of human rights in the workplace that envisions a broad application of human rights principles for the purpose of encouraging an inclusionary workforce.

¹ *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees’ Union (B.C.G.S.E.U.)*, [1999] 3 S.C.R. 3, [1999] S.C.J. No. 46 [*Meiorin* cited to S.C.R.].

² The extent of the obligation to accommodate people with disabilities in important public activities was reiterated soon after in the context of eligibility criteria for driving tests. See *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 S.C.R. 868, [1999] S.C.J. No. 78, 181 D.L.R. (4th) 385.

³ *Meiorin*, *supra* note 1 at para. 54.

⁴ *Honda Canada Inc. v. Keays*, 2008 SCC 39, [2008] 2 S.C.R. 362, [2008] S.C.J. No. 40. [*Honda*].

⁵ *Hydro-Québec v. Syndicat des employé-e-s de techniques professionnelles et de bureau d’Hydro-Québec, section locale 2000 (SCFP-FTQ)*, 2008 SCC 43, [2008] 2 S.C.R. 561, S.C.J. No. 44 [*Hydro-Québec*].

⁶ Human Resources and Social Development Canada, *Advancing the Inclusion of People with Disabilities (2006)* (Ottawa: Human Resources and Social Development Canada, 2006) at 92, online: Human Resources and Skills Development Canada <http://www.hrsdc.gc.ca/eng/disability_issues/reports/fdr/2006/advancinginclusion.pdf>.

⁷ Statistics Canada, *Participation and Activity Limitation Survey 2006: Labour Force Experience of People with Disabilities in Canada*, Catalogue No. 89-628-X (Ottawa: Minister of Industry, 2008) at 10, online: Government of Canada: Depository Services Program <http://dsp-psd.pwgsc.gc.ca/collection_2008/statcan/89-628-X/89-628-XIE2008007.pdf> [PALS 2006].

⁸ Statistics Canada, *Women in Canada: A Gender-based Statistical Report*, 5th ed., Catalogue no. 89-503-XIE (Ottawa: Minister of Industry, 2006) at 294, online: Statistics Canada <<http://www.statcan.gc.ca/pub/89-503-x/89-503-x2005001-eng.pdf>>.

In this comment, I will develop two themes in the decisions which have contributed to an apparent retreat from the *Meiorin* analysis. First, the type of disability of both Mr. Keays and Ms. Laverrière was considered to be outside of the norm, not easily confirmed or explained by standard medical analysis. Often, people with some conditions, such as CFS or mental illness, are simply not believed or not taken seriously. They are frequently subjected to endless medical scrutiny to legitimate their disability. With certain conditions, such as personality disorder, which is disabling only in a social environment, medicine can offer neither definitive diagnosis nor effective treatment. The second theme concerns the ways that human rights principles are applied to issues of employment law and labour law in these cases. Although there seems to have been an obvious disability discrimination issue in both cases, the decisions did not rely on human rights law as paramount. The Court was not primarily concerned with the duty to accommodate and undue hardship. Rather, the decisions focused on the principles of contract law and the technical rules about damages. Human rights became quite secondary.

This comment is divided into 4 sections. In Section I, I will give a brief description of the facts and the judicial history of each case. In Section II, I will move on to an analysis of two themes in the decisions: first, the significance of the controversial nature of the disabilities involved and second, the uncertainty about the meaning of the duty to accommodate and undue hardship in the context of employment and labour law. Finally I will draw some concluding observations about the discrepancy of these cases with the *Meiroin* analysis.

I DESCRIPTION OF THE CASES

A. Keays and Honda Canada

In March 2000, Kevin Keays was fired from Honda Canada after working for the company for 14 years. In 1997, he was diagnosed with chronic fatigue syndrome. For the following year he did not work and received insurance benefits from an insurer, London Life. After one year, London Life stopped paying his benefits on the basis of a medical opinion that he was fit to return to work full-time.

Mr. Keays' return to work was not smooth. He was placed in Honda's Disability Program which allowed employees absences if they were confirmed as disability-related. Unlike the protocol for other conditions, Mr. Keays was required to provide a doctor's note to confirm that every absence was related to his non-"mainstream" disability, a term first used by the trial judge.⁹ Despite the many notes, Honda became concerned that the doctors were not evaluating Mr. Keays' absences independently but were simply repeating his own explanations for being off work. To confirm Keays' diagnosis, Honda requested that he see Dr. Brennan, a company doctor. On the advice of his lawyer, Mr. Keays requested more information about the proposed consultation before he would agree to attend. On March 28, Honda replied with an ultimatum: either Mr. Keays would meet with Dr. Brennan, or he would be dismissed. Mr. Keays did not see Dr. Brennan and was dismissed. He sued for wrongful dismissal.

At trial, McIsaac J. found that Mr. Keays was wrongfully dismissed because Honda's direction to see Dr. Brennan was not reasonable in the circumstances and Mr. Keays had a reasonable excuse for resisting. McIsaac J. concluded that Mr. Keays should have been given 15 months notice but extended this to 24 months because of the bad faith associated with the manner of the dismissal and the medical consequences that ensued for Mr. Keays. The trial judge awarded \$500,000 in punitive damages against Honda because of its discriminatory and harassing treatment of Mr. Keays.

