DUTY TO ACCOMMODATE – AN ADVANCED PERSPECTIVE

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Basic Concepts of the Duty to Accommodate

For a discussion on the basic concepts related to the duty to accommodate as well as the applicable provisions of *The Human Rights Code* please see the paper which accompanied the session “Duty to Accommodate - Back to Basics”.

Introduction

This paper will discuss some of the more specific concepts and practical concerns involved in the duty to accommodate and which may arise in accommodating certain types of disabilities, in particular disabilities related to addictions.

In addition, we will explore other protected categories which may invoke the duty to accommodate specific issues that may arise.

Practical and Legal Issues that Arise Respecting Specific Characteristics

1. Mental Disabilities

Like other types of disabilities, there is no set definition of "mental disability". Rather, the issue is the extent to which an employee’s illness impacts their ability to perform the essential duties and obligations of their employment. In addition to situations where there is a real impact on normal functioning the duty to accommodate can arise when there is a perception of a disability.

While there may be no set definition of a mental disability, different mental disabilities often share many common characteristics. Perhaps one of the biggest problems with detecting and accommodating mental disabilities is that they are often surrounded by a social stigma which causes the person with the disability to deny the disability or to try and mask its presence.

This often results in employees failing to disclose the disability, misdiagnosis, or worse, employees denying or deliberately hiding the fact that they have a disability. This of course makes it difficult for unions and employers to detect and properly address disabilities in a way that complies with human rights principles. Often, this results in employers imposing discipline on people with mental disabilities instead of accommodating them.

Mental disabilities are usually either “cognitive disorders” or “psychiatric disorders”. Cognitive disorders are conditions such as learning disabilities whereas psychiatric disorders involve conditions such as depression and anxiety, bipolar disorder and obsessive-compulsive disorder. Mental disabilities can also include sleep disorders, psychosomatic sensitivity to chemicals and other emotional disorders.

However, as is the case with physical disabilities, mental disabilities vary with degree and a

mild learning disability or psychiatric disorder may not invoke the duty to accommodate.

Given the “invisible” nature of mental disabilities, issues often arise about the obligations of an employee to disclose their mental illness and the failure of an employer (or sometimes union) to detect an employee’s disability and act accordingly. Arbitrators have held that discipline or discharge of an employee because of their mental disability was improper even where an employee had failed to disclose their disability and, at the time discipline was imposed, the employer was unaware that an employee’s disability was the cause of their misconduct.

Arbitrators have also held that even where an employee did not disclose a mental disability that they knew about, the employer still had obligations to accommodate the employee. This is particularly the case where erratic or obvious behaviour of an employee at work should have caused the employer to suspect an employee’s illness. This remains the case even when the employee fails to disclose the existence of a medical condition until well after they are terminated. In cases where an employee has been disciplined for misconduct that can, at least in part be, explained by the existence of a mental disability, an arbitrator might consider the conduct non-culpable or at least consider the disability a mitigating factor. Even if the disability only came to light after the discipline, an employer might be required to explore accommodative options.

However, where an employer makes reasonable attempts to inquire into the possible existence of a disability and the employee refuses to give the employer information (that could have assisted the employer with accommodating the employee) then it is possible that the employer will be found to have satisfied its obligations to accommodate the employee.

It should be stressed that unions must also be aware that a member may make a human rights complaint against the Union (or perhaps make a duty of fair representation complaint under *The Labour Relations Act*) if the union fails to detect and/or act on obvious signs of a mental disability and fails to respond by representing the employee accordingly.

Further, where unions do take steps to represent an employee with a disability and are successful in negotiating a return-to-work agreement that accommodates the employee’s disability ("Accommodation Agreements" or "Last Chance Agreements"), unions must take care to ensure that the agreement itself does not violate *The Human Rights Code*.

Unions must also ensure that they do not give up on representing an employee simply because the employee breaches a return-to-work agreement. This is especially true where the breach of the agreement is related to the employee’s disability. This most often occurs in situations involving mental disabilities or addictions.

