



Employer and Union Discriminated Against Addicted Employee

Inside:

Workers' Compensation Immunity Can Apply To Grievances

Page 2

Competition From Former Employees, Rights Clarified

Page 3

Saskatchewan Enjoying Historic Employment Levels

Page 3

Minimum Wage Increase In May

Page 4

Province Wide Smoking Ban Now In Effect

Page 4

The Saskatchewan Human Rights Tribunal has issued a detailed decision in the area of accommodation of employees with addictions. The 158 page decision of the Tribunal is confirmation that accommodating individuals suffering from alcohol and/or substance addiction is no easy matter – for the employer and the union.

The case involved a crane operator who was sent to rehab by the employer after he voluntarily disclosed that he suffered an addiction to drugs and alcohol. The employer, with the

knowledge of the union, allowed the employee to return to work after he signed a conditional return to work agreement. This agreement required that the employee abstain from drugs and that failure to abide by this condition would result in immediate termination. A few months later, the employee failed a random drug screen that he was required to take pursuant to the employer's alcohol and drug screening policy. He went back to the rehab program. However, when he attempted to return to work, he was told that his employment was terminated, because he violated the conditional return to work agreement. He filed a human rights complaint shortly thereafter.

The Human Rights Tribunal heard expert witnesses on the topic of addictions and rehabilitation. On the basis of the evidence, the Tribunal confirmed that alcohol and drug addiction is a disability that must be accommodated by employers. More importantly, the Tribunal ruled that slips or relapses are to be treated as part of the disability, and therefore must be

accommodated as well to the point of undue hardship. The Tribunal confirmed that there is no blanket right to terminate an employee for a relapse. It was even suggested that “[several] relapses is the rule rather than the exception”.

The employer argued that it did not fire the employee because of his disability, but

The Tribunal concluded it is discrimination to discipline for misconduct where there is a causal connection between a disability and the misconduct and where it is reasonable to infer that the disability was a factor in the termination

because of dishonesty and violation of the conditional return to work agreement. However, the Tribunal concluded that it is

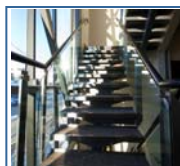
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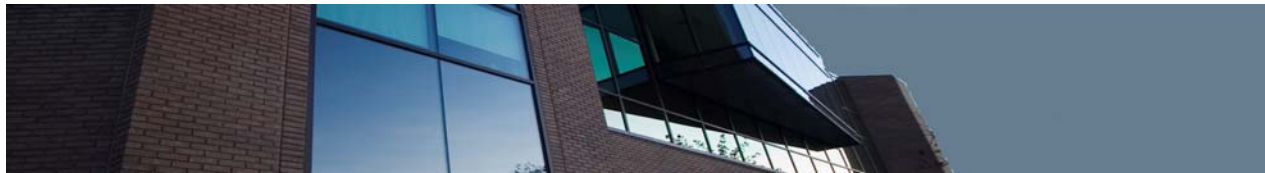
discipline for misconduct where there is a causal connection between a disability and the misconduct and where it is reasonable to infer that the disability was a factor in the termination. In other words, employers may have to tolerate or “accommodate” the misconduct to the point of undue hardship when it arises from the disability.

Interestingly, the Tribunal also ruled that the employer could not rely on the conditional return to work agreement because the agreement violated human rights legislation in that it was too harsh and punitive. The Tribunal particularly noted that the agreement provided absolutely no allowance for slips or relapses and that it required termination without any assessment being made about whether the slip or relapse impaired the employee from work.

The Tribunal also rejected the employer's defence that the termination was necessary for safety reasons, largely because the employee had an unblemished safety record. The Tribunal also suggested that the employer could have considered other options before termination, including leave of

See *Addicted Employee* continued on Page 2





Addicted Employee *Continued*

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absence, less safety sensitive work, shorter shifts, or breaks to allow the employee to call his sponsor.

The Tribunal reinstated the employee and awarded him damages for several years of missed wages with interest. He was also awarded \$8,000 for injured feelings. Importantly, the Tribunal held the union jointly liable for these damages. The Tribunal ruled that the union participated in the discrimination by failing to advocate for an alternative accommodation for the employee and by impeding reasonable efforts by the employee to obtain accommodation.

