

# Arbitrator Determines Termination of Nurse for Addiction-Related Narcotics Theft Discriminatory but Reinstatement not an Appropriate Remedy

Date : April 1, 2019

In the recent case of [\*Humber River Hospital v. Ontario Nurses' Association\*](#), (December 2018) an arbitrator considered the complex issue of addiction-related narcotics theft by a nurse. The issue was whether the Hospital had failed in its duty to accommodate when it terminated an emergency room nurse with a drug addiction who had stolen narcotics from the Hospital and used them while at work. The union grieved her termination on the basis that the termination was discriminatory, since her conduct stemmed from an addiction disability, and argued that the Hospital had failed in its duty to accommodate. The union also argued that the Hospital's actions breached the union representation clause under the collective agreement by failing to give proper notice to the grievor before the termination meeting, though she ultimately did have representation at the meeting. The union sought the grievor's reinstatement with accommodation, amongst other remedies. The Hospital argued that it had no knowledge of the grievor's addiction when she was terminated. Rather, the termination was a result of the seriousness of her conduct and the health and safety risk that it posed. Therefore, the Hospital argued, its conduct was not discriminatory and the termination should be upheld.

In a decision that is instructive for employers with respect to the duty to accommodate, the arbitrator determined that the termination was discriminatory and that the Hospital had not met its procedural duty to accommodate. However, the nurse's continuing lack of honesty and forthrightness about her addiction, even after stating that she was now clean, undermined the trust between her and the Hospital which was necessary for an employment relationship. As such, reinstatement was found not to be an appropriate remedy.

## The Facts

During an overnight shift, the grievor was observed by another nurse taking a patient's morphine into an empty patient room, dropping something into the sharps container three times, and putting her hand in her pocket, at which time the other nurse heard something drop. The nurse reported what she had observed to a team leader, who discussed the matter with the grievor. At the time, the grievor stated, "I'm very sorry, I think I have a brain tumour, I always have headache [*sic*] and I might be dying." During the discussion, the grievor revealed that she had six or seven unopened vials of morphine in her pocket. When the grievor was asked if she had anything in her bag, the grievor revealed vials of medication and tablets.

The grievor's manager held a meeting with the grievor, Human Resources, and the grievor's union representative. At the meeting, the grievor confirmed that the medications in her bag were

taken from the Hospital and were for her patients. She stated that she would give her patients half of a vial of medication, then keep the other half. If the patient needed more later on, she would take a fresh vial to keep for herself, and give the patient the remaining half from the first vial. She said that this conduct was to fight her condition. She admitted to last taking drugs, which she had taken from the Hospital previously, before the start of her shift the night before. She stated that if she did not do so, she would not be able to work. When those drugs wore off, two hours before the meeting, she took Tylenol. She did not state during this meeting that she had an addiction.

The union then raised concerns about the grievor's responses because of the concern that the grievor might be under the influence of drugs during the meeting. The grievor was sent home by taxi. That evening, the grievor emailed her manager twice, thanking her manager for her support, asking for advice, and stating, "I want to be clean." She also raised the prospect of working in a different area, away from drugs, if she were brought back to work.

The Hospital conducted an investigation and concluded that the grievor had stolen narcotics and other medications, self-injected stolen narcotics, not given patients the medications that she had stolen, self-medicated with the stolen medications, worked under the influence of narcotics, falsified documentation regarding the administration of medication, and diverted drugs. The grievor was terminated three days after the meeting took place. During the termination meeting, the Hospital verbally offered the grievor the support of the Employee Assistance Program.

### **The Appropriate Approach to Accommodation Cases**

The arbitrator stated that a complainant must first prove *prima facie* discrimination by showing the following:

1. She had a characteristic that is protected from discrimination under human rights legislation;
2. She experienced an adverse impact; and
3. The characteristic was a factor in the adverse impact.