Finally, it is important to note that the presence of a mental disability does not necessarily preclude discipline or some other action by the employer that negatively affects an employee

with a disability. For example, arbitrators have held that where there is no causal connection between an employee's conduct and his or her mental disability, discipline for misconduct might be justified. One test for mental illness as a mitigating factor uses the following criteria *Canadian Postmasters and Assistants Assn. v. Canada Post Corp.*, [2001] C.L.A.D. No. 589:

1. The grievor was experiencing an illness or condition at the time of the misconduct
2. A causal linkage or nexus between the illness or condition and the aberrant conduct has been established
3. If a causal linkage is found, the arbitrator must be persuaded that there was a sufficient displacement of responsibility from the grievor to render the conduct less culpable
4. The arbitrator must be satisfied that the grievor has been rehabilitated and that the risk of a recurrence of the aberrant behaviour is minimal

In a similar vein, legitimate business dealings that affect a disabled employee are not necessarily discriminatory. Thus, layoffs that include a disabled employee might not constitute discrimination. As an example, see *Tutty v. MTS Allstream Inc., et al,* 2011 FC 57, where the federal court upheld the finding that the employee's termination was the result of a legitimate business reorganization, and that the duty to accommodate the employee's mental illness did not preclude legitimate organizational change.

However, if there is a link between the employee's conduct and the disability, it is important to ensure that the issue of discrimination is considered.

2. <u>Family Status and Pregnant Employees</u>

(a) <u>Pregnant Employees</u>

Employees who are pregnant may need to be accommodated in positions that meet their physical (or other) limitations. For example, a woman's pregnancy may prevent her from performing certain physical activity or from working certain hours or shifts due to fatigue. Pregnant women may also be unable to work with certain products or in certain environments due to risks that may exist for their unborn child.

For example, employees who work as x-ray technicians in health facilities may be excused from performing certain duties in order to protect their unborn child. As another example, female fire fighters or police officers may be accommodated in roles which exclude them from regular duties fighting fires or being on general patrol.

Accommodation of pregnant women as described above is really no different than the process

and goals of accommodating employees with physical or mental disabilities or who have other accommodation rights because they fall within a protected characteristic. Generally speaking, it will be necessary for a woman who is pregnant to confirm the existence of her pregnancy and to document the type of accommodation that is required through a medical certificate provided by her doctor.

Once the pregnant woman establishes that she has a restriction related to her employment, the employer will have to accommodate the employee by giving them alternate duties or excusing them from performing duties which exceed their limitations or may put their unborn child at risk.

The normal accommodation principles apply, and an employer may not need to accommodate a pregnant employee if to do so would cause the employer undue hardship and/or where the duties that the employee is seeking to be excused from performing constitute *bona fide* occupational requirements.

It should also be stressed to an employer that accommodation of a pregnant employee is usually a short-term accommodation and that it should therefore be easier for the employer to accommodate the employee.

In addition, it may be necessary for an employer to grant an unpaid leave of absence to employees in order to allow them to continue breast-feeding their newborn child. In *Carewest v H.S.A.A.*, CanLII 62165, it was necessary for a mother to continue breast-feeding her child every three hours due to the difficulty the child was having in adapting to other sources of food. The employer offered to make a room available at the workplace and to enable the grievor to express and store her milk. However, the employer did not agree to provide an unpaid leave of absence. The arbitrator held that the employer's refusal was discrimination on the basis of sex and that the employer had failed to accommodate the grievor to the point of undue hardship and had not established that its insistence upon an immediate return to work was a *bona fide* occupational requirement.

Similarly, in *Charbonneau v Atelier Salon & Spa*, 2010 HRTO 1736, the applicant made the case that the employer refused to hire her for reasons which included that she would require maternity leave. The HRTO concluded that if that was true, then a *prima facie* case was made out because "[m]aternity leaves flow so directly from pregnancy and giving birth that treating a woman differently because she plans to take a maternity leave amounts to discrimination because of sex." In this case, the HRTO concluded that even though the employer had demonstrated that there were also clientele issues that contributed to their decision not to rehire the applicant, it was more probable than not that the applicant's disclosure that she was pregnant was also a factor in the respondents' decision.

(b) <u>Family Status</u>

In Manitoba, family status will be interpreted to include being a parent or not being a parent, regardless of the manner in which a person becomes a parent and it may also include any other familial or perceived familial relationship. Again, human rights tribunals and other human rights adjudicators attempt to give a broad definition to family status to include common-law relationship and same-sex relationships. In Manitoba, marital status is expressly included together with family status as a protected characteristic.

Discrimination based on family status is interpreted as a distinction which imposes a burden or disadvantage or denies an advantage or opportunity on the basis of one's family or marital status. This includes a person's status as a parent (or non-parent).

