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*Employment and Labour Law Update*

SHERRARD KUZZ LLP
*Employment & Labour Lawyers*

# Nurse steals narcotics to support addiction – Reinstated by arbitrator

Most employers know addiction to drugs or alcohol is a recognized disability in Canada, and an employer has a duty to accommodate that disability to the point of undue hardship. What some employers may not know is that even when addiction causes serious misconduct such as theft and dishonesty, or where it risks the health and safety of others, accommodation may still be required.

This issue was addressed in a recent Ontario arbitration in which repetitive theft of narcotics by a nurse was found to be a symptom of her addiction, warranting accommodation, not termination.

## What Happened?

In *Ontario Nurses' Association and Sunnybrook Health Sciences Centre*, a nurse was discharged from her employment after a workplace investigation determined that, throughout a two year period, she had been stealing narcotics for personal use. The nurse was also discovered to have altered patient medical records (to obtain the narcotics), worked under the influence of narcotics, and exposed patients to increased health risks.

Following her discharge, the nurse notified her employer she suffered from an addiction for which she was seeking treatment. She filed a grievance alleging her discharge was discriminatory because the misconduct for which she was punished was caused by her disability (*i.e.,* addiction).

## The Arbitrator's Decision

The arbitrator concluded the discharge was discriminatory and directed the employer to reinstate the nurse and explore whether she could successfully work under modified duties or in a new position altogether. The arbitrator relied extensively on the testimony of addiction experts who described how addiction can impair an addict's ability to control cravings causing them to steal in pursuit of drugs. The experts also testified that addicts suffer from a heightened sense of shame resulting in reluctance to disclose addiction and avoidance of treatment.

## Lessons for Employers

While theft and the falsification of documents is the type of gross misconduct which often justifies discipline, including discharge, discipline may not be warranted where misconduct can be attributed to

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an addiction-based disability. The requirement to accommodate the symptoms of a drug or alcohol addiction can occur in any industry or organization. It is therefore important for employers in every industry to understand how to properly manage drug or alcohol abuse without discriminating against an employee on the basis of an addiction-based disability.

Consider the following best practices:

**Step 1: Identify Signs of Addiction**

There are several indicators which may suggest an employee suffers from addiction. Not every indicator will apply to every employee, and some employees will not demonstrate any indicators. Nevertheless, an employer should be alert to the following:

- **Lateness:** Failure to attend work on time, prolonged breaks and difficulty meeting deadlines. This may be particularly pronounced on or around pay day.
- **Absenteeism:** Leaves work early without permission or is regularly absent from his work station. This too may be more prevalent on or around pay day.
- **Reduced work quality and productivity:** A greater number of performance errors and/or repeated instruction to perform a task.
- **Changes in mood and functioning:** Unexplained memory lapses, operates in a dissociative state, or behaves aggressively.
- **Isolation:** Isolation from colleagues and/or personal grooming habits degenerate.

**Step 2: Verify the Disability**

If there is reason to suspect addiction or, as in this case, the employee comes forward to disclose addiction, steps should be taken to verify the existence of a disability. This will include consulting with the employee and union (if applicable), and obtaining sufficient information from a medical professional as to the nature of the disability and whether and how accommodation may be implemented.

The employee and union have a positive obligation to participate in this process, failing which there may be grounds for discharge. If the employee fails or refuses to cooperate, or if the medical professional is unwilling or unable to provide sufficient information, consult with experienced employment counsel.

**Step 3: Accommodate the Disability**

Once verified, the duty to accommodate is triggered. This must be tailored on a case-by-case basis. An accommodate plan might include job-protected leave to seek treatment, often including more than one leave to accommodate anticipated relapse. The employer generally does not have to pay for the treatment program although some benefit plans may provide disability payments to the employee.

Once treatment has been completed the parties must develop a return to work plan which may include modified duties and/or transferring the employee to a position where he or she does not have access to the addictive substances. The plan may also include regular drug or alcohol testing to monitor the employee's condition and confirm there has been no relapse.

