

## EMPLOYEE OBLIGATIONS IN THE ACCOMMODATION PROCESS

*Ivaco Rolling Mills (2004) LP and United Steelworkers of America, Local 7940 (McLennan)*  
and *Canada Post Corporation and Canadian Union of Postal Workers (Ali Uzman)*

R. Lance Ceaser

### **Introduction**

Since the decision of the Supreme Court of Canada in *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970, there has been a recognized obligation on employees to identify the need for accommodation in the workplace, and to co-operate in reasonable efforts to accommodate the individual's needs. In two recent decisions, arbitrators have considered the scope of such obligations in deciding discharge cases.

***Ivaco Rolling Mills (2004) LP and United Steelworkers of America, Local 7940 (McLennan)***  
[2007] O.L.A.A. No. 421 (Weatherill) (QL)

The grievor was a labourer for the Company, but had not yet completed his probationary period at the time his employment was terminated. He was discharged in September 2006, due to a perceived lack of motivation and poor attitude toward his work. The collective agreement specifically exempted probationary employees from just cause protection, leaving decisions regarding termination "at the sole discretion of the company". A few days before the hearing of the grievance, the employer received a letter from the grievor's psychiatrist indicating that the grievor had a relapse of depressive symptoms in the autumn of 2006, which may have impacted his ability to work at that time. Neither the grievor nor the union had previously alerted the employer to the grievor's condition, nor had they sought accommodation for his disability prior to the arbitration hearing.

David Wakely, representing the employer, objected to the Arbitrator's jurisdiction, on the basis that a grievance regarding discharge of a probationary employee was expressly excluded from arbitration. After reviewing the language of the collective agreement, the Arbitrator agreed, but observed that he could still have jurisdiction if the grievance effectively alleged a violation of the *Human Rights Code*.

The Arbitrator considered the medical information provided by the grievor's psychiatrist, and the lack of any prior reference to a disability, and found (at para. 17):

It is not in dispute, however, that at no time during his employment did the grievor or anyone on his behalf seek accommodation or any application of the *Human Rights Code*. The grievance does not assert or imply any entitlement to accommodation, and it was not suggested (apart from what may be implicit in the doctor's note) prior to the hearing in this matter. Such an allegation would, in general, and if made in a timely fashion, establish a "difference"

between the parties which would be subject to the grievance and arbitration procedure, and over which I would, in a proper case, have jurisdiction, having regard to the provisions of the Labour Relations Act set out above. However, “An employer cannot accommodate that of which it is unaware”: see *L.B. (Committee of) v. Jones*, [1999] N.J. No. 128 (Nfld. S.C.) per Osborn J. at para. 40.

Given that the grievor had not raised the requirement for accommodation in a timely manner (i.e., while still employed or at the time of termination), the Arbitrator found that there was no difference between the parties over which he could assert jurisdiction. Therefore, the grievance was dismissed.

**Canada Post Corporation and Canadian Union of Postal Workers (Ali Uzman),**  
[2007] C.L.A.D. No. 154 (Gordon) (QL)

The grievor was a Service Writer at the Corporation’s Fleet Maintenance facility. He was addicted to crack cocaine. In September 2006, he called his supervisor to report that he had been in a motor vehicle accident and would be away from work. After the initial call, he did not again contact the employer for almost two weeks, at which time he called in again and claimed that he had a concussion or head trauma, which led to his prolonged absence. The grievor’s continuing absence was treated as an absence without leave, and his employment was terminated on the basis of his record of several AWOL episodes over the preceding year. Shortly before the arbitration hearing, the grievor admitted that his absence was actually due to a drug binge, and was not related to any injury he received in the car accident.

At the hearing, Arbitrator Gordon heard evidence that the grievor had become addicted to crack cocaine in early 2005, and that he had missed work for days at a time on several occasions while on drug binges. Evidence was also tendered indicating that the Corporation had repeatedly warned the grievor about his unauthorized absences, but had also advised him of the Employee Assistance Program and had provided him with extended periods of leave (some of which were covered by sick benefits) so that he could undertake treatment. In fact, the grievor had been permitted to be absent from late February 2006 until August 1, 2006 to attend various drug rehabilitation programs. Throughout his absences over a period of 18 months, the Fleet Maintenance facility had difficulties in covering for the grievor, and the department fell behind in the work of maintaining the Corporation’s vehicles. At no time prior to discharge (or even by the time of the arbitration) did the Corporation receive any confirmation that the grievor had completed a prescribed course of treatment or an opinion regarding his prognosis for regular attendance in the future.