Cases on accommodation of family status typically involve claims that an employer is obligated to accommodate an employee's family obligations by providing them with an alternate work schedule. The Federal Court of Appeal has outlined the test that must be met in proving discrimination based on family status in *Johnstone v Canada (Border Services)*, 2014 FCA 110. In that case, the Court affirmed that family status incorporates parental obligations such as childcare obligations. The Court then set out that in order to make out a *prima facie* case where workplace discrimination on the prohibited ground of family status resulting from childcare obligations is alleged, the individual advancing the claim must show:

(i) that a child is under his or her care and supervision;

(ii) that the childcare obligation at issue engages the individual's legal responsibility for that child, as opposed to a personal choice;

(iii) that he or she has made reasonable efforts to meet those childcare obligations through reasonable alternative solutions, and that no such alternative solution is reasonably accessible, and

(iv) that the impugned workplace rule interferes in a manner that is more than trivial or insubstantial with the fulfillment of the childcare obligation.

Of note, the Court's decision specified that the childcare responsibility must arise from a legal obligation rather than a personal choice.

The Manitoba Human Rights Commission has heard complaints (which were ultimately settled) respecting accommodation of an employee due to their family status. In one case, a single father with a four-year-old daughter who had special needs because of her disability requested to be excluded from shift work because it was almost impossible for him to work in the evening (or outside regular childcare hours). The employee's salary did not allow him to hire a person to care for his daughter after hours given the child's special needs.

The employee requested the opportunity to work shifts consistent with his family obligations and the employer denied his request. Only after the employee contacted the Human Rights

Commission was the employer willing to accommodate him until suitable childcare arrangements could be made.

In a second case, a female employee requested that her work schedule be modified upon her return from maternity leave. She requested the opportunity to work evenings so that she could be at home with her newborn child during the day while her husband was working. Her husband would then take care of the child in the evenings while she worked. The employer refused her request.

The employee filed a complaint with the Human Rights Commission and the complaint was ultimately settled in return for payment of $18,000 which was broken down into $8,000 as pay in lieu of notice at $10,000 as compensation for legal fees and general damages for injury to dignity, feelings and self-respect.

3. Reasonable Accommodation of Religious Beliefs

The Manitoba Human Rights Code expressly prohibits unreasonable discrimination on the basis of religion in all of the protected activities under the Code including employment. Religious beliefs include religion or creed, or religious belief, religious association or religious activity.

Just like other protected characteristics, an employer may have an obligation to accommodate the particular religion of an employee. Supreme Court decisions and arbitration decisions in Manitoba have confirmed that employers may have to take reasonable steps to accommodate an employee short of undue hardship. As it relates to religion, this usually requires an employer to accommodate the scheduling requests of employees to avoid working on a religious holiday which is specific to their own religion. This usually involves accommodating non-Christian employees given that most Christian holidays are already recognized in *The Employment Standards Code* or *The Canada Labour Code*.

However, accommodation of religion may include reasonable breaks throughout the day for prayer service or being excused from non-essential tasks associated with an employee’s position once the employee identifies that the task places him or her in conflict with his or her religious beliefs.

In addition to scheduling changes in order to accommodate religious beliefs, an employer may be required to accommodate religious dress requirements. The ability of an employer to accommodate religious dress requirements may conflict with employer policies that require certain dress or uniforms to ensure the health and safety of employees or the sanitation of a workplace. Again, each case will likely come down to whether it would cause undue hardship to the employer to accommodate the employee’s request.

One example that demonstrates a rather liberal treatment of religion as a protected ground is Global Communications Ltd. v. CEP Local 722-M, [2010] C.L.A.D. No. 298 (Levinson). This case involved an employee who wished to embark upon a once-in-a-lifetime religious pilgrimage. The employee had asked to take additional vacation days to complete the pilgrimage, which was denied by the employer. The employee did not grieve the refusal, but opted to take the time off in any event. The employer terminated the employee when she failed to attend work. The arbitrator found that the decision to terminate the employee was discrimination based on religion, and ordered reinstatement of the employee. Importantly, there was no evidence that the employer would have suffered undue hardship had it accommodated the employee's request.

