

Member's Quarterly

Fall 2019 Edition

Feature

A Sober Reminder: Duty to Accommodate Substance Use Disorders

Consider potential addiction before termination

Employers face challenges accommodating employees on a regular basis. While the legalization of recreational cannabis has attracted significant focus in recent months, it is important to remember that employers continue to face a myriad of substance abuse issues in the workplace.

In *Canadian Pacific Railway v Teamsters Canada Rail Conference*, 2019 CanLII 8545 (CA LA), a locomotive engineer was dismissed after the train he was operating was involved in a collision. Fortunately, passengers or by-standers were not injured. After arriving on the scene, police smelled alcohol on the employee and requested a breath sample, which resulted in a BAC reading of greater than 0.08. The employee was charged criminally and pleaded guilty. An investigation revealed that the employee brought a bottle of whiskey onto the train and drank some of it while operating the train prior to the collision. The investigation also revealed that the employee had suffered tragedies in his life and used alcohol to cope. The employer dismissed the employee for violating the company alcohol and drug policy and for using and possessing an intoxicant while subject to duty.

The union grieved the employee's dismissal and argued that employer failed to consider mitigating factors revealed during the investigation, that discipline was excessive in the circumstances and that the employer failed to accommodate the employee who suffered from mental health issues including severe alcohol use disorder. In response, the employer took the position that dismissal was justified in the circumstances and that the employee's alcohol dependency came to light *after* the incident, and that the medical evidence disclosed to substantiate the employee's alcohol dependency was provided *after* the dismissal. The arbitrator found that (1) the union had established *prima facie* discrimination as the employee suffered from a disability (addiction); (2) he suffered an adverse impact (termination of employment); and (3) his addiction was a factor leading to the adverse impact. The employee was reinstated to his former position with a number of restrictions.

Substance use issues also played a role in another recent case involving prescription painkillers. In *Regional Municipality of Waterloo (Sunnyside Home) v Ontario Nurses' Association*, 2019 CanLII 433 (ON LA), the employee was an RN working as a Team Leader at a long-term care facility when her employment was terminated for theft of narcotics and misconduct related to protocols. For a 2-year period prior to the termination of her employment, the employee would steal narcotics from her employer, falsify reports and records and use the narcotics herself while at work. The employee denied any involvement in the incidents and did not disclose any substance abuse issues initially, but admitted misconduct and addiction issues later on in the investigation just prior to termination.

As required by law, the employer advised the College of Nurses and the employee was then prohibited from practising for a period of time. Following the completion of an

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in-patient treatment program and continued treatment regime, the College of Nurses permitted the employee to return to practice with a number of conditions including:

- compliance with treatment regime
- restriction on access to narcotics
- restriction on administering narcotics
- restriction on working only in a setting where practice could be directly observed
- requirement of a workplace monitor and workplace supervisor

The union grieved the termination of employment. There was no dispute between the parties regarding the employee's substance abuse issue or that the severity of the misconduct as having justified termination of employment. The only issue to be decided by the arbitrator was whether the employer discriminated against the employee and if so, whether the employer could accommodate the employee to the point of undue hardship.

The union argued that *prima facie* discrimination was established and that the employer failed to demonstrate that it could not accommodate the employee without suffering undue hardship. In response, the employer took the position that *prima facie* discrimination was not established because the employee's disability was only disclosed after the misconduct had occurred and that it was not a factor in the decision to dismiss the employee. The employer also argued that the employee could not fulfill *bona fide* occupational requirements of her job. Specifically, the employer maintained that it could not comply with the conditions imposed by the College of Nursing given the presence of narcotics on site, the employee's need to work independently in her position, the employer's inability to guarantee observation and the lack of an appropriate workplace monitor and supervisor.

The arbitrator found that *prima facie* discrimination had been established because the employee's ability to comply with the workplace norm (not stealing and not falsifying records) had a discriminatory impact on her because her disability interfered with her ability to comply with those norms.

The arbitrator rejected the employer's argument that it could not accommodate the employee without suffering undue hardship. The arbitrator also found that the employer violated its procedural duty to accommodate the employee by failing to consider any accommodation and failing to inquire with the employee about a potential disability when they received reports of concerning behaviour. The arbitrator highlighted the fact that the employer's opinion that it would be impossible to accommodate the employee was based on the employer's current organization of the workplace and did not investigate how changes could be made to potentially accommodate the employee. The employee was reinstated with accommodation and awarded general damages and compensation for losses.

These cases serve as a strong reminder to employers that in situations where drugs (legal or illegal) or alcohol are involved, employers must consider the potential issue of addiction before taking any further action. Substance use issues are a disability under human rights legislation and employers should take the time to make inquiries as to whether addiction is at play in order determine the most appropriate action to be taken.

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