

LABOUR PAINS

March, 2011 Edition



...HELPING YOU
SEE THE FOREST
THROUGH THE TREES

Employers Have a Duty to Accommodate Theft?!

By Brownlee LLP

It is well established that employers have a duty to reasonably accommodate an employee's illness (including addictions which are considered to be a "mental illness" under the *Alberta Human Rights Act*) to the point of undue hardship, which we all know is a high bar to reach. Interestingly, a recent arbitration decision from Ontario suggests that the duty to accommodate includes tolerance of theft from the workplace.

In Re St. Mary's General Hospital and Ontario Nurses' Association (Harris) (2010), 199 L.A.C. (4th) 75, a nurse (Jennifer Harris) was terminated for stealing narcotics from the hospital at which she was employed. Harris had been employed by the St. Mary's Hospital in Kitchener, Ontario since 2004, and had been stealing narcotics from the hospital since 2007 including Tylenol 3, OxyContin, Percocet, and Diloted. In 2009, Harris attended the acute care unit of the hospital while off work and used her access password to withdraw two vials of hydromorphone that were prescribed for a patient. Harris was caught, and this incident resulted in her termination for just cause.

Following her termination, Harris commenced a 39-day inpatient addiction treatment program. Harris also grieved her termination, claiming that it was not a proportionate consequence to her conduct given the fact that she was battling an addiction and was now seeking treatment. The union successfully established that Harris was an addict and not simply a "recreational user" (which would not have entitled Harris to claim human rights protections), and that her addiction compelled her to steal the narcotics from her employer. On this basis, the Union argued that the Hospital had a duty to reasonably accommodate her addiction to the point of undue hardship, which the Union argued had not yet been met.

The Arbitrator accepted the Union's argument and reinstated Harris to her position. The Arbitrator found that while the Hospital could not create a "drug-free" work environment for Harris, the Hospital could implement reasonable safeguards to ensure that Harris was not to administer or handle narcotics and, further, that such accommodations did not establish undue hardship. However, the Arbitrator also recognized the significant harm to the employment relationship caused by Harris and, on this basis, denied her any award for back-pay.

It continues to be the case that the duty to accommodate imposed upon employers continues to be onerous and, at times, perhaps unbelievable. While we respectfully disagree with this decision and will continue to argue the contrary position, this case is a shocking reminder of the ever-expanding scope of the duty to accommodate. With that said, we anticipate that this decision will be appealed, and we will keep you updated on further developments as they unfold.

© Brownlee LLP 2011

Brownlee LLP • 780.497.4800 • www.brownleelaw.com