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# Addiction Defence to Theft of Hospital Opioids Not a “Get Out of Jail Free Card”

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Theft of opioids by an employee who subsequently asserts a substance abuse problem can be a particularly challenging workplace issue for healthcare sector organizations. But in this most recent case, the arbitrator upheld a just cause discharge as an appropriate disciplinary response, thereby rejecting an “addiction defence” for this type of serious misconduct. Find out why – and what guidance this decision may provide going forward.

## Arbitrator Finds Addiction to Opioids is Not “in Itself” a Defence

In *Cambridge Memorial Hospital v Ontario Nurses’ Association (Cambridge)*, Arbitrator Dana Randall upheld the discharge of a Registered Nurse (RN) for theft of opioids from her employer Hospital, including theft which diverted opioids from patients. The arbitrator found that the grievor failed to “own up” to the full extent of her misconduct. Most importantly for employers generally, especially in the healthcare sector, he also found that the grievor’s addiction to opioids was not “in itself, a defense to termination. Put differently, it is not *prima facie* evidence of discrimination.”

## Background Facts

The grievor was a 28-year employee with the Hospital with a clean disciplinary record. She held a position of responsibility as Patient Flow Coordinator at the time her opioid theft was discovered. Upon being confronted by the Hospital in August of 2014, the grievor promptly commenced a disability leave, entered into a rehabilitation program for addicts and presented herself ready to return to work with restrictions from the College in September 2015. Prior to her return, the Hospital investigated the grievor’s actions further and found that the opioid theft had occurred for a longer period than initially thought and that opioids had been diverted from patients. The Hospital believed the grievor was not candid during the investigation and, in any event, determined that theft, diversion of patient medications and falsification of patient records amounted to serious misconduct for which termination was justified. The grievor’s employment was terminated for just cause in November 2015.

## What Does the Case Law Say?

The Ontario Nurses’ Association relied on several prior awards that addressed the addiction

defence and argued that the arbitral consensus dictated a non-disciplinary approach in these circumstances. In each of the earlier cases, arbitrators had reinstated RNs who had been terminated for the theft of drugs from hospitals and/or patients, in circumstances where the RN pled an addiction.

The Hospital relied on the line of authorities arising out of the B.C. Court of Appeal in *British Columbia (Public Service Agency) v. British Columbia Government and Service Employees' Union (Gooding)* to argue that “to hold an addict to the same standard of culpability as a non-addict for a criminal act is not *prima facie* discrimination, because there is nothing arbitrary about the norm being enforced.” It also argued that no mitigation of the penalty was warranted due to the insufficient nexus made out between the grievor’s drug dependency and her misconduct.

## **The Arbitrator’s Findings**

Relying on *Gooding*, the arbitrator dismissed the grievance and differentiated the prior awards relied by ONA, stating:

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. The facts of this case also distinguish it from those awards, which are based on principles of mitigation. While the Grievor is a discipline free long service employee, who ‘but for’ her addiction would have not misconducted herself, her failure to own up to the full extent of her misconduct, together with other features of the case, disqualify her from considerations of mitigation, given the seriousness of her offence.

## **A Focus on Deterrence in the Healthcare Sector**

Significantly, the arbitrator also noted the importance of general deterrence, especially important for hospital employers and those in the healthcare sector generally:

I would be remiss to not mention my concern with respect to general deterrence. It is trite to note that workplace discipline has both specific and general deterrence purposes. 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.

## **Implications for Employers**

Employers should not automatically assume that the mere assertion of an addiction vitiates culpability and the potential to terminate for just cause. If employees are normally terminated for engaging in theft, it is not necessarily discriminatory to apply the same standard to employees stealing narcotics from their employer, notwithstanding the presence an addiction-related disability.

Consideration should also be given to reporting narcotics thefts to the local police in recognition of the seriousness of the misconduct and *Criminal Code* implications.

The facts will of course matter, including the extent of the addiction and any perceptible impact on work performance and conduct. Also, where the employee comes forward seeking assistance before being caught, it is more likely an arbitrator would view the matter through a human rights lens and apply accommodation principles. In all cases, proactive implementation of well-crafted policies and protocols will be a key part of an appropriate organizational response in these types of cases. Consider:

- reviewing current employment disability accommodation policies
- reviewing current substance abuse protocols
- ensuring protocols are in place to respond to employee requests for addiction support resources or assistance programs
- auditing current training and education initiatives with respect to the foregoing.

Should you have any questions or require further information, please contact your regular [Hicks Morley lawyer](#).

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