

## **ACCOMMODATION OF EMPLOYEES WITH SUBSTANCE ADDICTION DISABILITIES**

### **Introduction**

This document focuses on the recent B.C. Court of Appeal case of *Kemess Mines Ltd. v. International Union of Operating Engineers, Local 115*, [2006] B.C.J. No. 263 (C.A.).<sup>1</sup> Briefly stated, the case involved the issue of accommodating an employee with a substance addiction disability.

### ***Kemess Mines Ltd. v. International Union of Operating Engineers, Local 115*, [2006] B.C.J. No. 263 (C.A.)**

#### Background

Kemess Mines Ltd. (the “Employer”) operates an open pit mine at which it has a “zero tolerance” drug policy in effect.

One of the mine workers, Mark Gardiner (the “Employee”), was dismissed from employment with the Employer after he was caught smoking marijuana in his room at the mine bunkhouse.

The International Union of Operating Engineers, Local 115 grieved the termination of the Employee’s employment, taking the position that he suffered from an addiction making his conduct entirely non-culpable. The Employee took the position that he was not fully aware he was an addict until after his dismissal.

By way of background, the Employer offers a confidential counselling and treatment program to any of its employees who suffer from substance addiction disabilities. The Employee was aware of the program but had never used it.

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<sup>1</sup> We note that the appeal in *Kemess Mines Ltd. v. International Union of Operating Engineers, Local 115* was heard together with the appeal in *Health Employers Assn. of B.C. (Kootenay Boundary Regional Hospital) v. B.C. Nurses’ Union*, [2006] B.C.J. No. 262 (C.A.). The reasons for judgment in the two cases were published contemporaneously. In this document – in light of space constraints – we only focus on *Kemess Mines Ltd. v. International Union of Operating Engineers, Local 115*.

At some point, the Employer indicated that it would be prepared to rehire the Employee without any seniority if he were to successfully complete a rehabilitation program.

### Arbitral Proceedings

Arbitrator Donald Munroe heard the termination grievance.

He considered the Employee's substance addiction to be a disability that was a factor in his misconduct, but not to the point that the Employee was incapable of refraining from using marijuana at the mine site. In other words, the arbitrator took the view that the Employee's conduct was composed of both non-culpable and culpable elements.

Arbitrator Munroe proceeded to rule that the Employer had not fulfilled its duty to accommodate the Employee's disability.

According to the arbitrator, it was possible to safeguard the Employer's interests without upholding the termination of the Employee's employment. In his award, the arbitrator:

- (a) reinstated the Employee to employee status;
- (b) substituted the Employee's dismissal with a ten-month disciplinary suspension without pay or benefits; and
- (c) attached various conditions to the Employee's return-to-work, including abstaining from smoking marijuana, completing a treatment program, attending Narcotics Anonymous group meetings, and submitting to random searches of his room at the mine bunkhouse.

The Employer appealed the arbitral award to the Court of Appeal.

### Analysis of Court of Appeal

The first issue canvassed by the Court of Appeal related to jurisdiction.

Chief Justice Lance Finch – who delivered the judgment of a unanimous Court of Appeal – ruled that the Court of Appeal had jurisdiction to proceed with hearing the appeal because it was based on principles of general law not confined to the B.C. Labour Relations Board.

In the Chief Justice's view, the basis of Arbitrator Munroe's award was his interpretation and application of human rights principles, which are principles of general law that apply with equal force in both unionized and non-unionized workplaces.

Chief Justice Finch then turned to the human rights issues raised in *Kemess Mines Ltd. v. International Union of Operating Engineers, Local 115*.

He began his analysis by identifying section 13(1) of the *Human Rights Code*, R.S.B.C. 1996, c. 210 as a relevant provision. That section reads, in part, as follows: “A person must not ... refuse to continue to employ a person ... because of physical or mental disability ...”

Chief Justice Finch accepted that the dismissal constituted *prima facie*<sup>2</sup> discrimination against the Employee on the basis of disability. The Chief Justice refused to interfere with the following findings of Arbitrator Munroe:

“[T]he reason the company dismissed the grievor was that he was found to be using marijuana at the mine site. The grievor’s possession and use of marijuana at the mine site ... was partly the product of substantially diminished control due to his addiction ... [T]he grievor’s disability must be found to have been a factor in his dismissal.”