The employer argued that the case involved purely culpable conduct, and that the analysis should, therefore, focus on whether there was cause for discipline and whether discharge was the appropriate penalty in the circumstances. The Corporation pointed out that the grievor had never provided a medical diagnosis of addiction, and so there was no prima facie proof of disability. Moreover, the Corporation also argued that even if a disability had been established, the employer had satisfied the duty to accommodate, based on its tolerance and its efforts to assist the grievor in his rehabilitation. When the grievor opted to not attend work and instead go on a drug binge, he failed to participate in his own rehabilitation. His continued lack of candour

about his conduct indicated an inability to meet the employer's reasonable expectations, and militated against reinstatement. The union argued that the grievor did suffer from a disability and that the case raised the question of whether the employer had met its duty to accommodate. Even applying the analysis in the "hybrid cases", where arbitrators had dealt with addiction issues as both culpable and non-culpable, the union argued that cause for discharge was not made out. The union asserted that the grievor had come to grips with his addiction after being terminated, and that reinstatement to employment (with terms and conditions) would be feasible.

The Arbitrator reviewed the employer's approach to the grievor's situation, which mixed disciplinary sanctions with accommodative measures, and concluded that the parties had effectively agreed that the grievor's situation was of the "hybrid" type (i.e., some of his behaviour was addiction-related, but there was also an element of personal responsibility to his conduct). Applying the "hybrid" analysis, the Arbitrator found that the grievor's behaviour in being AWOL for almost two weeks, in being dishonest about the reasons for his absence until shortly before the arbitration hearing, and in failing to follow his supervisor's instructions to provide substantiation for his absence, constituted culpable conduct worthy of discipline. None of the prior discipline imposed on the grievor had been grieved, nor had it corrected his behaviour. On the non-culpable side, the Arbitrator agreed with the employer that the lack of medical evidence of addiction was troubling, but found that this issue need not be fully addressed since she was persuaded that the Corporation had discharged its duty to accommodate to the point of undue hardship. In particular, the Arbitrator observed:

... Even if I were to accept that a disability had been established as contemplated under the Act and the Grievor's misconduct was caused by symptoms related to that disability, I am persuaded that the Corporation's duty to accommodate the Grievor's disability to the point of undue hardship has been exhausted because he has not proved that his concomitant duty to facilitate the accommodation process has been sufficiently satisfied. Where, as here, an employer has given an addicted employee an accommodative opportunity for rehabilitation, the employee has a corresponding duty to take reasonable steps to obtain treatment, recover, and facilitate the successful implementation of the accommodation process: *Bergen*.

[emphasis added]

The Arbitrator went on to find that any further accommodation of the grievor would work an undue hardship for the employer, in the form of intolerable disruption of its fleet maintenance operations. She also observed that the grievor had not provided any evidence which would indicate a positive prognosis for improvement in his attendance at work or his ability to meet the employer's legitimate expectations. Moreover, the grievor showed no insight into the causes of his relapse in September 2006, expressed no remorse for his behaviour, and only entered another rehabilitation program approximately two weeks before the arbitration hearing. The Arbitrator concluded that no further accommodation was possible for the Corporation and that the employment relationship with the grievor was no longer viable. In the result, the grievance was dismissed.

## **Conclusion**

These cases demonstrate that accommodation is not a “one-way street”. Employees suffering from a disability (or covered by some other ground protected by human rights legislation) have a responsibility to bring to the employer’s attention any condition which may necessitate accommodation. Where the employer takes reasonable steps to fulfill its duty to accommodate (such as directing employees to assistance programs or providing time off for them to attend treatment), the employee has a duty to co-operate in the accommodation, including taking all steps and measures required to rehabilitate him or herself and to facilitate a successful return to work. Where an employee fails to meet his or her obligations, the employer may have legitimate reason to terminate the relationship.