MANAGEMENT COUNSEL
Employment and Labour Law Update

SHERRARD KUZZ LLP
Employment & Labour Lawyers

Transit Employee's Addiction No Excuse for Theft

An employer's perception of its human rights obligations can sometimes undermine its willingness to act proactively against a difficult employee or in a challenging set of circumstances. When an employee suffers from a disability concepts such as *accommodation* and *undue hardship* can leave even the most experienced human resources professional unsure of when an employer can discipline the employee for misconduct and when the misconduct must 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 when discipline is appropriate and when accommodation is required often becomes blurred.

An employer *can* discipline a 'disabled' employee

An employee's addiction can create undetonated landmines for an employer. However, there are cases where an employer is *entitled* to discipline despite an employee's claim the disability (addiction) caused the misconduct. There are a number of cases where employers have been justified in disciplining a disabled employee – especially where the employee engaged in reprehensible conduct causing loss to the employer.

A recent arbitral decision offers such an example. In *Toronto Transit Commission and Canadian Union of Public Employees and its Local 2 (M.P. Grievance)*, 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:

- The employee 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.

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- 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.

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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 therefore 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 obtain the resources to buy the drugs by stealing rather than spending money to which he already had access. 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 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 enough to thwart discipline. There must be a sufficient connection between the disability alleged and the misconduct at issue. To determine whether such a connection exists an employer should investigate and consider the following issues:

- 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?

By designing and implementing an informed and well thought out protocol and practice to investigate disability related claims 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.

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

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DID YOU KNOW?

As of July 15, 2011, for workplace accidents occurring in 2008 or more recently, the WSIB's NEER experience rating review period will change from three years to four years.
To learn more, and/or for assistance, contact a member of the Sherrard Kuzz LLP team.

Between you and me

Email and solicitor-client privilege

You receive an email from your company's lawyer with advice about how to handle a difficult situation with an employee. A few of your colleagues have been assisting you with the situation and this advice would help the group decide how to proceed. **STOP**. Before you forward the email to your colleagues have you considered the impact of doing so on solicitor-client privilege?

Solicitor-client privilege is a very important but often misunderstood concept. Communication covered by solicitor-client privilege is protected from disclosure to any person that does not 'own' the privilege – including other parties, courts, arbitrators or administrative bodies such as the Labour Relations Board, Human Rights Tribunal, Ministry of Labour, *etc*. This protection is central to the legal process, because it encourages clients to speak openly with their lawyers without fear their conversations will be made public. So important is solicitor-client privilege, the Supreme Court of Canada has declared it a fundamental civil and legal right.

So, when does solicitor-client privilege apply? Unlike litigation privilege, which protects documents created for the dominant purpose of litigation, solicitor-client privilege protects confidential communications between a lawyer and client. However, solicitor-client privilege does not apply to every such communication. For a communication to be protected by solicitor-client privilege, the following four requirements must be satisfied:

1. The communication must be between a lawyer and his/her client.
2. The communication must be connected to obtaining legal advice, as opposed to business or non-legal advice.
3. The communication must be confidential.
4. There must have been no waiver of confidentiality.

Now, let's return to the email scenario introduced above. The first question to ask is whether the communication is *between* a lawyer and client. Merely copying a lawyer on the communication will not be enough to bring that communication within the purview of solicitor-client privilege. The exception is when you and your lawyer have agreed the lawyer will be copied on all relevant communication for the purpose of receiving legal advice during the course of a mandate.

The second question is whether the communication pertains to obtaining or providing legal advice. This includes information provided *by the client* to the lawyer. Communications unrelated to legal advice, such as business advice, are generally not protected by solicitor-client privilege.

The third issue to consider is whether the communication is confidential. To satisfy this requirement, the parties need to demonstrate an intention to maintain confidentiality. This intention is potentially undermined if numerous people are forwarded or copied on a communication. The exception is if the other individuals are reasonably necessary to protect the client's interests and understand they are expected to maintain confidentiality. For example, an employee's direct supervisor, human resources manager and company president could all be involved in making a termination decision. Their inclusion in a communication is therefore reasonably necessary to protect the employer's interests. The same might apply to the inclusion of an accountant or tax adviser.

The final issue to consider is whether solicitor-client privilege has been waived by the client. Waiver may occur *voluntarily* or *involuntarily*. Voluntary waiver may occur if, for example, a party relies on all or part of a privileged communication as a component of a claim or defence. In that case, the party has willingly put the privileged communication into the public domain and as such is deemed to have waived the privilege.

Involuntary waiver may occur where an electronic communication is accidentally sent to an individual who ought not to have received that correspondence. In that case, an adjudicator will consider, on a case-by-case basis, if the accidental disclosure should render the communication no longer privileged. Factors that will affect the adjudicator's decision include: how the information was disclosed, whether the error is excusable, when the disclosure was discovered, whether an immediate attempt was made to retrieve the information, the number and nature of third parties who became aware of the communication, whether preserving privilege would create actual or perceived unfairness to the opposing party, and the actual or perceived impact of preserving privilege on the court, tribunal or arbitration.

Tips for Employers

Given the importance of solicitor-client privilege, and the growing prevalence of electronic correspondence, the following recommendations may assist you to maintain solicitor-client privilege over appropriate electronic exchanges:

- **Limit the number of recipients.** Send to, copy or forward electronic correspondence only to individuals who are reasonably necessary to advance the employer's interests.
- **Ensure recipients of electronic correspondence containing privileged communication clearly understand the information is and must remain confidential.** State this clearly at the top of the communication; for example "Privileged and Confidential – Solicitor & Client Communication". This statement will not automatically render the contents of the communication privileged (*i.e.* if the other criteria are not present) but it may provide evidence of the party's intentions to keep the contents confidential.
- **Ensure recipients understand and appreciate the risk associated with forwarding the communication to others not necessary to protect the employer's interests or intended to be a part of the privileged communication.** State this clearly on the communication together with a directive the communication must not be forwarded.
- **Before hitting the 'send' button**, double-check the recipients are the correct individuals.

To learn more contact a member of Sherrard Kuzz LLP.

MANAGEMENT COUNSEL

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Employment Law Update - *What's New? What's Worth Repeating?*

Termination for Cause

- What's 'cause'?
- What's owed?
- Common law vs. Employment Standards
- How to meet the 'for cause' test under both the common law and employment standards
- *Oosterbosch v. FAG Aerospace*

Independent v. Dependent Contractors

- What's the difference?
- Why does it matter?
- How to ensure your workers are properly classified.
- *McKee v. Reid's Heritage Homes Ltd.*

Fixed v. Indefinite Term Employees

- What's the difference?
- Why does it matter?
- When does a fixed term employee become an indefinite hire?
- How to ensure a fixed term employee stays that way.
- *Van Mensel v. Walpole Island First Nation*

The Disabled Employee

- She's been off work a long time - can you terminate her employment?
- What does it mean for a contract to be 'frustrated'?

DATE: **Tuesday November 15, 2011; 7:30 – 9:30 a.m.** (breakfast at 7:30 a.m.; program at 8:00 a.m.)

VENUE: **Hilton Garden Inn, Toronto-Vaughan,** 3201 Hwy & West, Vaughan, ON L4K 5Z7

COST: Please be our guest

RSVP: **By Friday November 4, 2011** to 416.603.0700 or register on-line at *www.sherrardkuzz.com/seminars.php*
(for emergencies our 24 Hour Line is 416.420.0738)

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HRPAO CHRP designated members should inquire at www.hrpao.org for certification eligibility guidelines regarding this *HReview Seminar*.

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