

Does Violation of Last Chance Agreement Justify Termination for Poor Judgment?



SITUATION

A city worker with a safety sensitive job has a drug problem, some attendance and performance issues and at one point walks off the job shouting 'I'm getting the f@%! out of here, I've had enough.' The city enters into a series of 'last chance' agreements with the worker during the course of his employment. The latest agreement addresses both non-culpable behaviour related to his drug problem and culpable conduct because of his attendance and performance history. During one of his night shifts and without permission, he drives the front-loader he's operating off the worksite and to his home, where he uses it to pile snow into a hill on which his girlfriend's child could play. The city receives complaints from neighbours about the worker's actions and says a fence may have been damaged. The worker admits exercising poor judgment although he says he wasn't on drugs that night. The city fires him, claiming he violated the last chance agreement. But the worker argues the last chance agreement violates human rights law. His union files a grievance.

QUESTION

Did the city properly fire the worker'

- A. No, because he wasn't impaired when he took the equipment.
- B. No, because last chance agreements are discriminatory and illegal.
- C. Yes, because he engaged in serious misconduct that violated the last chance agreement.
- D. Yes, because the city had accommodated his disability to the point of undue hardship.

ANSWER:

A. The worker committed serious misconduct that not only violated the last chance agreement but also would have justified termination even without the agreement.

EXPLANATION

This hypothetical is based on an Ontario case in which the arbitrator upheld a city's termination of a worker who took the employer's front-end loader off the worksite for personal reasons and without permission. That worker had entered into a last chance agreement with the city because of a drug problem and record of disciplinary actions. But he wasn't under the influence of drugs when he took the loader. The arbitrator described a last chance agreement as a compromise between a worker about to be terminated and his employer, who imposes conditions to reinstatement. Violations of those conditions can warrant termination. The arbitrator said it was reasonable for the last chance agreement to address both culpable and non-culpable conduct. The arbitrator described the worker's misconduct in driving 'a front-end loader off on a frolic in the middle of the night' as so serious that it could've been grounds for termination even without the existence of a last chance agreement. Therefore, the arbitrator found termination reasonable because the city could no longer trust the worker and his conduct exposed the city to significant liability.

WHY THE WRONG ANSWERS ARE WRONG

A is wrong because the conduct itself was grounds for termination regardless of whether it was caused by drug impairment. The worker took equipment off the worksite and used it for personal benefit, creating potential for damage to private property and liability for the employer. Additionally, this last chance agreement included as grounds for termination culpable misconduct unrelated to any drug addiction disability. So the fact that the worker wasn't impaired when he committed this misconduct doesn't affect the reasonableness of the termination or the fact that his actions violated the last chance agreement.

B is wrong because last chance agreements aren't illegal. Treating workers differently because they have a disability can be discrimination violating human rights laws. But last chance agreements with workers who have a drug addiction aren't automatically discriminatory. They simply ensure that all employees are held to a standard of acceptable performance. The employer and worker agree that the worker won't be terminated for misconduct if he maintains acceptable performance, avoids further misconduct or meets other conditions. Here, the worker had absenteeism issues and other performance problems in addition to an admitted drug problem. The city had grounds to terminate the worker but agreed to the last chance agreement if he avoided drug use *and* maintained acceptable performance. His actions on the night shift weren't acceptable conduct and thus justified his termination for violating that agreement.

D is wrong because this situation isn't about accommodating the worker's disability but rather whether his actions justified termination. That is, the city wasn't arguing that it had accommodated the worker's drug addiction to the point of undue hardship. Instead, it correctly argued that his termination was justified because his taking the front-end

loader off the worksite and engaging in dangerous conduct'not done under the influence of drugs'was serious, destroyed the employer's ability to trust the worker and violated the terms of the last chance agreement.

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[Canadian Union of Public Employees, Local 133 v. Corporation of the City of Niagara Falls](#), [2014] CanLII 6917 (ON LA), Feb. 6, 2014