

ARBITRATOR FINDS AN EMPLOYER HAS NO DUTY TO ACCOMMODATE AN INTOXICATED EMPLOYEE WHO *MIGHT* SUFFER A DISABILITY

Amcan Castings v. United Steelworkers of America, Local 4153,
[2006] O.L.A.A. No. 363 (M.L. Tims)

By Laura Karabulut

An Ontario arbitrator found that in the absence of evidence clearly establishing that the grievor suffers from a handicap within the meaning of the Ontario *Human Rights Code* (the “Code”), the employer is not subject to a statutory duty to accommodate.

The grievor, who occupied a safety sensitive position in the workplace, attended work in an inebriated state. The workplace was hazardous and there was a real risk of serious personal injury. The plant supervisor became suspicious of the grievor's condition as the grievor was “loud and agitated”. That afternoon, the grievor was found to have left a bull ladle unattended filling with molten metal and a forklift running without securing the hand brake. Once the employer was able to secure a replacement for the grievor, a meeting was held between management, the grievor and two union stewards. The grievor was advised that he was being suspended for having committed an unsafe act in violation of the employer's plant rules. At the suspension meeting, the grievor appeared unsteady on his feet and his speech was slurred and incoherent. In addition, there was the smell of alcohol on the grievor's breath and so he was sent home in a taxi. Following the suspension meeting, a union representative advised the employer that the grievor was “going into a program”.

The employer had a zero tolerance policy with respect to intoxication in the workplace, of which the grievor was aware. The employer also offered an Employee Assistance Plan (“EAP”) to all employees and the EAP was referenced in the parties' collective agreement. It was the employer's view that the grievor engaged in serious misconduct warranting discharge. Accordingly, the grievor's employment was terminated. The union acknowledged that the grievor had been drinking and that this gave rise to significant safety issues. It contended, however, that the employer had a duty to accommodate the grievor because he *might* suffer from alcoholism, a disability under the *Code*. Accordingly, it was the union's position that the grievor should be accommodated and reinstated with restrictions while the parties ascertained “if there is a disability”.

The grievor had been dismissed for drinking at work approximately two years earlier when he was found sleeping on the job in an intoxicated state, with a thermos full of wine. The grievor had been subsequently reinstated on conditions. Following that incident, the grievor had met with counsellors and had sought treatment of an “unspecified nature”.

Arbitrator Tims found that the employer had just cause to discharge the grievor. She also determined that the evidence did not establish that the grievor had a disability within the meaning of the *Code* and, therefore, the employer had no statutory duty to accommodate. The arbitrator noted that in the absence of such evidence and compelling mitigating factors,

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reinstatement was not justified in order to determine whether or not the grievor was so afflicted. The grievance was dismissed.

On the other hand, in an award released one day before *Amcan Castings*, a grievor who was dismissed for attending work in an intoxicated state and continuing to consume alcohol during his shift was reinstated to his safety sensitive position. The grievor in *Sifto Canada Inc. v. Communications, Energy and Paperworkers Union of Canada, Local 16-0 (Schultz Grievance)*, [2006] O.L.A.A. No. 361 (H.D. Brown) ("*Sifto Canada*") had been an admitted alcoholic for most of his adult life and his drinking problem became worse in the two years prior to his dismissal. The grievor had been disciplined on three occasions during the previous year for attending work while intoxicated. The grievor had also participated in the EAP provided by the employer. Following his dismissal, the grievor received treatment for his drinking problem and claimed that he had not consumed alcohol for approximately nine months as of the date of the arbitration.

Arbitrator Brown found that the employer had cause to take disciplinary action against the grievor, particularly given the safety sensitive nature of the operation. The arbitrator determined, however, that the safety issue did not override the need and requirement for accommodation of the grievor who suffered from alcoholism. In addition, in light of the grievor's attempt at rehabilitation following his dismissal, the arbitrator found that reinstating the grievor in his safety sensitive position would not constitute undue hardship for the employer. The grievor was reinstated without loss of seniority but without compensation and subject to specific conditions.

According to the decision of *Amcan Castings*, an employer does not have a duty to accommodate an employee who *may* suffer from a disability. According to *Sifto Canada*, however, where there is sufficient evidence to establish that an employee suffers from a disability such as alcoholism, an employer has a duty to accommodate the employee's disability to the point of undue hardship, even if it may require reinstating the employee to a safety sensitive position.

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