Can Employer Fire Addicted Worker for Violating Last Chance Agreement?

SITUATION

A worker with a safety-sensitive job with a marine transportation company tells the company that he's an addict, attends a residential treatment program and signs a return to work agreement. After three relapses involving use of alcohol while off-duty, he and the company enter into a last chance agreement stating: 1) the worker will abstain from alcohol or drugs for two years; 2) if he isn't fit to return to his original position, the company will accommodate him with other suitable work it may have, including non-safety-sensitive positions; and 3) a positive drug or alcohol test or other breach of the agreement will result in immediate termination. The signed agreement stipulates that the company has accommodated the worker to the point of undue hardship. He subsequently fails a random alcohol test, so the company fires him. The union grieves the termination. It produces a doctor's report diagnosing the worker with major depressive disorder and ADHD, and stating that if his two mental health issues were treated, he'd be more likely to remain sober. The worker argues he has always voluntarily reported his relapses, never been impaired at work and was never involved in any alcohol- or drug-related safety incident. Plus, the company has non-safety-sensitive positions available that he could fill.

QUESTION

Was the company's firing of the worker discriminatory'

A. No, because he violated the last chance agreement.

B. No, because he had a safety-sensitive position and relapsed four times, so any further accommodation is an undue hardship.

C. Yes, because the company failed to accommodate him to the point of undue hardship.

D. Yes, because an automatic termination clause in a last chance agreement is never enforceable.

ANSWER

C. Because the company could accommodate the worker with a non-safety-sensitive position, it hadn't accommodated him to the point of undue hardship and so the termination is discriminatory.

EXPLANATION

This hypothetical is based on a federal arbitration decision under the *Canada Labour Code* in which the arbitrator declared that, to prove discrimination, a worker has to show he has a disability, was subject to adverse employment action and the action was linked, at least in part, to the disability. Here, the arbitrator said, the worker had a disability'alcohol and drug addiction'his termination was an adverse employment action and his disability was the primary factor in that termination. So he established discrimination. Because the company had available non-safety-sensitive jobs, the arbitrator found the worker could be reinstated to such a position as contemplated in the agreement. The arbitrator noted that the worker reported his relapses every time, never worked while impaired, never used drugs or alcohol at work and didn't cause any safety incidents. So in light of the doctor's opinion that, with treatment of his depression and ADHD, he

could likely remain sober, the arbitrator reinstated him on the condition of a medical exam to determine his fitness to return to work.

WHY THE WRONG ANSWERS ARE WRONG

A is wrong because all aspects of the agreement may not be enforceable. For example, parties can't contract away human rights protections with an automatic termination provision in a last chance agreement. Human rights law protects workers with a disability such as drug addiction from adverse employment action relating to that disability and requires an employer to accommodate such workers to the point of undue hardship. Simply stipulating in a last chance agreement that the employer has accommodated a worker to the point of undue hardship doesn't make it so. In this case, although the worker *did* violate the last chance agreement, the automatic termination clause in that agreement wasn't enforceable because the company could further accommodate the worker with a non-safety-sensitive position.

B is wrong because in evaluating whether an employer has accommodated a disabled worker to the point of undue hardship, *all* of the facts and circumstances must be considered. An employer doesn't have to undertake accommodations that impose an undue hardship on it. For example, an employer doesn't have to make up a job or role that doesn't already exist and which it doesn't need or spend an unreasonable amount of money to modify the workplace for the worker. An employer also doesn't have to accommodate a worker if it'll endanger the health or safety of others, such as employing a schizophrenic worker whose erratic behavior in a safety-sensitive workplace can put others at risk. (See, 'Accommodation v. Undue Hardship'). Here, each of the worker's relapses involved off-duty conduct and never involved use of alcohol or drugs while on the job. In fact, he never worked while impaired or caused any incidents. And a physician believes the worker could remain sober if he received proper treatment for underlying mental

conditions. Lastly, the company has non-safety-sensitive positions to which it could assign him. So based on *all of the circumstances*, it's not true that simply because the worker had four relapses, undue hardship has been reached.

D is wrong because automatic termination provisions in an agreement may be enforceable in some circumstances. Automatic termination provisions in a last chance agreement are subject to a just cause analysis, evaluating whether:

- There was reasonable and just cause for termination;
- Discipline was excessive; and
- There was a 'just and equitable' alternative if the discipline was excessive.

Here, because the worker didn't cause any safety incidents, didn't use alcohol or drugs while on the job or work while impaired and was upfront about his addiction, automatic termination is excessive and not a reasonable and just response to his relapses. And because the company has non-safety-sensitive positions that he could fill, the just and equitable alternative is to reinstate him in one of those jobs and allow him to obtain treatment for his underlying conditions.

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Seaspan ULC v. Int'l Longshore & Warehouse Union. Local 400, [2014] CanLII 83893 (BCLA), Sept. 16, 2014