



eCaseNote

2006 No. 05

SUBSTANCE ABUSE - EMPLOYER'S DUTY TO ACCOMMODATE

Health Employers Assn. of British Columbia v. B.C.N.U., 2006 BCCA 57 and *Kemess Mines Ltd. v. International Union of Operating Engineers, Local 115*, 2006 BCCA 58

In early 2006, the British Columbia Court of Appeal released its decisions in two cases involving the dismissal of employees for conduct that was attributed to drug use. We believe a brief summary would be of interest to any of our employer clients.

In the *Health Employers* case, Bergen, a registered nurse at the Kootenay Boundary Regional Hospital ("Kootenay"), had an ongoing drug addiction. He was terminated for theft, dishonesty and failure to remain abstinent. In the *Kemess Mines* case, Gardiner, a tailings pond operator for Kemess Mines, was terminated after he was caught smoking marijuana at the mine site, contrary to his employer's zero tolerance policy. Both unions successfully grieved their dismissals. Both of their employers subsequently brought appeals before the British Columbia Court of Appeal. Kootenay's appeal was successful. Kemess Mines' was not.

The BC Court in each case found that drug addiction is recognized as a disability. Under human rights legislation, it is discrimination to refuse to employ or continue to employ someone because he or she has a disability, unless the refusal is based on a *bona fide* occupational requirement (BFOR). The Supreme Court of Canada had previously established that an employer may justify what might otherwise be human rights laws be considered to be a discriminatory employment standard by establishing that it has met the following BFOR test on the balance of probabilities:

- (1) that the employer adopted the standard for a purpose rationally connected to the performance of the job;
- (2) that the employer adopted the standard in an honest and good faith belief that it was necessary to the fulfillment of that legitimate work-related purpose; and
- (3) that the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show this, the employer must demonstrate that it is impossible to accommodate individual employees sharing the characteristic of the claimant without imposing undue hardship upon the employer.

In each case, the first two elements of the test were met. The difference in the decisions arose out of the Court's treatment of the third element. In Bergen's case, Kootenay was found to have met the third element. At the time Bergen was hired, Kootenay was aware of his drug addiction. Bergen was participating in a drug recovery program and Kootenay set up monthly meetings with him to monitor his rehabilitation. The Court also found that Bergen had received two prior employment opportunities to cope with his addiction and had failed to do so. The Court stated:

The employer's duty to accommodate Mr. Bergen was matched by his duty to facilitate the accommodation process. 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. (Citations omitted)

In Gardiner's case, however, the Court found that Kemess Mines had not met the third element of the BFOR test. Gardiner was not fully aware of his disability. He did not think that he was addicted to marijuana, though he did admit that he knew he had a "problem" with the drug. The Court found that his resulting failure to seek assistance did not end the employer's duty to accommodate. As explained by the Court:

An addicted employee does have a duty to facilitate accommodation through rehabilitation... In my view, however, the scope of the employee's duty may vary depending on the relevant factors in the case, including whether the employee is in denial or unaware of his addiction disability. I would not say that there can never be a duty on an undiagnosed employee to seek help voluntarily. And once the employee is aware of his addiction, there is no doubt that he must do all he can to facilitate the success of his rehabilitation and treatment. The facts of each situation must be assessed on a case by case basis.

Kemess Mines, however, was not left without remedy. The Court went on to say, "*the arbitrator dealt with the fact that Mr. Gardiner knew he was breaching the employer's drug policy every time he possessed and used marijuana at the mine site. The arbitrator addressed these aspects of Mr. Gardiner's conduct by imposing a ten month disciplinary suspension (without pay or benefits) and a number of strict conditions on Mr. Gardiner's reinstatement.*"

Readers should note that leave to appeal to the Supreme Court of Canada has been sought in both of these cases. However, whether the rulings stand or fall, they still emphasize the dual obligations on employers and employees in situations where an employee suffers from an addiction. An employer has a duty to accommodate that employee to the extent that it does not impose undue hardship. Such accommodation may come in the form of providing opportunities to the employee to rehabilitate, and may include taking steps to accommodate the employee once it is discovered that the employee suffers from an addiction. The employee, however, also has a responsibility to take the necessary steps to deal with his or her condition. If the employer has provided an employee with opportunities to rehabilitate and the employee has not taken those necessary steps, the employer may be found to have met its duty to accommodate and the employee may be without remedy.

The comments contained in this eCaseNote provide general information only and should not be construed as legal advice or opinion. For more information or specific advice on matters of interest, please call our offices at (709) 579-2081.