The Ontario Court of Appeal dismissed the appeal by Honda. Goudge J.A. wrote for the Court except on the quantum of punitive damages. He was reluctant to interfere with the findings of the trial judge in a case so heavily laden with facts. On the issue of the availability of punitive damages, Goudge J.A. held that discrimination may constitute an independent actionable wrong giving rise to

⁹ *Keays v. Honda Canada Inc.*, [2005] O.J. No. 1145, 40 C.C.E.L. (3d) 258 at para. 7 (Ont. S.C.J.) [*Honda trial* cited to O.J.].

punitive damages. Writing only for himself, Goudge J.A. would have upheld the award of the trial judge of \$500,000. Rosenberg J.A., who wrote for the majority on the quantum of punitive damages, did not agree that there was evidence of a protracted conspiracy to warrant such a high award. The majority, therefore, set punitive damages at \$100,000.

At the Supreme Court of Canada, Bastarache J. (McLachlin C.J., Binnie, Deschamps, Abella, Charron, Rothstein J.J. concurring) wrote for the majority. LeBel and Fish J.J. dissented in part. The Court upheld the decision that Mr. Keays had been wrongfully dismissed and agreed with the 15 month notice period set at trial. The Court was unanimous in setting aside the punitive damages award but differed on damages for the manner of dismissal. Unlike the majority, the dissenting justices would have upheld the damages for the manner of dismissal.

The majority found an extraordinary number of errors in the findings of fact by the trial judge. One of the most significant errors, according to the majority, was the finding that Honda had engaged in a corporate conspiracy. Other errors included a finding that Dr. Brennan had already concluded that Mr. Keays' condition was "bogus",¹⁰ that Dr. Brennan took a "hardball"¹¹ attitude, and that Honda's cancellation of accommodation was a reprisal for Keays retaining legal counsel.¹² Based on the majority's findings, there was no longer any evidence of bad faith in the manner of Keays' dismissal and thus no damage award based on the conduct of the dismissal.

In its analysis of the case's human rights dimension, the majority did not find evidence of discrimination.¹³ Like the courts below, the majority referred to its previous decision in *Bhadauria*¹⁴ that established that a breach of human rights legislation could not constitute a distinct tort.¹⁵ Furthermore, despite its decision in *McKinley v. BC Tel*,¹⁶ the majority seemed to be of the view that discrimination could not be "an independent actionable wrong" on which a punitive damages award could rest.¹⁷

LeBel J., writing in dissent, began by emphasizing that a review of damages for the breach of an employment contract must be informed by the values of human rights codes and the *Canadian Charter of Rights and Freedoms*.¹⁸ While the dissent agreed with the majority that there was no basis for punitive damages, it held that it was appropriate for the trial judge to award damages for manner of dismissal because it was done in bad faith and in a discriminatory manner. Unlike the majority, the dissent found very few errors in the findings of fact at trial.

B. Ms. Laverrière, Syndicat des employé-e-s de techniques professionnelles et de bureau d'Hydro-Québec and Hydro-Québec

During her last seven and a half years working for Hydro-Québec, Ms. Laverrière missed 960 days of work. She had a number of physical and mental disabilities including tendonitis, epicondylitis, hyperthyroidism, hypertension as well as episodes of reactive depression and mixed personality disorder with borderline and dependent character traits. One of Ms. Laverrière's main disability-related difficulties was her relationships with supervisors and co-workers. During the period of her employment, Hydro-Québec tried to respond to Ms. Laverrière's difficulties by giving her light duties, a gradual return to work after a period of depression and, eventually, a new position to which, according to the union, she was not entitled. When she was dismissed, Ms. Laverrière had not been to work for 5 months.

¹⁰ *Honda*, *supra* note 4 at para. 43.

¹¹ *Ibid.* at para. 46.

¹² *Ibid.* at para. 47.

¹³ *Ibid.* at para. 67.

¹⁴ *Seneca College of Applied Arts and Technology v. Bhadauria*, [1981] 2 S.C.R. 181 [*Bhadauria*].

¹⁵ *Honda*, *supra* note 4 at para. 67.

¹⁶ *McKinley v. BC Tel*, 2001 SCC 38, [2001] 2 S.C.R. 161, S.C.J. No. 40 at para. 89 (case involving the dismissal of a chartered accountant with hypertension, a unanimous court mentioned in *obiter* that discrimination may give rise to a punitive damages award).

¹⁷ *Honda*, *supra* note 4 at para. 64. See also *Vorvis v. Insurance Corporation of British Columbia*, [1989] 1 S.C.R. 1085.

¹⁸ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

Medical reports suggested that she would continue to be absent as she had in the past. The complainant grieved the dismissal as unjust.

The arbitrator dismissed the grievance on the basis that the employer could terminate the contract if the complainant was unable, “for the reasonably foreseeable future, to work steadily and regularly as provided for in the contract.”¹⁹ The Union’s expert evidence stated that improvement was possible if all stressors could be removed from Ms. Laverrière’s environment. This would mean completely changing her work environment and eliminating the stresses within her family. According to the arbitrator, this would require the employer to provide the complainant, periodically and repeatedly, with a completely new working environment including a new supervisor and coworkers. According to the arbitrator, this level of accommodation would constitute undue hardship.

On judicial review in the Quebec Superior Court, Matteau J. upheld the arbitrator’s decision. Matteau J. did not agree with the Union’s submission that the employer had to show that Ms. Laverrière’s absences had “insurmountable consequences”.²⁰ The Quebec Court of Appeal took a different view. From its perspective, in order to follow the approach set out in *Meiorin*, to claim undue hardship the employer had to prove that it was impossible to accommodate the employee’s characteristics.