Another example is where an attendance recognition program gave employees a bonus for perfect attendance during certain periods. In *Koroll v. Automodular Corp.,* [2011] O.H.R.T.D. No. 800 the employee was unable to meet the perfect attendance requirement due to religious observance. The tribunal found that insofar as the applicant's religious absences were counted against him so as to disqualify him from attaining perfect attendance under the attendance recognition program, it was clear that the program, or the manner in which it was applied by the employer, had adverse effect on the applicant based on his creed. The tribunal found that the employer did not show that it could not accommodate the employee's religious creed without undue hardship, and therefore it discriminated against the employee.

On the other hand, employees do not enjoy absolute impunity in the workplace if they base their complaint on religious grounds. In *Friesen v. Fisher Bay Seafood*, 2009 BCHRT 1, an employee was terminated after continuously preaching in the workplace, to the point where it irritated other employees and interfered with production. Although there was clear *prima facie* case of discrimination on religious grounds, the tribunal found that the employer had accommodated the employee to the point of undue hardship.

More recently, in *Nova Scotia Nurses' Union v IWK Health Centre*, 2022 CanLII 57410, Arbitrator Hollett concluded that a nurse's refusal to be vaccinated against COVID-19 on the grounds of religion was protected under that province's human rights legislation. In this case, the employer had introduced a mandatory vaccination policy where employees who remained unvaccinated were placed on unpaid leaves. The grievor sought an accommodation on the basis of religion because of her Christian faith. Her request was denied, and she was placed on an unpaid leave.

In this case there was no dispute that the grievor was a Christian and she had deep ties to her faith and strongly held religious beliefs. The grievor testified that she believed that forcing people to take the COVID-19 vaccine was part of an evil plan and this was the way the "Mark of the Best" was being introduced into society. She explained that the Mark of the Beast is talked about in Revelations, Chapter 13. The Beast is Satan and the Bible says people will have to take the Mark of the Beast on their right hand or forehead and people will not be able to buy or sell without the Mark of the Beast on their body. She explained that Mark of the

Beast was the ultimate denial of Christ and went against everything she believed.

Arbitrator Hollett applied the test endorsed by the Supreme Court of Canada in *Syndicat Northcrest v Amselem*, 2004 SCC 47, noting that in order for a religious belief to be protected, it does not need to conform to official church doctrine and that the court's role in assessing sincerity of belief is intended only to assure that a presently asserted religious belief is in good faith, neither fictitious or capricious. They concluded that under this approach there was "no requirement for independent or expert evidence to establish the existence of an individual's subjective religious obligation or belief…"

Arbitrator Hollett found that the grievor's rights under the collective agreement and the *Human Rights Act* were engaged. They ordered that the grievor be accommodated.

4. Accommodating People with Addictions

There is little question that addictions such as drug, alcohol and gambling addictions are disabilities which invoke an employer's obligation to accommodate an employee up to the point of undue hardship.

Like mental disabilities, these addictions are often invisible and very often are not raised or admitted by the employee until after discipline or discharge has been imposed by the employer. In this regard, it is important for unions to keep an eye out for members who display behaviour consistent with addictions such as repeated absenteeism, particularly around the weekends, difficulty in getting to work in time for morning shifts, long lunches or lateness in returning from lunch and leaving work early. Where unions are suspicious that an employee is suffering from an addiction they should take steps to confront the employee and ensure they are referred for counselling or at the very least are made aware of counselling that is available.

At one time, arbitral law respecting addictions fell primarily into one category now referred to as the "therapeutic approach". The therapeutic model requires an addiction be recognized as a disease or disability and any employee conduct relating to his or her addiction be treated as non-culpable and therefore not subject to discipline. The primary emphasis under this model is treatment and rehabilitation and will also usually involve an analysis of the extent to which an employer has accommodated the employee's disability and whether or not further accommodation will constitute undue hardship. Employment relationships can be brought to an end under the therapeutic model but only if the employer has accommodated the employee's disability to the point of undue hardship or if the employment contract has been frustrated by chronic absences over an extended period.

However, it is becoming much more common for arbitrators to employ a "hybrid approach" in dealing with employees who suffer from addictions. Under the hybrid approach, arbitrators

combine a disciplinary response to problematic behaviour of an employee who is addicted to alcohol or drugs with a therapeutic approach to the addiction/disability. These cases may involve imposition of a penalty on an employee, such as a suspension, which is frequently combined with a series of strict conditions to abstain from consumption of the addictive substance and to participate in a treatment program. These cases also frequently feature support and assistance being provided by the employer, which may include participation in employer-sponsored assistance programs or the employee being granted a leave of absence for the purpose of pursuing treatment.