The Chief Justice then turned – as required by the Supreme Court of Canada case of *British Columbia (Public Service Employee Relations Commission) v. B.C.G.S.E.U. (Meiorin)*, [1999] 3 S.C.R. 3 – to the question of whether “the ‘discriminatory standard’ [was] a *bona fide* occupational requirement”.

Chief Justice Finch accepted that the safety factor was highly relevant in the circumstances of the case. In doing so, he made the following significant observation:

“There is no dispute that an open pit mining operation is a safety-sensitive work environment, and that an employee impaired by drugs poses a safety risk not only to him or herself, but also to other employees. The concept of ‘undue hardship’ has to be considered with those safety concerns in mind.”<sup>3</sup>

The Chief Justice also made clear that an addicted employee has “a duty to facilitate accommodation through rehabilitation” and must “do all he [or she] can to facilitate the success of his [or her] rehabilitation and treatment”.<sup>4</sup>

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<sup>2</sup> “*Prima facie*” is a Latin phrase meaning “on the face of it, at face value, or without further examination”.

<sup>3</sup> We underscore that the safety factor is critical when appraising whether an employer, attempting to accommodate an employee with a substance addiction disability, has reached the point of “undue hardship”. We refer to a March 2006 article authored by Helena Bryan and entitled “Deadly Habits” that appeared in the Workers’ Compensation Board of B.C. publication, *WorkSafe Magazine*. In that article, it was stated: “Substance abuse can impair a worker’s alertness, accuracy, and reflexes, which can cause serious accidents in the workplace. What’s more, substance abuse is often accompanied by ... increased equipment damage ... [P]eople who abuse alcohol face three to six times the risk of workplace accidents compared with their peers ... [S]ubstance abusers are five times as likely as their peers to file a claim.”

<sup>4</sup> At this juncture, we refer to Arbitrator David McPhillips’ award in *Pacific Blue Cross v. C.U.P.E., Loc. 1816 (Colleged Grievance)*, [2005] B.C.C.A.A. No. 37 (McPhillips). In his award, Arbitrator McPhillips was of the view that a substance-addicted employee plays a critical role in accommodation efforts. He or she is required to actively participate in – and, in fact, facilitate – the process of accommodation. An employer may not be required to accommodate an employee who makes no serious effort on his or her behalf.

Notwithstanding the foregoing, Chief Justice Finch – relying on the fact that the Employer had indicated its willingness to rehire the Employee after successful completion of a rehabilitation program – held that the Employer “was ... of the view that the employment relationship remained viable”.

It was of little consequence – in the Chief Justice’s view – that the Employee did not seek assistance through the Employer’s confidential counselling and treatment program because he was not fully aware of his addiction until after his dismissal.

Chief Justice Finch then stated that the ten-month disciplinary suspension without pay or benefits would have enough deterrent effect so as not to undermine the Employer’s “zero tolerance” drug policy. It was clear – in the view of the Chief Justice – that the Employee had not been “absolve[d] ... of all personal responsibility”. The Chief Justice accordingly rejected the Employer’s argument that an exception could not be made in the case of the Employee because the “zero tolerance” drug policy would lose its deterrent effect.

### Conclusion

Chief Justice Finch ultimately reached the conclusion that Arbitrator Munroe did not err “in holding that the employer had not accommodated Mr. Gardiner to the point of undue hardship”. The Chief Justice declined to interfere with the arbitrator’s human rights analysis, and accordingly dismissed the Employer’s appeal.<sup>5</sup>

Please do not hesitate to contact any member of our firm if you have questions in respect of *Kemess Mines Ltd. v. International Union of Operating Engineers, Local 115* or the accommodation of employees with substance addiction disabilities, or if you wish to have information on any labour or employment law issue.

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\* Every effort has been made to ensure accuracy in respect of this document. The comments, however, are necessarily of a general nature. Clients and other interested parties are urged to seek specific advice on matters of concern and not to rely solely on the text of this document. \*

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<sup>5</sup> As a matter of interest, we note that the Employer is considering an appeal of the Court of Appeal’s decision to the Supreme Court of Canada.