In discussing the third consideration, the arbitrator stressed the importance of approaching each case on its own facts. The arbitrator observed that "in some cases, an addiction may have no effect on an employee's ability to comply with workplace rules, while in others it may deprive the employee of the capacity to comply at all." The proper focus at this step is not whether the employer had a discriminatory intent or attitude in making the decision, but whether there was a discriminatory impact.

Once *prima facie* discrimination is proven, the onus shifts to the employer's obligation to accommodate. The arbitrator was careful to note that just because *prima facie* discrimination is proven does not mean that the employee has to be accommodated. In situations of addiction, it may constitute undue hardship for an employer to accommodate an employee who refuses

treatment or who is in denial about the full extent of their addiction. Such factors could undermine the ability to rebuild the required trust for the continuation of the employment relationship, or to establish the employer's confidence that the employee will no longer carry out behaviours which are not compatible with the employment relationship.

### **The Employer's Failure in the Duty to Accommodate**

In applying the above considerations to this case, the arbitrator accepted on the evidence that the grievor had an addiction. It was not disputed that the termination was an adverse impact on the grievor. The arbitrator determined that the addiction was a factor in the termination. As a result of the evidence provided by the grievor's doctor, an addiction medicine specialist who treated her and whose evidence was found to be fair and balanced, the arbitrator was satisfied that she stole and used the drugs to manage her addiction and to be able to work. The arbitrator noted that "diversion of drugs is a feature of addiction, especially for healthcare professionals." It should be noted that the arbitrator accepted that the Hospital did not terminate her because she was an addict, nor did the Hospital have a prejudicial attitude towards addicts. However, it was not necessary for the Hospital to have discriminatory intent as the analysis focuses on whether or not the impact was discriminatory. Due to the nexus between her disability and the termination, the termination was *prima facie* discriminatory.

In turning to the analysis regarding the Hospital's duty to accommodate, the arbitrator found that the Hospital did not take any steps to consider accommodation of the grievor, either before or after they learned about her addiction. Rather, the Hospital took the position throughout the matter that "theft is theft" and "moved swiftly to terminate the grievor's employment for theft, without regard to the duty to accommodate." This course of action constituted a failure in the Hospital's procedural duty to accommodate. The grievor's failure to explicitly state that she had an addiction prior to her termination did not absolve the Hospital of the duty to accommodate. Denial and inability to disclose were noted to be features of addiction. The arbitrator found that "the Hospital had ample information prior to the grievor's termination to identify the disability issue, and that it chose to ignore the issue and proceed with the termination in light of its views concerning the seriousness of the theft."

In that regard, the arbitrator noted that the Hospital knew, as of the completion of its investigation, that the grievor had a large volume of drugs, that she was under the influence of drugs at work and was behaving strangely, that she had diverted drugs for personal use, that she was taking the drugs herself, and the reasons that she gave for doing so were not coherent or clear. She had also mentioned having a serious problem that she had hidden from her family, as well as a desire to be "clean." She had suggested in her email to her manager that she could work in a position away from drugs. These factors all "point to the link between the grievor's theft of drugs and an addiction disability," and as such, the Hospital either knew, or ought to have known, that there was a possibility that the grievor's conduct was related to a drug addiction. The Hospital's failure to inquire into the possibility of a disability or whether the grievor could be accommodated constituted

a failure to discharge its procedural duty to accommodate.

### **Reinstatement Not an Appropriate Remedy**

The arbitrator noted that typically, he would have remitted the matter back to the parties to determine if accommodation of the grievor was possible. However, he had concerns about significant inconsistencies in the grievor's testimony, particularly with respect to the timing of when her addiction had commenced. While he recognized that denial of addiction, relapse, and memory problems were characterizations of addiction, the inconsistencies in her evidence basically amounted to two entirely different narratives of her addiction and the events that led to her termination. He therefore concluded that the grievor was not being honest and forthcoming, even though she had claimed to be in full remission and to have full insight into her disability. As such, the "grievor's ongoing lack of candour even while purporting to be clean and in remission has undermined the trust that is essential to the employment relationship" and reinstatement was not appropriate. The parties were left to determine between themselves the remaining remedies, while the arbitrator remained seized in case an agreement could not be reached in that regard.