At the Supreme Court of Canada, Deschamps J. wrote for a unanimous Court and dealt with the meaning of the term “impossible” as it was set out in *Meiorin*. The question was not whether it was impossible to accommodate the employee but, more specifically, whether it was impossible to accommodate the employee without causing the employer undue hardship. Undue hardship involved the questions of whether the employer’s operation was excessively hampered or whether the employee was unable to work for the foreseeable future, despite the employer’s attempts to accommodate. The basic obligation of the employment contract, being the exchange of labour for wages, however, remains intact. Hydro-Québec had no obligation to alter the employment relationship in a fundamental way. It was, therefore, Ms. Laverrière’s breach of the employment contract that justified her dismissal.

II ANALYSIS OF THE DECISIONS

A. The Nature of the Disability Effects the Legal Outcome

In this section, I will argue that the nature of the particular disabilities of Mr. Keays and Ms. Laverrière was an important factor in the legal outcome. Underpinned by a medical model of disability, the Court’s perception of certain disabilities as “non-mainstream” reflects a disability hierarchy with respect to legitimacy. Disabilities that are poorly understood, or do not fit neatly into a medical model, are considered less legitimate than others. In previous equality and human rights cases, the Court has often recognized the particular difficulties faced by people with controversial disabilities. This was not recognized in the current cases. Rather, attitudes about the particular nature of these disabilities set the stage for the Court to minimize the human rights obligations of employers to accommodate the disabilities of these employees.

1. *Disability as “Non-Mainstream”: A Hierarchy of Legitimacy*

The disabilities of both Mr. Keays and Ms. Laverrière were considered outside the norm or not “mainstream”. This is not because CFS or mental illness is uncommon. To the contrary, the prevalence of these conditions is very high, with considerably higher rates in women.²¹ According to the

¹⁹ *Hydro-Québec*, *supra* note 5 at para. 5.

²⁰ *Ibid.* at para. 7 quoting from *Syndicat des employé-e-s de techniques professionnelles et de bureau d’Hydro-Québec, section locale 2000 (SCFP-FTQ) c. Corbeil*, [2004] J.Q. no 11048 at para. 52 (QL) [translation by the Supreme Court of Canada].

²¹ Jungwee Park & Sarah Knudson, “Medically unexplained physical symptoms” (2007) 18:1 Health Reports 43. (According to a Statistics Canada study, entitled *Medically Unexplained Physical Symptoms*, in 2003 it was estimated that 341 000 Canadians aged 12 or older, approximately 1.3% of the national population, had chronic fatigue syndrome. Approximately 69% of these individuals were women).

Department of Health and Human Services: Centers for Disease Control and Prevention webpage, a source cited in the *Honda trial* judgment,²² more than one million Americans have CFS.²³ This makes the incidence of CFS higher than that of multiple sclerosis, lupus, lung cancer, or ovarian cancer. According to this same source, CFS occurs four times more often in women than in men.²⁴ In 2002, Statistics Canada estimated that 2,600,000 Canadians, or 10.4% of the national population, had a mental illness or substance dependency, the majority of them women.²⁵

The Court's description in *Honda* of certain disabilities as "non-mainstream" is problematic. If this term does not refer to numbers, what does it mean? Probably it suggests that a condition is inconsistent with a medical model of disability and is, therefore, questionable. A medical model views disability as individual pathology or deficiency where medical tests, doctors and other health professionals establish legitimacy. Neither CFS nor mental illness, especially personality disorder, fit well in a medical model of disability. This likely influenced the Court's view of the disabilities of Mr. Keays and Ms. Laverrière as not particularly compelling, legitimate, or comprehensible.

When the Ontario Superior Court of Justice first differentiated "mainstream" illnesses from conditions like CFS in *Honda trial*, it seemed to refer to conditions that are "invisible" impairments to the outside observer.²⁶ However, the idea of conditions outside of the "mainstream" in this context has an evaluative dimension. Unlike "mainstream" disabilities like blindness, deafness, or the effects of a spinal cord injury, people with chronic pain or fatigue are often suspected of malingering by employers, compensation officials, and even physicians.²⁷ This interpretation finds further support in the following statement by the Court of Appeal:

The need for this large employer, and indeed all employers, to take seriously their responsibilities in accommodating employees with disabilities is very important. This is, if anything, more true for employees whose disabilities may be seen by some as outside the mainstream and therefore not genuine.²⁸

These excerpts reveal the current underlying suspicion that conditions like CFS are dubious. Quite possibly the conditions are either not "real" or not very serious.

Within the medical community itself, we see opinions that suggest CFS can be faked. In *Honda*, the majority quoted Dr. Brennan who referred to the authoritative Centre for Disease Control as developing "some strict diagnostic criteria for Chronic Fatigue Syndrome (CFS) to aid in its diagnosis and differentiation from depression, fatigue of chronic illness, *malingering*, multiple rheumatic diseases etc."²⁹ Because of this underlying scepticism, employers are more likely to insist on repeated doctors' visits to confirm a diagnosis or special systems to monitor disability-related absences, as Honda did with Mr. Keays.

Unfortunately, the same scepticism that motivates employers to impose unduly strenuous monitoring systems on people with non-mainstream disabilities is what allowed the majority to perceive Honda's actions as appropriate, non-discriminatory and to find errors in the trial judge's findings of fact. The judgments indicate that Mr. Keays was seen by at least three doctors before Honda insisted that he see Dr. Brennan. Based on his London Life disability benefits, there was little doubt that at least one of those doctors had already made the chronic fatigue syndrome diagnosis. In interpreting the March 28 ultimatum, the trial judge therefore found that Honda had intimidated Mr. Keays by deliberately misstating and misinterpreting whether his file revealed that there had already been a diagnosis of CFS. However, the

²² The *Honda trial* judgment refers to a webpage on the Centers for Disease Control and Prevention website that has since been removed. We are using the information currently available on the website. *Honda trial*, *supra* note 9 at para. 13.