In a unionized setting the employer, employee and union are each required to participate in the accommodation process. The employer has a duty to explore all reasonable accommodation. The employee has a duty to attempt to work in the accommodated job unless doing so would jeopardize health and safety. The union has a duty to waive aspects of a collective agreement, such as a job posting, if accommodation cannot be achieved through any other means.

**Step 4: When the Duty to Accommodate Ends**

The duty to accommodate may come to an end when the employee is no longer under a disability, or accommodation amounts to undue hardship to the employer.

The term "undue hardship" is open to interpretation and varies depending on the nature of the workplace and disability. Under some human rights legislation, an employer may only successfully argue undue hardship on the basis of health and safety and/or financial cost. However, adjudicators have clearly stated cost alone will not be considered undue hardship unless it impacts the viability of the organization. As such, cost is rarely a deciding factor in accommodation cases. More often, undue hardship arises where a genuine attempt to accommodate has proven futile, a health and safety issue cannot be resolved, or the employee refuses to participate in the process.

## Final Thoughts

Navigating the world of addiction disability is never easy. However, with a well-drafted drug and alcohol policy (outlining expectations and potential discipline and the employer's commitment to accommodating addiction-based disability), and by following best practices, employers can appropriately protect themselves and their employees.

*For assistance developing an appropriate drug and alcohol policy, and/or addressing accommodation issues impacting your workplace, contact the employment law experts at Sherrard Kuzz LLP.*

# DID YOU KNOW?

An Ontario government report recommends the *Employment Standards Act* pregnancy and parental leaves be replaced by pregnancy "first parent" and "second parent" leave (called "Shared Parental Leave"). Allocated on a "use it or lose it" basis, if implemented, one parent could no longer take the *entire* pregnancy and parental leave period.

*To learn more, contact a member of Sherrard Kuzz LLP.*

# *"Are we exclusive?"*

## *The latest on Dependent Contractors*

If your company requires a third party contractor to not provide services to any other company, you may have created a dependent relationship and exposed yourself to unforeseen liability on termination of the relationship. Here's why…

A worker is either an *employee* or *independent contractor*. While an *employee* frequently enjoys benefits and is entitled to notice of termination, an *independent contractor* is in business for itself and typically has a commercial arrangement permitting termination of services on specified notice or a fixed term.

However, there is a class of contractor, between employee and independent contractor, known as a 'dependent contractor'. A dependent contractor is considered so beholden to a company it has termination entitlements similar to an employee. The rationale for this entitlement is the economic vulnerability of a contractor that depends heavily on one company for income; even more so where the contractor is prevented from offering services to any other company. *Exclusivity* is therefore an important factor in determining whether a contractor is independent or dependent. However, as the Court of Appeal for Ontario confirmed this year[1], the analysis regarding exclusivity is not as straightforward as first thought.

### The Dependent Contractor

Lawrence Keenan and his wife, Marilyn, worked as employees for Canac Kitchens Limited ("Canac") since 1976 and 1983, respectively. In 1987, the company informed the Keenans their employment relationship was over but they would be entering into new arrangements to continue doing business with Canac as independent contractors. At Canac's request the Keenans carried on business under "Keenan Cabinetry" doing the same work as before.

In 2007, Canac's business slowed significantly. Although the Keenans viewed their agreement with Canac to be exclusive, to supplement their income, they began providing services to Cartier Kitchens (to the knowledge of Canac), a competitor of Canac. The breakdown of income derived by the Keenans from the two companies was as follows:

2007: *Canac* - 80.0%; *Cartier* - 20.0%

2008: *Canac* - 66.4%; *Cartier* - 33.6%

2009: *Canac* - 72.6%; *Cartier* - 27.4%

In 2009, Canac closed its operations. At the time, Mr. Keenan was 63 years of age and had provided services to Canac for 32 years, while Mrs. Keenan was 61 years of age and had provided services to Canac for 25 years. Canac was of the view the Keenans were independent contractors and provided them no advance notice of termination or pay *in lieu* thereof.

In the subsequent lawsuit the trial judge found the Keenans to have been dependent contractors, averaged their years of service, and awarded them 26 months' notice. Canac appealed the decision on several grounds, including that the relationship between Canac and the Keenans lacked the exclusivity required to find dependency.

