

# Toronto mayor talks tough on termination

## *Can city employees be terminated for fraudulent drug claims?*

BY ANDREW BROWN

A RECENT report by City of Toronto Auditor General Beverly Romeo-Beehler revealed millions of dollars paid out for allegedly fraudulent drug claims submitted by City of Toronto employees. In response to the report, Mayor John Tory declared: "I would suggest that termination (is) an appropriate kind of penalty for that sort of thing because we cannot, in a circumstance where we're trustees of the public's money, allow it to (be) abused whether it's for Viagra or any other drug or any other purpose whatsoever."

A bold statement, no doubt with the best of intentions. Serious misconduct should be met with serious consequences. Unfortunately, as many employers know, even serious misconduct such as fraud does not always result in termination for cause. Each case must be decided on its own merits, weighing a variety of factors.

The audit report revealed a number of "red flags" relating to the way the city managed its extended health and dental benefits plan. For example, five employees claimed more than \$5,000 for sex-enhancing drugs in a single year, while 37 employees claimed more than \$3,000. As well, 348 employees received multiple reimbursements for the same drugs, prescribed the same day by a variety of doctors. The concern is that employees were de-

frauding the system to obtain large quantities of drugs to sell illegally to the public.

Generally, to terminate an employee for just cause, an employer must demonstrate the employee either violated an essential term of the employment contract or breached the good faith and loyalty inherent in an employment relationship.

While a fraudulent drug claim is a serious act of misconduct, it won't always justify termination for cause. There is a range of mitigating factors which, taken together or independently, can call into question the suitability of termination. These include:

- Clean disciplinary record.
- Admission of misconduct and sincere remorse.
- Addiction is a recognized disability in Canada and employers have a duty to accommodate it to the point of "undue hardship" (significant difficulty on the employer), including the symptoms of addiction such as theft or dishonesty. Accommodation may include rehabilitation treatment and a return-to-work plan.
- Failure by the employer to consistently discipline other employees for the same misconduct.

Consider the case of *Sunnybrook*

*Health Sciences Centre and ONA (SB13-04), Re.* A nurse was terminated after a workplace investigation determined that, over a two-year period, she had stolen narcotics for personal use. The nurse also altered patient medical records to obtain the narcotics, worked under the influence of narcotics, and exposed patients to increased risk. Following termination, the nurse notified her employer she suffered from addiction for which she was receiving treatment. She filed a grievance alleging her termination was discriminatory because the misconduct for which she was punished was caused by a disability.

The arbitrator found the termination was discriminatory. He directed the employer to reinstate the nurse and explore whether she could successfully work under modified duties or in a new position. The arbitrator relied extensively on the evidence of addiction experts who described how addiction can impair the ability to control cravings, causing addicts to steal in pursuit of drugs. The experts also testified addicts suffer from a heightened sense of shame, resulting in reluctance to disclose addiction and seek treatment.

**If there is a criminal proceeding** In addition to termination, an employee discovered to have commit-

ted fraud may be exposed to criminal sanction. This was suggested by Romeo-Beehler, who said a criminal investigation may be launched to identify offending city employees. Where there is a criminal proceeding, an employer may choose to suspend the employee with pay pending the results. If charges are laid and upheld, the employer will generally have a stronger case for termination.

### Lessons for employers

While fraud is the type of misconduct which often justifies termination, this is not always so. The City of Toronto will have to evaluate the circumstances of each case to determine whether the fraudulent activity justifies termination or a lesser sanction (if any). Accordingly, while Mayor Tory's outrage may be justified, his enthusiasm for termination may be premature — at least for now. See *Sunnybrook Health Sciences Centre and ONA (SB13-04), Re.*, 2016 CarswellOnt 14836 (Ont. Arb.).

---

*Andrew Brown is a lawyer with Sherrard Kuzz LLP, a management-side employment and labour law firm in Toronto. Andrew can be reached at (416) 603-0700 (Main), (416) 420-0738 (24 Hour) or by visiting [www.sherrardkuzz.com](http://www.sherrardkuzz.com).*