²³ U.S. Centers for Disease Control, "Chronic Fatigue Syndrome—Basic Facts", online: Department of Health and Human Services: Centers for Disease Control and Prevention <<http://www.cdc.gov/cfs/cfsbasicfacts.htm>>.

²⁴ *Ibid.*

²⁵ Statistics Canada, "Canadian Community Health Survey: Mental health and Well-being" *The Daily* (3 September 2003) 2, online: Statistics Canada <<http://www.statcan.gc.ca/daily-quotidien/030903/dq030903-eng.pdf>>.

²⁶ *Honda trial*, *supra* note 9 at para. 53. "Invisible" disability is a common term in disability discourse meaning unseen. This is different from the concept of "mainstream," a word that has other connotations such as "regular" or "acceptable" or even "believable."

²⁷ *Honda trial*, *supra* note 9 at para. 53.

²⁸ *Keays v. Honda Canada Inc. (c.o.b. Honda of Canada MFG)* (2006), 82 O.R. (3d) 161, [2006] O.J. No. 3891 at para. 65 (C.A.) [*Honda Ont. C.A.*].

²⁹ *Honda*, *supra* note 4 at para. 44 [emphasis added].

majority showed no deference to this determination, finding instead that Honda simply conveyed the information gathered from its experts. The trial judge also found that Dr. Brennan had already decided prior to the consultation that the claim by Mr. Keays was “bogus” and that Keays’ referral was a “set up”. Again, the majority overturned this finding of fact, finding instead that Dr. Brennan was taking a cautious approach, a position endorsed by the medical profession. Finally, the majority did not accept the trial judge’s finding that, had the consultation occurred, Dr. Brennan would have taken a “hardball” approach. Rather, it held that Dr. Brennan needed to see Keays in order to make his diagnosis according to the standards set out by the Centre for Disease Control. While the intemperate language of the trial judge may have contributed to the willingness of the Court to disturb the findings of fact, the ambiguous nature of the disability paved the way for such interference. If Mr. Keays had a spinal cord injury, readily confirmed by X-rays, it is unlikely that the trial judge’s negative perception of Honda’s actions would have been considered an error. However, in cases of CFS and other “non-mainstream” conditions, self-reported data is often the primary source of medical “proof”. In these situations, the credibility of the employee becomes central to the case. By looking at the majority’s conclusions, it is clear that most, if not all, of Mr. Keays’ evidence was examined through a lens of doubt created by the medical model’s characterization of “non-mainstream” disabilities.

Unlike Mr. Keays, Ms. Laverrière had a number of physical conditions that could be confirmed by standard medical tests and were consistent with a medical model of disability. However, she also had a psychiatric diagnosis, personality disorder, which was particularly problematic. This aspect of Ms. Laverrière’s disability was even less mainstream and less compatible with the medical model because of its psychiatric nature. While the Court did not focus on the ambiguities of mental illness in Ms. Laverrière’s circumstances, but rather her extended absences from work, concepts of mental illness diverge from the manner of diagnosis and prognosis usually associated with physical disabilities. Personality disorder probably exemplifies the essence of the social construction of disability in which the social environment, rather than an individual’s trait, defines the condition. This disability made it difficult for Ms. Laverrière to get along with others. When the Union experts recommended that accommodation involve periodic change to Ms. Laverrière’s environment, they were predicting an ongoing inability to get along with other people. From a medical perspective, neither drugs nor psychotherapy provide a remedy for a personality disorder. If Ms. Laverrière did return to work, the same problems were likely to occur with a period of absenteeism as part of the cycle.

The medical model that forms the background to these decisions is a blunt, limited view of disability and a step backwards from previous disability decisions by the Court. Conditions such as multiple sclerosis provide examples of conditions that were not previously considered legitimate for lack of a clear medical explanation. It was not until a biological basis was discovered that the medical community fully accepted that persons with this condition were not malingering.³⁰ Increasingly, previously unexplained mental illnesses, such as schizophrenia, have been determined to have a biochemical basis. That being said, the search for a medical explanation of disability is frequently not helpful.

Activists, policymakers and scholars have argued that the appropriate approach to disability depends on context.³¹ Some types of disability arise from a clear biological impairment accompanied by physical signs that can be confirmed by medical tests. Other physical conditions, equally real, cannot be determined by objective medical assessments but depend on the reported experience of the individual. Disability may also be defined on a functional basis which looks at the range of activities that a person can perform, an approach which is often most relevant to the question of work. Another approach strongly favoured in critical disability studies, views disability as the product of social attitudes and structures that create handicap. In *Mercier*, the Court itself recognized that a “handicap” may be “the result of a physical

³⁰ See generally Judith Richman et al., “Feminist Perspectives on the Social Construction of Chronic Fatigue Syndrome” (2000) 21 *Health Care for Women International* 173; P. Moss & K. Teghtsoonian, *Contesting Illness Processes and Practice* (Toronto: University of Toronto Press, 2008); Judy A. Le Page, Grant L. Iverson & Peter Collins, “The impact of judges’ perceptions of credibility in fibromyalgia claims” (2008) 31 *International Journal of Law and Psychiatry* 30.

