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Not All Addiction is Created Equally - Dismissal of addicted nurse upheld

In a recent arbitration decision (*Cambridge Memorial Hospital v Ontario Nurses' Association*, 2017 CanLII 2305 (ONLA)), Arbitrator Dana Randall upheld the discharge of a 28 year, drug-dependent, nurse, with 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”.



Ashley Brown
416.217.2231
abrown@sherrardkuzz.com

What happened?

For several years, an experienced, registered nurse stole and personally consumed narcotics from the hospital where she worked. 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

...continued from front

- 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.

The grievance is dismissed

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.

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Explaining his decision, 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:

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.

*I would be remiss to not mention my concern with respect to general deterrence. ... **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...***

[emphasis added]

Perhaps this decision is the start of a new, more practical and realistic line of cases which will benefit employers in all industries. We will follow this decision closely and keep readers apprised.

To learn more and for assistance addressing drug and alcohol misconduct in your workplace, contact the experts at Sherrard Kuzz LLP.

DID YOU KNOW?

Effective December 3, 2017, an eligible pregnant employee may receive Employment Insurance ("EI") maternity benefits up to **12 weeks** before her due date. More significantly, an eligible employee may take up to **61 weeks** of parental benefits at a lower benefit rate (33%) or elect to take the existing benefit rate (55%) for 35 weeks.

The combined result is an employee who elects to receive maternity benefits and then parental benefits at the reduced rate may be eligible for EI coverage for 18 months (with a one-week EI waiting period).

To learn more, contact Sherrard Kuzz LLP.

Alberta Court of Appeal opens door to random drug and alcohol testing



Andrew Ebejer
416.603.6244
aebeker@sherrardkuzz.com

In a significant decision, in June 2013, a 6-3 majority of the Supreme Court of Canada struck down as unreasonable a program of random breathalyzer alcohol testing for safety sensitive positions at Irving Pulp and Paper Ltd. (*CEP, Local 30 v Irving Pulp and Paper*, 2013 SCC 34 [*Irving*]). In summary, the Supreme Court held that a dangerous workplace was not, in and of itself, automatic justification for random testing. Instead, testing might only be justified if an employer could show there was a “general problem with substance abuse in the workplace”.

The question left unanswered was: *What constitutes a general problem sufficient to justify random testing?*

More recently, the Court of Appeal of Alberta tackled that question when it upheld a random drug and alcohol testing program adopted by Suncor Energy Inc. (*Suncor Energy Inc v Unifor Local 707A*, 2017 ABCA 313). Clarifying and restating the test in *Irving*, the court confirmed two requirements: 1. the workplace must be dangerous; and 2. there must be a general problem with drug or alcohol use in that workplace.

What happened?

Suncor’s Alberta oil sands operations are, by their nature, dangerous. Heavy equipment, high voltage power lines, chemicals, radiation sources, explosives, and flammable liquids and gases are all prominent characteristics of the work environment.

For years, Suncor had concerns about the safety hazards posed by alcohol and drug use at its operations. In response, it adopted a comprehensive strategy including employee and supervisor training, post-incident and reasonable cause testing, treatment for employees with dependencies and an alcohol-free lodging policy.

In June 2012, Suncor announced Canada-wide random drug and alcohol testing (breathalyzer and urinalysis) for employees in safety-sensitive positions as well as members of the Suncor management team on site – the same testing procedures used by Suncor since 2003 following a workplace incident or near miss.

One month later, Unifor (the union representing some of Suncor’s employees) filed a policy grievance, alleging the random testing unreasonably interfered with the privacy interests of its member-employees.

The arbitration decision

In a 2-1 decision, the arbitration panel found in favour of Unifor and ordered that Suncor’s random testing program could not be implemented. In summary, the panel held that breathalyzer testing “effects a significant inroad” on employee privacy, and also that Suncor did not demonstrate a “significant” or “serious” alcohol problem within the bargaining unit nor a causal connection between alcohol use and the bargaining unit’s accident, injury or

near miss history. The panel also criticized the inability of urinalysis to demonstrate current impairment (it only shows a drug is present in the body, including what might be a trace amount from several days or weeks prior).

Suncor asked the Alberta Court of Queen’s Bench to judicially review the panel’s decision.