### Exclusivity

For a worker to be considered a dependent contractor there must be a relationship of exclusivity, or near exclusivity. Canac argued the trial judge was wrong to find the Keenans were dependent contractors because they did not work exclusively for Canac in the two years immediately preceding termination. The Court of Appeal agreed in principle, but rejected Canac's "snapshot approach" of looking only at the last two years of the arrangement. Instead the court looked at the full history, including that services to Canac's competitor, Cartier, were provided for a relatively short period of time and in specific response to the slowing of work from Canac.

The decision in *Keenan vs. Canac* represents a softening of the principle of exclusivity, but affirms the significance of economic dependency. As such, even where a worker is properly characterized as a contractor and may have other customers, the employer must honestly assess whether the relationship is one of significant economic reliance such that the contractor will be considered 'dependent'.

### Lessons for Employers

When assessing whether an independent contractor arrangement is appropriate, savvy companies understand getting it "wrong" can result in liability for tax withholding, failure to remit CPP and failure to have WSIB coverage, to name a few areas of liability. However, the **termination obligation is often the undetonated landmine** – catching many companies by surprise. The flexibility to end the relationship is often one of the primary reasons to have an independent contractor arrangement. Yet it is the very structure that affords flexibility and limits post-engagement obligations that can be the source of significant liability.

### How to Protect the Employer

If the relationship needs to be exclusive (or creates significant economic dependence) exposure can be contained by a written agreement stipulating entitlements to notice upon termination and/or defining a fixed term. Although a fixed term may not be workable in every situation, in some circumstances setting the parameters for the longevity of a relationship may help protect against a claim of dependence.

Alternatively, if a company does not need exclusivity an agreement can be prepared which creates a monitoring mechanism to ensure the company has the information it needs to make strategic business decisions (such as amending the agreement with the contractor). For example, the agreement can require the contractor to: (a) ensure a majority of its business is derived from other sources; and (b) advise the company if, in any fiscal period (*e.g.*, quarterly or annually), the services provided by the contractor to the company account for at least 50% of the contractor's revenue.

As always, one of the best ways to manage liability is an enforceable written agreement between the parties.

[1] *Keenan v. Canac Kitchens Limited,* 2016 ONCA 79

*To learn more and for assistance preparing and reviewing workplace agreements to protect your organization, contact the employment law experts at Sherrard Kuzz LLP.*

# MANAGEMENT COUNSEL

**HReview Seminar Series**

*Please join us at our next HReview Breakfast Seminar:*

# Workplace Investigations:

## How to Comply with the Law and Manage Risk

Bill 132's changes to the *Occupational Health and Safety Act* mean, among other things, an employer has a specific obligation to investigate a complaint of workplace harassment in a manner "appropriate in the circumstances". This is in addition to every employer's general obligation to investigate a workplace accident or other health and safety incident. But what does "appropriate" mean and how does an employer meet these obligations?

**Harassment Investigations**

- The requirement to conduct an 'appropriate' investigation under Bill 132.
- How the Ministry of Labour can (and is) enforcing Bill 132.

**Health and Safety Investigations**

- The benefit of conducting an investigation into a health or safety accident or incident.
- Responding to a Ministry of Labour request during an investigation.

**Issues That Apply Across the Board**

- Risks and costs associated with an improper investigation.
- Third party vs. internal investigation - when to 'outsource' a workplace investigation.
- When your investigation will (and will not) be privileged.
- How to instruct and manage a third party investigator.
- How to deal with the complainant and respondent during a workplace investigation.
- The investigation report is in your hands - now what? Requirements and best practices for the post-investigation process.

**DATE:** **Wednesday February 1, 2017; 7:30 – 9:30 a.m.** (breakfast at 7:30 a.m.; program at 8:00 a.m.)

**VENUE:** NEW LOCATION: **Hazelton Manor, 99 Peelar Road, Concord**

**COST:** Complimentary

**RSVP:** **By Monday January 16, 2017 at www.sherrardkuzz.com/seminars.php**

**Law Society of Upper Canada CPD Hours:** This seminar may be applied toward general CPD hours.

**HRPA CHRP** designated members should inquire at www.hrpa.ca for eligibility guidelines regarding this *HReview Seminar*.

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