³¹ See e.g. Jerome Bickenbach, *Physical Disability and Social Policy* (Toronto, University of Toronto Press: 1993) at chapters 1-3; See also Dianne Pothier, “Appendix: Legal Developments in the Supreme Court of Canada Regarding Disability” in Dianne Pothier & Richard Devlin, eds., *Critical Disability Theory: Essays in Philosophy, Politics, Policy and Law* (Vancouver: UBC Press, 2006) at 305.

limitation, an ailment, a social construct, a perceived limitation or a combination of all of these factors. Indeed, it is the combined effect of all these circumstances that determines whether the individual has a 'handicap' for the purposes of the *Charter*.³² The reality is that disabilities are not all alike.

Just because we do not fully understand a disability does not mean that it is not legitimate or serious. Both Mr. Keays and Ms. Laverrière were unable to work as a result of their disabilities. This suggests that a functional rather than a biomedical approach to disability would have been much more appropriate in both cases. However, a hierarchy of disability supported by a medical model of disability was more influential in the analysis.

2. *Specialized Regimes for "Non-Mainstream" Disabilities*

In previous *Charter* equality and human rights cases, the Supreme Court has dealt with numerous situations in which employees with "non-mainstream" disabilities were subjected to specialized schemes in employment-related contexts. In striking down several such schemes, the Court recognized the particular problems, stigma and discrimination that go along with controversial disabilities. This was not the view in *Honda*. As mentioned above, the specialized system used by Honda to monitor Keays' absences was more onerous than the system used for employees with other disabilities that were more consistent with a medical model. Keays had to provide confirmation from a doctor for every single disability-related absence. The majority did not see Honda's demands as inappropriate.

In *Battlefords and District Co-Operative Ltd. v. Gibbs*,³³ the Court found that an eligibility criterion for long term disability benefits, that required people with a mental disability as opposed to a physical disability to be institutionalized, was discriminatory. This decision recognized that persons with mental disabilities have suffered a particular disadvantage, a conclusion echoed by the Court in other decisions.³⁴ In *Nova Scotia (Workers' Compensation Board) v. Martin*,³⁵ the Court found that a separate regime for workers with chronic pain, under Nova Scotia's Workers' Compensation Act and the Functional Restoration Program Regulations, violated section 15 of the *Charter* and was not a reasonable limit under section 1. By legislating separate benefits, argued to be uniquely tailored to chronic pain, "far from dispelling the negative assumptions about chronic pain sufferers, the scheme actually reinforces them by sending the message that this condition is not 'real.' ... This message clearly indicates that, in the Nova Scotia legislature's eyes, chronic pain sufferers are not equally valued as members of Canadian society."³⁶

Both *Gibbs* and *Martin*, however, occurred in contexts different from the present cases. In those cases, the primary focus was access to insurance benefits that flowed from employment rather than employment itself. The Court did not need to contemplate what was necessary for Gibbs or Martin to remain in the workplace with their disabilities. Rather, the question concerned the fairness of the employment insurance scheme that came into effect after the decision had been made that the disabled employees should not work either temporarily or permanently. In the past, a decent level of economic support outside the workplace was the best people with disabilities could hope for. In the present cases, the plaintiffs wanted to continue working.

Even in the context of employment-related benefits, the Court has not consistently recognized the unique difficulties associated with common disabling conditions when these conditions do not fit a neat medical model. In *Granovsky*,³⁷ by way of contrast to *Martin* and *Gibbs*, the court did not find discrimination. Mr. Granovsky claimed disability benefits because of a back condition.³⁸ However,

³² *Québec (Commission des droits de la personne & des droits de la jeunesse) v. Montréal (City)*, 2000 SCC 27, [2000] 1 S.C.R. 665, [2000] S.C.J. No. 24 at para. 79 [Mercier].

³³ *Battlefords and District Co-operative Ltd. v. Gibbs*, [1996] 3 S.C.R. 566, [1996] S.C.J. No. 55.

³⁴ See *Winko v. British Columbia (Forensic Psychiatric Institute)*, [1999] 2 S.C.R. 625, [1999] S.C.J. No. 31; *R. v. Swain*, [1991] 1 S.C.R. 933, [1991] S.C.J. No. 32.

³⁵ *Nova Scotia (Workers' Compensation Board) v. Martin*, 2003 SCC 54, [2003] 2 S.C.R. 504.

³⁶ *Ibid.* at para. 105.

³⁷ *Granovsky v. Canada (Minister of Employment and Immigration)*, 2000 SCC 28, [2000] 1 S.C.R. 703.

³⁸ *Ibid.* at para. 4.

the effects of Mr. Granovsky's chronic, deteriorating and intermittent back condition had prevented him from accumulating the 10 year continuous work pattern that would qualify him for Canada Pension Plan Disability Benefits.³⁹ While the scheme made available certain "drop-out" provisions, under which periods of disability were not counted in the recency of contribution calculation, Mr. Granovsky's deteriorating back problem did not qualify as a severe and permanent disability, making him ineligible for these exemptions.⁴⁰ The Court found that there was no disability discrimination in Mr. Granovsky's case even though it was his disability that produced his sporadic work pattern and, therefore, his disability that disqualified him from receiving benefits. The Court concluded that those who experience temporary disabilities are "better off" than those with pre-existing disabilities. Again, as in *Honda*, we see the emergence of a hierarchy of legitimacy in which some disabilities are considered more legitimate, more worthy or more real than others.⁴¹

B. The Duty to Accommodate and Undue Hardship in the Context of Employment Law and Labour Law

One of the most significant questions arising from these decisions is whether the burden on the employer to prove undue hardship has been relaxed from the high standard set out in *Meiorin*. Unfortunately, the cases do not provide a straightforward answer. Rather, the Court chose to prioritize the principles of contract law, both in the context of employment law in *Honda* and in labour law in *Hydro-Québec*.