Review by the Alberta Court of Queen’s Bench

The Alberta Court of Queen’s Bench overturned the arbitration decision, finding the panel had incorrectly applied the legal test set out in *Irving* and failed to consider relevant evidence.

First, the court found the panel misapplied the *Irving* test by making it more difficult to meet. The Supreme Court had said random testing might be justifiable where there was evidence of a “general problem with substance abuse in the workplace”. However, the arbitration panel elevated this standard by requiring evidence of a “significant” or “serious” problem. The panel also erred by requiring Suncor to prove a causal connection to the bargaining unit’s accident, injury or near-miss history, when no general requirement to prove a causal connection exists.

Second, the panel erred when it narrowly focussed on evidence tied directly and exclusively to Unifor’s bargaining unit members, and not the workplace generally. By doing so, the panel minimized the significance of more than 2000 workplace drug and alcohol incidents which had been documented at Suncor, because the panel was unclear how many of those incidents involved bargaining unit employees.

The court sent the case back to a new arbitration panel for a fresh look and decision. The union appealed.

Decision of the Court of Appeal of Alberta

In September 2017, the Court of Appeal of Alberta upheld the decision of the Court of Queen’s Bench to send the case back to a new arbitration panel. The Court of Appeal based its judgement on the second factor addressed above – that the arbitration panel incorrectly focused on the Unifor bargaining unit when the *Irving* test required there to be a general workplace problem of drug or alcohol abuse. According to the Court of Appeal, this was an unjustifiable “arbitrary distinction” between substance abuse problems at the workplace generally and those specific to unionized employees, particularly in this case where unionized employees, non-unionized employees and contractors worked side-by-side in “integrated workforces at integrated job sites”.

Impact on employers

The Court of Appeal of Alberta may have made it a little easier for employers in that province to introduce a random testing policy. However, before employers get too excited about this important judgment, know that Unifor has sought leave to appeal to the Supreme Court of Canada (the leave application is expected to be heard in February 2018), and in December 2017, was granted an interim injunction preventing Suncor from implementing random testing until the matter is decided by the court (or another arbitration panel). As such, the saga continues.

Sherrard Kuzz LLP will continue to follow these, and related decisions, and report back to readers. Meanwhile, for assistance addressing drug and alcohol issues in your workplace, contact a member of the Sherrard Kuzz LLP team.

HReview Seminar Series

Please join us at our next HReview Breakfast Seminar:

Bill 148

It's Now The Law! What It Means for Employers

In 2017, the Ontario Government introduced *An Act to amend the Employment Standards Act, 2000 and the Labour Relations Act, 1995 and to make related amendments to other Acts*, referred to as the “*Fair Workplaces, Better Jobs Act, 2017*” (“*Bill 148*”).

Bill 148 introduces **significant** amendments to Ontario’s *Employment Standards Act* and *Labour Relations Act*, and limited amendments to the *Occupational Health and Safety Act*. **Many amendments came into force on January 1, 2018, and some as early as November 2017.**

Sherrard Kuzz LLP has written several briefing notes and led countless training sessions on Bill 148 and how to comply. Now that the Bill has been in place for two months, join us to take stock and learn more about these significant amendments and best practices. Topics we’ll cover include:

Employment Standards Act

- Increased minimum wage
- Equal pay for part-time, contract and assignment employees
- Pay for on-call and cancelled shifts
- Increased vacation and public holiday pay entitlement
- Enhanced personal emergency leave
- Expanded parental and pregnancy leave entitlement
- Heightened enforcement and penalties

Labour Relations Act

- Card-based certification in specific industries
- Union access to employee lists for organizing efforts
- First collective agreement mediation/arbitration
- Enhanced just cause protection post-certification and during strike/lockout
- Expanded successor rights

DATE: Wednesday March 7, 2018; 7:30 – 9:30 a.m. (breakfast at 7:30 a.m.; program at 8:00 a.m.)

VENUE: Hazelton Manor, 99 Peeler Road, Concord, ON L4K 1A3

COST: Complimentary

REGISTER: By Tuesday, February 20, 2018 at www.sherrardkuzz.com/seminars.php (spaces limited)

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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250 Yonge Street, Suite 3300
Toronto, Ontario, Canada M5B 2L7
Tel 416.603.0700
Fax 416.603.6035
24 HOUR 416.420.0738
www.sherrardkuzz.com
[@SherrardKuzz](https://twitter.com/SherrardKuzz)



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