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Transit Employee's Addiction No Excuse for Theft

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An employer's understanding of its human rights obligations can sometimes undermine its willingness to act proactively in a challenging set of circumstances. Particularly when an employee suffers from a disability the concepts *accommodation* and *undue hardship* can leave even the most experienced human resources professional unsure of what to do. Can the employee be disciplined for misconduct related to the disability? Must the misconduct be treated as without blame. This struggle is intensified when the disability is addiction.

As a general rule, an employee with a disability is protected by human rights laws from adverse treatment by the employer for workplace issues related to, or caused by, the disability. For example, it would be a human rights violation if an employee's cancer treatment causes a prolonged absence and an employer treats the absence as misconduct and terminates the employee.

On the other hand, where the disability is addiction and the employee demonstrates behavioural, performance or attendance issues, the line between discipline accommodation is often becomes blurred.

An employer *can* discipline a 'disabled' employee

The good news for employers is there are circumstances in which an employer is *entitled* to discipline an employee despite the employee's claim a disability (addiction) caused certain acts of misconduct.

Consider the recent case of *Toronto Transit Commission and Canadian Union of Public Employees and its Local 2 (M.P. Grievance)*. In that case an employee, who happened to be the union president, was fired for stealing from the *TTC* copper wire with a street value of \$500.00. The employer and police investigation revealed the following facts:

- The employee had ordered copper wire to be delivered to his worksite in the ordinary course of his job duties as a journeyman electrician.
- Upon arrival, the employee stole the copper wire and – a few weeks later - left his jobsite (without clocking out) drove to a recycling yard and sold the stolen goods.
- The employee had stolen wire on two previous occasions each time selling the goods for approximately \$300.
- The employee had once returned safety boots *after* receiving a \$320 boot allowance which was paid on the understanding he had purchased the boots.

As a result of the investigation, criminal charges were laid against the employee; and, as part of a plea agreement, he received two years' probation and was ordered to stay off non-public TTC property without a union representative or counsel present. He was also terminated from his employment for just cause.

The termination was grieved by the union on the basis the employee was suffering from several addictions at the time he committed the thefts including an addiction to cocaine which, the union argued, prompted the thefts. In the union's view, the termination could not stand because it was the employee's disability (addiction) which *caused* the misconduct and was therefore subject to accommodation, not discipline.

Did the disability cause the misconduct?

At the arbitration hearing the parties agreed the employee had stolen and resold the wire for personal profit. It was also undisputed an addiction to cocaine, if established, constituted a recognized disability under the *Human Rights Code*. The issue before the arbitrator was whether the addiction had *caused* the misconduct: in other words, whether the theft was a manifestation of the employee's cocaine addiction and if so whether the disability was a factor in the employer's decision to terminate.

The arbitrator found there was no connection between the theft and the addiction. Using the employee's own bank records, the TTC demonstrated *at all material times* the employee had enough cash in his bank account to buy cocaine without having to resort to theft. As such, the TTC argued, it was not the addiction that 'made him do it' but rather the employee's preference to *steal* money to pay for the cocaine rather than spend his own money. Seen this way, the decision to steal was not a compulsive manifestation of his need to obtain money for cocaine, but rather a conscious choice to commit a theft. As the arbitrator said, "*The only connection between the theft and the cocaine addiction is the fact that the grievor used the money he received for selling the stolen copper wire ... to purchase an eight ball of cocaine. As noted earlier the use of that money was a choice the grievor willingly made instead of using his own money that he had readily available*".

On that basis the arbitrator held the termination could not be connected to the disability. The grievance was dismissed and the termination upheld.

Lessons learned for employers

When misconduct has taken place and an employee attempts to avoid discipline by linking his or her actions to an alleged disability, an employer should not assume its hands are tied. As the TTC case demonstrates, the allegation of a disability – even the finding of a disability (in this case, an addiction to cocaine) – is not in and of itself sufficient to thwart discipline. There must be a meaningful connection between the disability alleged and misconduct at issue.

To determine whether such a connection exists every employer should have in its arsenal proactive protocols to investigate disability related claims. By having these protocols an employer will have put itself in the best position to effectively manage its workplace and, if necessary, defend against an allegation it has discriminated on the basis of a disability. Issues to consider include:

- What disability is the employee claiming?
- Did the disability exist at the relevant time?
- What medical evidence of the disability has been presented?
- Is the medical evidence sufficient?
- What non-medical evidence would be relevant?
- Has the employee demonstrated a sufficient connection between the disability and misconduct?

To learn more, or for assistance developing policies and practices to strategically address disability related issues, please contact a member of the Sherrard Kuzz LLP team.

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