### **Union Representation**

In its grievance, the union also raised the issue of what it alleged to be improper notice of the termination meeting. It argued that the grievor was only told that she had to attend, but was not told of the purpose of the meeting or her right to union representation. The union also argued that its representatives were not provided with substantial information about the meeting's purpose, causing the union to believe that the meeting was a continuation of the investigation and not a termination. The union argued that the breach was not just a technical one, but that it actually limited the union's ability to provide the grievor with meaningful representation that may have changed the disciplinary outcome.

The Hospital argued that it did not breach the notice requirement, and that even if it did, the breach was only technical in nature. The grievor did, in fact, have union representation at the meeting by an experienced union representative. The representative did not raise objections regarding the notice issue at the time. The Hospital also argued that it had involved the union in the investigative meeting, contacted the president of the bargaining unit before the termination meeting, and effectively communicated how serious the circumstances were.

The arbitrator found that the wording of the clause clearly required the Hospital to provide advance notice of an employee's right to union representation in cases of suspension or discharge. Even though the Hospital arranged for the grievor to have union representation at the meeting, it did not explicitly tell the grievor of her right to representation before the meeting, and did not tell her of the purpose of the meeting. This did not satisfy the requirement for advance notice, which is designed to allow an employee the chance to consult with their union prior to the meeting. However, the Employer's communication before the meeting that the situation was "not good" was interpreted

by the union to mean that the employee was going to be let go. The Hospital had also told the union that termination was possible. The union had also been in attendance at the investigation meeting and had the same information as the Hospital regarding the grievor's conduct. The arbitrator therefore found that the union had advance, effective notice of termination.

The arbitrator left it to the parties to determine between themselves the appropriate remedy for the breach of the grievor's notice rights.

## In Our View

This case serves as a useful reminder to employers about the need to satisfy obligations under the collective agreement relating to union representation and notice of disciplinary meetings. Arbitrators will not hesitate to nullify disciplinary action or impose other remedies where there is a failure to comply with such obligations.

The employer's procedural obligations are also important in the fulfillment of the duty to accommodate, particularly in situations involving addiction. This case underscores that it is not sufficient for an employer to treat all employees the same fashion. Where an addiction disability is a factor in an adverse consequence for an employee, such as a sanction for a breach of workplace rules, employer decision-making must take account of the duty to accommodate. Even if an employee cannot ultimately be accommodated at the end of the day, it is still essential that an employer be in a position to show that it had taken all necessary procedural steps to consider whether there was a disability, whether the disability was a factor in the conduct at issue, and whether the employee could be accommodated to the point of undue hardship.

The reasoning of the arbitrator in *Humber River Hospital* was recently adopted with approval in the case of [\*Regional Municipality of Waterloo \(Sunnyside Home\) v. Ontario Nurses' Association\*](#), (January 2019) which also dealt with the issue of addiction-related narcotics theft by a nurse. The arbitrator in *Waterloo* found that the union had established *prima facie* discrimination because the grievor's breach of workplace rules, such as theft and use of narcotics and falsification of medical records, were due to her addiction. The employer was found to have breached its procedural obligations to accommodate because it did not properly consider accommodation issues, rather approaching the matter as a termination for just cause throughout. It also did not take steps to determine if the grievor had a need for accommodation, despite observations and reports about the grievor's appearance and behaviour which should have led the employer to perceive that the grievor might have a disability. The employer's evidence about why the grievor could not be accommodated was insufficient. As such, the grievor was ordered to be reinstated and to be accommodated to the point of undue hardship. Like *Humber River Hospital*, *Waterloo* serves to emphasize the importance of the procedural component of the employer's duty to accommodate.

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