This case is significant for two reasons. One, it indicates that the Human Rights Commission and the Tribunal have very expansive expectations for employers who have employees suffering from addictions. The Tribunal's decision is arguably inconsistent on

Workers' Compensation Immunity Can Apply to Grievances

The Court of Appeal for Saskatchewan has quashed a decision of the Workers' Compensation Board that threatened to undermine the immunity paid for by employers under *The Workers' Compensation Act, 1979*. John R. Beckman, Q.C. and David Stack of McKercher LLP represented the employer in the appeal.

The decision of the Workers' Compensation Board ("WCB") related to an allegation that an employee was injured by alleged workplace harassment. The employee brought both a union grievance and a workers' compensation claim in relation to the same injury. The workers' compensation claim was dismissed because the WCB ruled that the alleged harassment did not occur. The employer then brought an application to the WCB for an order barring the union grievance on the basis that *The Workers' Compensation Act, 1979* prohibits employees from bringing civil actions against employers for alleged workplace injuries.

The WCB rejected the employer's application. Surprisingly, the WCB ruled that once it determines that an injury did not occur in the workplace the employee is free to bring a union grievance. This decision threatened to undermine the no-fault workers' compensation system that employers fund in order to avoid

some points with higher court authority. However, surprisingly the employer and the union did not appeal the decision. There will undoubtedly be a future case where the courts will be asked to review the Tribunal's expansive approach to accommodation of addiction. The second reason the case is significant is because it tagged the union for not being a strong advocate. It is arguable that this will result in more grievances and arbitrations, as unions will be worried that any agreement worked out with the employer will be subject to second guessing in the human rights process, even if the employee has signed the agreement.

Given the significance of this decision, it is recommended that employers review their disability policies and consult with legal counsel when accommodating employees suffering from addictions.

civil liability.

The employer applied for judicial review of the WCB decision. The Court of Appeal quashed the WCB decision. The Court ruled on three important points:

- ◆ The statutory bar in *The Workers' Compensation Act, 1979* prohibits an employee from suing an employer for alleged workplace injuries even if the remedies sought in the law suit are different from the remedies available to the employee under *The Workers' Compensation Act, 1979*
- ◆ When a union grievance pertains to an alleged workplace injury it may be prohibited by the statutory bar.
- ◆ If the WCB has rejected an employee's workers' compensation claim, the employee is *not* permitted to pursue a civil action based on the same alleged workplace injury. The statutory bar continues to apply after the WCB rejects the worker's injury claim.

In light of the Court of Appeal's decision, it is important that employers seek legal advice if confronted with a union grievance or law suit alleging a workplace injury. It may be that the union grievance or law suit is statute barred.



Competition From Former Employees

Traditionally the common law has afforded little protection to employers when employees leave to join a competitor or to open up a competing business. Unless the departing employee occupies a fiduciary position (which is not the norm), employment law has generally only required departing employees to provide the employer with reasonable notice before quitting, and to not misuse the employer's confidential information. However, the Supreme Court of Canada released a recent Judgment (*RBC Dominion Securities Inc. v. Merrill Lynch Canada Inc.*, 2008 SCC 54) that appears to offer some additional protection to employers.

RBC was a case in which an RBC branch manager left his employment without notice to take a job with a competitor of RBC. The branch manager took with him a number of other employees who were under his charge. At trial it was concluded that the branch manager had engaged in "unfair competition". The Supreme Court of Canada held that the trial decision was wrong in law as employees do *not* have a general duty not to compete with former employers. The majority of the Supreme Court, however, ruled that the former branch manager breached his duty of good faith to his former employer when he organized the mass exit of other employees. The majority particularly cited the fact that part of the manager's job involved retention of these employees for the employer. RBC was awarded damages for lost profits as a result of this breach.