In both cases, the Court failed to provide real guidance regarding the point at which the accommodation of disability-related absenteeism becomes undue hardship, a difficult issue both in principle and in practice. The leading cases on undue hardship hold that the burden rests on the employer to prove undue hardship as the limit on the duty to accommodate. An employer is expected to be "conscientious",⁴² "serious",⁴³ and "genuine"⁴⁴ in its efforts to accommodate. Common workplace accommodations for individuals with disabilities include modified or reduced hours or days, special chairs or back supports, job redesigns, and modified or ergonomic workstations.⁴⁵ The exact meaning of undue hardship varies with the circumstances and has always been heavily dependent on the nature of the employer's operation and the plaintiff's employment. Factors that may be considered when assessing the undue hardship limit include "financial cost, disruption of a collective agreement, problems of morale of other employees, [and] interchangeability of work force and facilities."⁴⁶ An alleged hardship must be undue, meaning more than a mere nuisance or inconvenience to the employer. In *Central Okanagan School District No. 23 v. Renaud*, the Court said:

More than mere negligible effort is required to satisfy the duty to accommodate. The use of the term 'undue' infers that some hardship is acceptable; it is only 'undue' hardship that satisfies this test. ... Minor interference or inconvenience is the price to be paid for religious freedom in a multicultural society.⁴⁷

While *Renaud* was a case about religious accommodation, the Court made it clear that broad social goals require that undue hardship mean more than minor inconvenience.⁴⁸ This would certainly pertain to the inclusion of people with disabilities, especially given their underrepresentation in the workforce.

Despite the elevated position the Court has previously granted to human rights obligations, the Court did not underscore their paramountcy in these cases. Because human rights law serves to protect

³⁹ *Ibid.* at para. 5.

⁴⁰ *Ibid.* at para. 8.

⁴¹ See Fiona Sampson's case comment on this point. Fiona Sampson, "Granovsky v. Canada (Minister of Employment and Immigration): adding insult to injury?" (2005) 17 C.J.W.L. 71.

⁴² *C.U.P.W. v. Canada Post Corp.*, 1997 CarswellNat 1864 at para. 49 (Canada Arbitration Board) (WLeC).

⁴³ *Krznaric v. Chevrette* (1997), 154 D.L.R. (4th) 527 at 547, [1997] O.J. No. 4712, at para. 86 (Ont. C.J.).

⁴⁴ *Holmes v Canada (Attorney General)* (1997), (1998) 130 F.T.R. 251, [1997] F.C.J. No. 577 at para. 34.

⁴⁵ *PALS 2006*, *supra* note 7 at 18.

⁴⁶ *Central Alberta Dairy Pool v. Alberta (Human Rights Commission)*, [1990] 2 S.C.R. 489 at 521, [1990] S.C.J. No. 80 at para. 62.

⁴⁷ *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970 at 984-85, [1992] S.C.J. No. 75 at para. 19, 20 [*Renaud*].

⁴⁸ *Ibid.*

our most important values, human rights considerations are central to interpreting any piece of legislation, common law rule or contract.⁴⁹ Human rights law has a special nature that is “not quite constitutional but certainly more than the ordinary ...”⁵⁰ However, there is no indication that the majority viewed human rights in this broad social sense, reflected in *Renaud* or *Meiorin*. Rather, it was the essence of the private employment contract that was pivotal.

1. *Disability Discrimination and Unjust Dismissal*

In *Honda*, the approach of the Court was to separate completely the human rights analysis from an examination of whether the employment contract was breached. According to the majority, the Human Rights Code is a complete and self-contained system. “Thus, a person who alleges a breach of the provisions of the Code must seek a remedy within the statutory scheme set out in the Code itself.”⁵¹ The overall effect of the decision is somewhat contradictory. Although the Court upheld the finding that Mr. Keays was unjustly dismissed, the majority strongly defended the conduct of Honda, largely by rejecting an analysis that would include discrimination.

In the context of unjust dismissal, the majority in *Honda* never used the critical concepts of the duty to accommodate or the undue hardship limit. Instead of recognizing that disability discrimination was at issue in ordering Mr. Keays to see the company doctor, the case was framed as a matter of insubordination because Mr. Keays refused to do so. Human rights were addressed in a very limited way, only to determine whether discrimination could be a factor in the calculation of damages. Systematically, the majority eliminated even that possibility. As mentioned above in this comment, the majority found errors in a great number of facts found at trial, many of which had suggested discrimination upon which damages for manner of dismissal or punitive damages could rest.⁵² Without this factual foundation, there was no evidence to support a finding of discrimination. Additionally, however, the majority seemed to support the proposition that since *Bhadauria* established that discrimination was not an independent tort,⁵³ discrimination could not, in law, constitute an independent actionable wrong on which to base punitive damages.⁵⁴ In contrast to the finding of the trial judge that the monitoring system for Mr. Keays’ absences due to his “non-mainstream” disability was itself discriminatory, the majority found this system to be itself an accommodation, beneficial to Mr. Keays in the circumstances.⁵⁵ Monitoring regular absenteeism went to the very nature of the employment contract.⁵⁶ While the dissent agreed that management had the right to monitor absences, it cautioned against assuming all methods were equally non-discriminatory.⁵⁷

The failure to incorporate human rights obligations in a case of employment law involving disability is extremely problematic. Human rights tribunals had developed an extensive body of law on the right to accommodation for disabilities.⁵⁸ As demonstrated by *Honda*, however, this seemed to have little effect on this case. Human rights obligations should be viewed as implied terms of any employment contract. Implied terms have long been a part of the law of contract, and include the right to reasonable notice upon termination, the implied term at issue in *Honda*. In *Parry Sound*,⁵⁹

