

# Not all addiction is created equally

## *Ontario arbitrator departs from precedents in finding addiction isn't automatic defense for stealing drugs in a medical workplace*

BY ASHLEY BROWN

**IN A RECENT DECISION**, *Cambridge Memorial Hospital and ONA (M. (S.))*, Re, Ontario arbitrator Dana Randall upheld the discharge of a drug-dependent nurse with 28 years of service and no disciplinary record who was caught stealing narcotics from her employer. The decision is significant because it deviates from a string of arbitration decisions in Ontario which appear to support the proposition that a nurse who pleads and proves an addiction to a particular drug, and successfully commits to rehabilitation, has a human rights defense to termination for stealing that drug from her employer. One arbitrator referred to this defense as a “get out of jail free card.”

### What happened?

For several years, an experienced registered nurse stole and personally consumed narcotics from the hospital where she worked in Cambridge, Ont. In some cases she diverted prescribed painkillers to herself from patients under her care and falsified medical records. The hospital dismissed the nurse, for cause, and the union grieved.

The hospital argued the nurse's actions constituted a fundamental breach of trust and serious criminal misconduct justifying dismissal for cause. Although there was evidence the nurse was addicted to the narcotics, that evidence did not demonstrate the addiction was so strong it caused the criminal misconduct. Instead, said the hospital, this was a case of a nurse who, while she may have been addicted, should nevertheless control and moderate her use. By way of example:

- The nurse never used at work
- The nurse never used on family vacations — some lasting two weeks in length
- There were no outward signs of dependency in the workplace

- There were no workplace performance issues related to dependency
- The nurse never came to the hospital, off-shift, to look for drugs

There was also a lack of remorse in that, despite having admitted wrongdoing, even after participating in rehabilitation, the nurse never admitted to the full extent of her misconduct.

The union argued the nurse's misconduct was not so egregious as to justify dismissal. Patients had not been put at risk (the nurse had not used drugs while on shift), nor had the nurse come to the hospital off-shift to steal drugs. Furthermore, she had demonstrated a commitment to rehabilitation and was unlikely to relapse.

### Addiction didn't compel nurse's behaviour

The arbitrator agreed with the hospital and dismissed the grievance on the basis the addiction was not so strong it caused the criminal misconduct. In other words, there are degrees of addiction, and this nurse's addiction was not compulsive. Rather, she had made conscious decisions for which she should be held accountable. The arbitrator also cast doubt on the soundness of the line of Ontario cases which appear to stand for the proposition that, in a case like this, addiction is a complete defense.

The arbitrator articulated a nuanced approach to cases of narcotic addiction and theft: one that carefully considers each case on its merits, and does not assume addiction means the inability to make decisions, exercise free will or to be held accountable. The arbitrator elaborated:

“I don't accept that pleading an addiction to the drug being stolen, which is to say, establish a nexus between the addiction and the misconduct, is, in itself, a defense to termination. Put differently, it is not prima facie evidence of discrimination... “... there are degrees of addiction. The

(nurse's) addiction, based on her own evidence, was not compulsive. She did not use at work. She went on vacation for one or two weeks without using. She suffered little or no withdrawal when going off the percocets. ... (The doctor) testified that the (nurse) had a serious addiction, but he was quick to admit that he was a patient advocate.

“My findings distinguish this case from most of the awards which make up the arbitral consensus in Ontario. Many of those rely on the compulsive nature of an addiction, which compulsion I have found is not sufficiently evident here...”

“While not requiring an employee to meet the criminal defense of being ‘unable to appreciate or understand the nature and quality of their actions,’ in my view, that standard is relevant to cases of this kind. On her own evidence, the (nurse) acknowledges that she cannot bring herself close to that standard.”

The court also noted the importance of the role dismissal plays in serving as a warning to others who might consider similar misconduct.

“I would be remiss to not mention my concern with respect to general deterrence,” the arbitrator said. “At a time when opioid addiction is rampant in the culture and a major issue for healthcare professionals, sending the message that pleading addiction, only after being caught stealing one's drug of choice, should be strongly deterred.”

Perhaps this decision is the start of a new, more practical and realistic line of cases which will benefit employers in all industries. Developments should be followed closely in the event of an appeal to see where it ends up.

### For more information see:

- *Cambridge Memorial Hospital and ONA (M. (S.))*, Re, 2017 CarswellOnt 930 (Ont. Arb.).