

ACCOMMODATION OF EMPLOYEES WITH SUBSTANCE ADDICTION DISABILITIES

Introduction

We previously focused 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.).

As you may know, the Court of Appeal heard the appeal in *Kemess Mines Ltd. v. International Union of Operating Engineers, Local 115* 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, we will provide a summary and brief analysis of *Health Employers Assn. of B.C. (Kootenay Boundary Regional Hospital) v. B.C. Nurses' Union*. The case – as did *Kemess Mines Ltd. v. International Union of Operating Engineers, Local 115* – raised the issue of accommodating an employee with a substance addiction disability.

***Health Employers Assn. of B.C. (Kootenay Boundary Regional Hospital) v. B.C. Nurses' Union*, [2006] B.C.J. No. 262 (C.A.)**

Background

The grievor, Ron Bergen, was employed as a registered nurse at the Kootenay Boundary Regional Hospital. It was beyond question that Mr. Bergen was disabled by a substance addiction. His employment was terminated after he, among other things, stole drugs from the hospital and resumed his drug use.

It was not the first time the grievor was dismissed for reasons relating to his substance addiction. While in the employ of another hospital, the Castlegar and District Regional Hospital, Mr. Bergen had twice previously been discharged for similar reasons. On both of those occasions, Mr. Bergen had been reinstated to employment under so-called “last chance agreements”.

The British Columbia Nurses' Union grieved the termination of Mr. Bergen's employment, arguing that his use of drugs was part of his substance addiction, and therefore was not culpable conduct. The union took the position that the employer had failed to accommodate Mr. Bergen's disability.

Arbitral Proceedings

The termination grievance was heard by Arbitrator Marguerite Jackson.

The arbitrator took the view that the employer did not fulfil its duty to accommodate the grievor's disability to the point of undue hardship. She reversed the termination decision of the employer, and reinstated Mr. Bergen to employment.

Among other things, Arbitrator Jackson ruled that the employer ought to have explored the possibility of finding a position where Mr. Bergen would not have access to drugs.

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

Analysis of Court of Appeal

Chief Justice Lance Finch – with Justices John Hall and Kenneth Mackenzie concurring – delivered the judgment of the Court of Appeal.

The Chief Justice began by canvassing the B.C. Labour Relations Board's decision in *Re Fraser Lake Sawmills Ltd.*, [2002] B.C.L.R.B.D. No. 390 and, in particular, the "concept of the 'hybrid case' – those situations where the conduct of an addicted employee [is] partly culpable and partly non-culpable".

Chief Justice Finch set out the law articulated in *Re Fraser Lake Sawmills Ltd.* as follows:

"Where the addiction [is] found to have no causal link to the misconduct, the misconduct should be treated as culpable, and therefore appropriate to a 'just cause for dismissal' analysis in the labour law context. Where the addiction [is] the sole cause of the misconduct, it [is] to be regarded as non-culpable, and therefore subject to the discrimination accommodation analysis in the human rights context. But where the addiction and voluntary behaviour [are] joint causes of the misconduct it [is] to be treated as a hybrid case."

Chief Justice Finch proceeded to set out the applicable provision of the *Human Rights Code*, R.S.B.C. 1996, c. 210. That provision reads, in part, as follows: "A person must not ... refuse to continue to employ a person ... because of the ... physical or mental disability ... of that person".

The Chief Justice then clarified the circumstances under which the duty to accommodate arises. As stated by the Chief Justice, the question of accommodation “arises only when the disabled person has first established a *prima facie* case of discrimination” (as you probably know, “*prima facie*” is a Latin phrase meaning “on the face of it, at face value, or without further examination”).

Prima facie discrimination on the basis of disability had, in the view of Chief Justice Finch, been established in *Health Employers Assn. of B.C. (Kootenay Boundary Regional Hospital) v. B.C. Nurses’ Union*. According to the Chief Justice:

- (a) there was “no dispute that Mr. Bergen ha[d] a disability”;
- (b) the grievor “was adversely treated in that his employment was terminated”;
and
- (c) “Mr. Bergen’s theft and dishonesty, as well as his failure to abstain, were caused substantially by his disability, namely his addiction”.

Chief Justice Finch proceeded to address the question of whether the employer had fulfilled its duty to accommodate. He prefaced his accommodation analysis with the following significant statements: “[a]ccommodation must be approached with basic notions of balance, flexibility and common sense” and “as a nurse, Mr. Bergen was in a position where public safety was of crucial importance and this must be considered in the context of accommodation”.

The Chief Justice then made a number of critical statements:

- (a) “[T]he arbitrator erred in failing to consider that there was a duty on Mr. Bergen to facilitate the accommodation process, and in failing to consider that he had been given two previous opportunities to rehabilitate his addiction, had relapsed, and had failed to take the necessary steps to address that relapse” [emphasis added].
- (b) Arbitrator Jackson had “fail[ed] to consider adequately or at all that Mr. Bergen had received two prior employment opportunities to cope with his addiction, and had failed to do so.”
- (c) “The employer’s duty to accommodate Mr. Bergen was matched by his duty to facilitate the accommodation process” [emphasis added].
- (d) “Addiction, as a treatable illness, requires an employee to take some responsibility for his rehabilitation program ... Mr. Bergen failed to discharge that duty, and the duty to accommodate was exhausted” [emphasis added].

Conclusion

Chief Justice Finch allowed the employer's appeal, stating, "In my view, the employer was not in breach of its duty to accommodate Mr. Bergen." The Court of Appeal overturned Arbitrator Jackson's reinstatement order, and restored the employer's decision to terminate Mr. Bergen's employment.

In our view, *Health Employers Assn. of B.C. (Kootenay Boundary Regional Hospital) v. B.C. Nurses' Union* is a significant decision for a couple of reasons. Firstly, it confirms that the duty to accommodate is not a free-standing duty. It is an error of law to address the question of accommodation in the absence of a finding of *prima facie* discrimination. Secondly, the decision makes it very clear that the duty to accommodate imposes obligations on the employee as well as the employer. The employee has the obligation to "facilitate" the accommodation process.

Please do not hesitate to contact any member of our firm if you have questions in respect of *Health Employers Assn. of B.C. (Kootenay Boundary Regional Hospital) v. B.C. Nurses' Union* or the accommodation of employees with substance addiction disabilities, or if you wish to have information on any labour or employment law issue.

* 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. *