⁴⁹ Some light may be shed by misconduct cases involving employees with addictions in the labour law context. These decisions distinguish between culpable voluntary behaviour, non-culpable non-voluntary behaviour and hybrid misconduct. Where misconduct is non-culpable or hybrid, as in the cases of Mr. Keays and Ms. Laverrière, a human rights analysis is certainly required. See *Health Employers Assn. of B.C. (Kootenay Boundary Regional Hospital) v. B.C. Nurses’ Union*, 2006 BCCA 57, [2006] 54 B.C.L.R. (4th) 113 ; *Fraser Lake Sawmills Ltd. (Re)*, [2002] B.C.L.R.B.D. no. 390 (British Columbia Labour Relations Board).

⁵⁰ *Ontario (Human Rights Commission) v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536 at 547.

⁵¹ *Honda*, *supra* note 4 at para. 63.

⁵² See *Honda*, *supra* note 4 at para. 62; *Whiten v. Pilot Insurance Co.*, 2002 SCC 18, [2002] 1 S.C.R. 595 at para. 82.

⁵³ *Bhadauria*, *supra* note 15.

⁵⁴ *Honda*, *supra* note 4 at para. 64.

⁵⁵ *Ibid.* at para. 67.

⁵⁶ *Ibid.* at para. 71.

⁵⁷ *Ibid.* at para. 121.

⁵⁸ See generally Michael Lynk, *Disability and the Duty to Accommodate in the Canadian Workplace*, online: Ontario Federation of Labour <http://www.ofl.ca/uploads/library/disability_issues/ACCOMMODATION.pdf>.

⁵⁹ *Parry Sound (District) Welfare Administration Board v. O.P.S.E.U., Local 324*, 2003 SCC 4, [2003] 2 S.C.R. 157 [*Parry Sound*].

the Court gave jurisdiction to arbitrators to decide human rights issues and held that the substantive rights and obligations of the Ontario *Human Rights Code* were incorporated into collective agreements. As Iacobucci J. for the majority stated: “[H]uman rights and other employment-related statutes establish a floor beneath which an employer and a union cannot contract.”⁶⁰ There is no justification for restricting this principle to unionized employees. Obligations in the employment contract simply cannot be considered apart from human rights obligations.

LeBel J., speaking for the dissent in *Honda*, recognized that even damages for the breach of an employment contract must be considered in view of the values of human rights codes and the *Canadian Charter of Rights and Freedoms*. These considerations should not represent a separate or secondary inquiry but should be combined into one integrated inquiry. LeBel J.’s analysis exemplified this integrated approach. For instance, the dissent acknowledged that, while monitoring absences of disabled employees is a valid objective for any employer, it should not be assumed that all methods are acceptable and non-discriminatory. LeBel J. also recognized that sending Mr. Keays to Dr. Brennan, in view of his perspective on “non-mainstream” conditions, was intended to serve the interests of the employer rather than to promote inclusivity in the workplace. He said:

Dr. Brennan’s objective is to recommend the “accommodation” that is best for Honda, not the one that is best for the employee. Although he suggests that he is only giving a “medical” opinion, his opinion is focussed on maximizing an employee’s productivity for Honda in light of the employee’s condition. His goal is clearly not to find ways for Honda to make it easier for the employee to do his or her current job.⁶¹

2. *Undue Hardship and the Fundamental Nature of the Employment Contract*

By way of contrast, the Court in *Hydro-Québec* claimed that it was dealing squarely with the human rights analysis by refining the phrase “impossible to accommodate”, taken from *Meiorin*. Nevertheless, the decision rested ultimately on the employment contract. *Hydro-Québec* was a grievance decided in the context of labour relations arbitration, where the collective agreement is the central concern of both parties. In this context, the principles of longstanding importance to the parties, such as management rights for the employer and seniority for the union, may take precedence over the creation of an inclusive work environment.⁶² Unlike the mandate of human rights tribunals, where the promotion of diversity, dignity, and inclusion form the *raison d’être* of the decision-making process, arbitrators are concerned with the interpretation of a collective agreement with a background of an ongoing relationship between the parties.

In *Hydro-Québec*, the Court described the goal of accommodation as ensuring that “an employee who is able to work can do so”⁶³ or, more specifically, that those who are “otherwise fit to work are not unfairly excluded where working conditions can be adjusted without undue hardship.” In setting out the undue hardship limit, the Court pointed to the fundamental nature of the employment contract as the exchange of labour for wages. Since Ms. Laverrière failed to meet these basic obligations, even after significant attempts at accommodation, the employer had shown that it was impossible to accommodate her without incurring undue hardship. Adopting the words of Thibault J. in *Québec (Procureur général) v. Syndicat des professionnelles et professionnels du gouvernement du Québec (SPGQ)* the Court stated that “it is less the employee’s handicap that forms the basis of the dismissal than his or her inability to fulfill the fundamental obligations arising from the employment relationship.”⁶⁴

One interpretation of this decision is that the fundamental terms of an employment contract now make up the standard for undue hardship. Another related possibility is that the terms of the employment contract help interpret the undue hardship limit. This is similar to the approach taken in

⁶⁰ *Ibid.* at para. 28.

⁶¹ *Honda*, *supra* note 4 at para. 100.

⁶² Of course, this criticism does not apply to the human rights decisions of all arbitrations. In fact, *Meiorin*, *supra* note 1, was decided by an arbitrator in the first instance.

