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**ILLNESS AND DISABILITY
IN THE WORKPLACE**

Bennett Jones LLP

Release No. 57, March 2019

What's New in This Update:

This release updates chapters: 3 (The Union Employee), 4 (Human Rights Legislation) and 6 (Workers' Compensation and Other Statutory Benefits).

Case Law Highlights

Of the new case law discussed in this release, the following are of note:

- **The Union Employee – Illness and Disability Benefits Under the Collective Agreement – Short-Term and Long-Term Disability Benefits** – Sick pay is intended to replace regular earnings, not extraneous monies such as overtime pay - If a person who is receiving short term disability benefits is suspended from employment without

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pay, this raises the question of whether he is entitled to continue receiving short-term benefits, since he is no longer entitled to receive his regular wages - Ontario arbitrator determined that, where the right to STD benefits has crystallized and the entitlement to benefits has already vested before the employee is suspended, then indeed he is entitled to ongoing STD benefits: University of Windsor and WUFA (Pandher), Re, 2018 CarswellOnt 20837 (Ont. Arb.).

- **The Union Employee – Alcohol and Drug Addiction – Employer Rules and Policies** – The employer’s prerogative to develop and implement a substance abuse policy in the workplace is not unfettered - Any such policy which oversteps the employer’s authority by trampling employee rights will not be enforceable - Case in point, employers are not permitted to draft policies allowing them to search employee personal effects in the workplace, nor to collect and use employee personal health information for unrelated purposes: Interior Health Authority and HEU (Substance Use Disorder Policy), Re, 2018 CarswellBC 3242 (BC Arb.).
- **The Union Employee – Safety Concerns and Medical Fitness** – Employer sought to introduce mandatory cognitive testing requirement upon all employees - Employees claimed that policy was intrusive and violated their privacy - Arbitrator agreed - The policy failed to adequately balance the employer’s need to safely operate its buses with the privacy rights of the employees and the intrusion upon same represented by the test - A unilaterally imposed test which requires substantive cognitive evaluation of all employees was found to be an overreach of the employer’s authority such that the policy was unenforceable: ATU, Local 569 and Edmonton (City), Re, 2018 CarswellAlta 1859 (Alta. Arb.).