Since a business can suffer dearly when a former employee joins a competitor or sets up a competing business, not all employers are content to rely on the protection of the common law and the implied duty of good faith. Some employers insert express non-competition covenants into employment contracts in an effort to gain added protection against the unscrupulous defector. These covenants usually contain three main elements: i) a statement of the prohibited area of competition (eg. accepting employment as an insurance broker...); ii) a geographic restriction (within the City of Saskatoon...); and iii) a temporal restriction (for a period of 1 year). It is important to realize, however, that the courts will allow employers to go only *so far* in relying on non-competition covenants.

As non-competition covenants operate as a restraint of trade, the courts regard them as void unless the employer can justify the reasonableness of the restraint. There are two policy concerns behind this rule: i) a concern to avoid unduly limiting competition in a free market; and ii) a concern that

the former employee should not be unduly restrained from making a living with another employer. The courts will enforce a non-competition covenant if it is determined that the employer has a legitimate interest in need of protection, and if the geographic, temporal, and activity restrictions in the covenant are reasonable.

However, in a Judgment released in January of 2009, the Supreme Court of Canada in *Shafroon v. KRG Insurance Brokers (Western) Inc.*, 2009 SCC 6, has cautioned that restrictive covenants in employment contracts are scrutinized more rigorously than restrictive covenants in a sale of a business. This is based on the assumption that there is often an imbalance in power between employees and employers, which may make it unfair to enforce a restrictive covenant against an employee. The Supreme Court also noted ambiguous non-competition covenants will be considered to be unreasonable.

The *Shafroon* case demonstrates why it is very important to draft non-competition covenants with clear language and to avoid overreaching. In *Shafroon*, only a part of the covenant was unreasonable, and the Court of Appeal purported to fix the covenant by modifying it. The Supreme Court of Canada, however, ruled that the entire non-competition covenant was unenforceable, and that the courts could not fix it. The Court clarified that it will only be in rare cases where the courts will only remove the offending part of a non-competition covenant, ie. where it is a "trivial" part of the covenant. In most cases, the entire non-competition covenant will be rendered unenforceable, even if only a portion of it is unreasonable.

In considering the use of a non-competition covenant in a specific employment relationship it is therefore important to closely examine the particular circumstances to assess: i) if there is a sufficient proprietary interest in need of protection; and ii) what, if any, reasonable restrictions can be placed on the employee to sufficiently mitigate this risk. If the restrictions inserted in the employment agreement are too broad, then the non-competition covenant may not be enforceable when it is needed, and the employer will be forced to rely on the limited protection offered by common law.

It is also important to seek legal advice when responding to employee competition. It may be that other areas of the law could apply to the situation, including breach of fiduciary duty or breach of confidence.

Saskatchewan Enjoying Historic Employment Levels

Saskatchewan has more people working than ever before in the province's history, according to the Statistics Canada Labour Force Survey released early in June. There were 530,100 people working in Saskatchewan in May 2009, compared to the previous record of 522,500 set in September 2008. The May 2009 employment figures reveal an increase of 12,600 jobs compared to May 2008. This is at a time when Canada lost 337,500 jobs during that same 12-month period.

MINIMUM WAGE INCREASES IN MAY

Saskatchewan's minimum wage increased from \$8.60 per hour to \$9.25 per hour effective May 1, 2009.

This is the third of three stages of increases that raised the minimum wage from \$7.95 to \$9.25 between January 2008 and May 2009. The minimum call-out pay, which is three times the level of the minimum wage, also increased to \$27.75.

The government reports that there are approximately 12,000 minimum wage earners in Saskatchewan.



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Reminder

Saskatchewan Province-wide Smoking Ban Now in Effect

As of May 31, 2009, a province-wide smoking ban took effect. The ban is the result of amendments to *The Occupational Health and Safety Regulations, 1996*. Smoking is prohibited in all enclosed places of employment, including buildings, vehicles, other enclosed structures and underground mines with some exceptions. This is intended as an expansion of the ban imposed in 2005, which did not include industrial and other types of workplaces where the public is typically not present.

While the government has stated that the Occupational Health and Safety Division ("OHS") will initially focus on education, failure to follow this new ban can result in OHS issuing a notice of contravention. It is also possible that disregard of the ban (particularly repeated disregard) may result in prosecution and a fine.