⁶³ *Hydro-Québec*, *supra* note 5 at para. 14.

⁶⁴ *Ibid.* at para. 18 citing approvingly and translating from *Québec (Procureur général) c. Syndicat des professionnelles et professionnels du gouvernement du Québec (SPGQ)*, 2005 QCCA 311, 2005 R.J.Q 944 at para. 76.

*McGill University Health Centre (Montreal General Hospital) v. Syndicat des employés de l'Hôpital général de Montréal*⁶⁵ where the collective agreement specified the period when dismissal could follow after a lengthy absence. Because the parties to a collective agreement are knowledgeable about the enterprise and the workforce, such a term is useful, but not definitive. The majority held that a provision in a collective agreement should be one factor in determining whether the employer had satisfied the duty to accommodate, but this could not substitute for a case by case analysis.⁶⁶

In *Hydro-Québec* the Court explicitly drew the connection between undue hardship and the fundamental terms of the contract in the context of chronic absenteeism. Deschamps J. said:

In a case involving chronic absenteeism, if the employer shows that, despite measures taken to accommodate the employee, the employee will be unable to resume his or her work in the reasonably foreseeable future, the employer will have discharged its burden of proof and established undue hardship.⁶⁷

Here the Court was quite clear that the duty to accommodate did not go so far as requiring that the fundamental nature of the employment contract be altered. That is, the employer is entitled to some benefit for the wages paid to the employee. Although this general principle may be correct, it leads to a number of thorny questions. Does this elision of undue hardship with the fundamental nature of the employment contract apply only to absenteeism? What is the minimum obligation of the employee to “perform work” as per the employment bargain? Is it enough for an employee to merely show up at his or her place of work? How frequent must his or her attendance be? Can employers claim that a fundamental term of the contract is the production of a certain number of widgets? These questions are particularly pertinent to employees with disabilities and raise the question of whether the fundamental nature of the employment contract is itself subject to accommodation.

The decision in *Hydro-Québec* reflects the idea that an employer should not be required to bear the cost of an employee from which there is no benefit at all to the enterprise. In my view, this principle is correct. However, it is important to recognize that this case still sets a very high standard for the undue hardship limit. The extreme nature of the facts here must be underscored. Ms. Laverrière had not been at work for many months and was not expected to return in the foreseeable future. Over several years the employer had undertaken significant measures to accommodate Ms. Laverrière, going so far as the creation of a new job for her after corporate restructuring. While there was some difference of opinion among experts, it was clear that certain issues, such as the stresses within Ms. Laverrière’s family that contributed to her absenteeism, were completely outside the control of the employer. Thus, the limit described here is met where an employee is absent, does not perform any work at all for a protracted period of time, and expects no change in the foreseeable future despite extensive efforts at accommodation.

While the undue hardship limit here may be appropriate on these facts, it reveals an important policy consideration given the drastic statistics concerning people with disabilities and employment. While private employers should not shoulder the entire cost when the requirements for accommodation are extreme, persons with disabilities who want to work should have the opportunity to do so. Rather, there should be a shared responsibility between both the public and private sectors. For everyone, the significance of employment is multi-faceted, with dimensions of economic security, personal satisfaction and social validation. For this reason, the spirit of anti-discrimination law should require extensive public support for employers to hire and retain employees with disabilities in such circumstances.⁶⁸

⁶⁵ *McGill University Health Centre (Montreal General Hospital) v. Syndicat des employés de l'Hôpital général de Montréal*, 2007 SCC 4, [2007] 1 S.C.R. 161, [2007] S.C.J. No. 4.

⁶⁶ *Ibid.* at para. 20. As the majority explains:

The period negotiated by the parties is therefore a factor to consider when assessing the duty of reasonable accommodation. Such clauses do not definitively determine the specific accommodation measure to which an employee is entitled, since each case must be evaluated on the basis of its particular circumstances.

⁶⁷ *Hydro-Québec*, *supra* note 5 at para. 17.

⁶⁸ It is beyond the scope of this comment to outline the possibilities, but these could include wage subsidies to employers, a taxation system or an externally funded service to the employer community

CONCLUSION

In many ways, *Meiorin* was an easy case. Tawney Meiorin was a female forest firefighter who had worked at her job competently and without incident. The case dealt with formal equality in that it revolved around the exclusionary effect of a fitness standard that was set for all employees regardless of gender. *But for* the rule that excluded the complainant as a result of a physical fitness standard developed for men, Meiorin had demonstrated that she was perfectly proficient at her job. Only an arbitrary standard was the obstacle. The remedy did not require any change in the job description or re-organization of the workplace. The only change necessary was a revision of the standard, a change that caused no disruption and incurred absolutely no cost to the employer.

At best, the decisions in *Honda* and *Hydro-Québec* suggest that the Court has failed to clarify how the *Meiorin* vision applies to disability cases in employment. Outside of the specialized human rights decision-making process, the Court has marginalized the human rights dimensions of a wrongful dismissal action and left unanswered critical questions in the interpretation of a collective agreement. The Court has confounded undue hardship with the fundamental principles in an employment contract without having considered fully the nature of the contract in the disability context. At worst, the cases suggest that an employer needs to pay little attention to accommodating employees with disabilities if it is too difficult. This is especially true if the disability arises from a condition that is non-specific, difficult to treat, or where there is poor foreseeability regarding prognosis. Further, employers can require endless confirmations of disability even when these run roughshod over the individual employee. Medical expertise can be used to legitimate the exclusionary agenda of the employer. This was not the *Meiorin* vision of an inclusive workplace.