In theory, the hybrid model is supposed to recognize and address the competing interests that exist between an employer's goal to maintain a productive and efficient work environment and ensure there are reasonable consequences for inappropriate behaviour (where the employee has the capacity to control the behaviour) while also supporting an employee's interest in pursuing treatment and rehabilitation and being accommodated while doing so.

The therapeutic model and the hybrid model share an important common feature which is that addiction (whether to alcohol, drugs or gambling or some other addictive behaviour) is recognized as a disability.

The third model that exists is the disciplinary model. Under the disciplinary model, the addictive behaviour of employees is treated as being culpable behaviour and warranting discipline. Discipline may include discharge. If an employee is able to establish that he or she is suffering from an addiction then the addiction will be treated as a mitigating factor but not an exculpatory factor. In other words, the existence of the addiction may lessen the penalty imposed (particularly where rehabilitation efforts are being pursued by the employee) but the addiction will not negate the imposition of discipline.

The question in every case is to decide which model, the therapeutic, the hybrid or the disciplinary is appropriate in each case. Increasingly, arbitrators are utilizing the hybrid model when dealing with employees who suffer from addictions.

In Manitoba, Arbitrator Graham in *Legal Aid Lawyers Assn v Manitoba*, [2009] M.G.A.D. No. 6, concluded that the hybrid model was the appropriate model for use in a case involving an employee who was addicted to cocaine and had violated an employer's policy which requires employees to disclose criminal charges or investigations that could ultimately lead to charges. The employer claimed that they had disciplined (discharged) the employee not because of his addiction and not because of the fact that he had criminal charges pending but because he had failed to report an incident that led to investigation of criminal charges. The employer claimed that the employee was being treated no differently than any employee who failed to report a similar incident and therefore was not being discriminated against in violation of *The Human Rights Code*.

The evidence before the arbitrator was relatively straight forward and not materially in dispute.

All parties recognized that the employee suffered from an addiction and that the addiction, to some degree, caused him to do things that were beyond his control (such as fuel his addiction by purchasing drugs). However, the employer took the position that the incident for which they were terminating the employee (the failure to report in accordance with the policy) was behaviour that was not directly related to the addiction.

The union obtained expert medical evidence from a doctor who specialized in addictive behaviour and who also testified at the hearing. The evidence was that the employee was indeed suffering from an addiction and at the relevant time was acting under the influence of his addiction. More importantly, the evidence disclosed that the employee was facing a very high risk that he would suffer a relapse and that at the time of his failure to report in accordance with the policy, he was acting as part of his addicted behaviour. That is, the medical evidence established that addicts are inclined to distort the truth and to hide their addictions as well as to tell lies to conceal their addiction. In that regard, the grievor's failure to disclose in accordance with the employer's policy was part of his addicted behaviour.

The arbitrator concluded that:

1. It is well settled that drug and alcohol addiction constitutes a disability;

2. It is necessary to find that a grievor's disability (his addiction) was a factor in his adverse treatment;

3. Because the grievor's conduct in failing to disclose was influenced by his addiction, his disability (his addiction) was a factor in his termination;

4. Because the policy required the grievor to report certain conduct and because an addict is much less likely to disclose their own misconduct, the employer's policy was discriminatory.

Perhaps of greatest importance, the arbitrator declined to accept case law out of the B.C. Court of Appeal which was argued by the employer. The employer was arguing that the grievor was not discriminated against because he suffered no greater impact for his misconduct than any other employee would have suffered. The arbitrator stated that that reasoning overlooks the fact that the grievor's addiction made it much more likely that he would breach the reporting requirements of the policy, than would an employee who does not suffer from an addiction. The arbitrator stated that one of the salient features of discrimination is differential treatment based on an enumerated characteristic. The grievor was treated differently because his disability made it much more likely that he would run afoul of the reporting requirements of the policy than would an employee who was not addicted.

In the result, the grievor was reinstated with back pay but, in light of the application of the hybrid approach, it was also recognized that some discipline was warranted and the arbitrator

imposed a two month suspension given this was the second violation by the employee of the same employer policy and given that he had previously received a brief suspension for the previous misconduct as agreed to by the parties.

However, it is important to note that, just like the case with other mental illnesses, if misconduct is completely unrelated to the addiction the presence of addiction might not be an exculpatory factor.

For instance, in *Toronto Transit Commission v. CUPE, Local 2,* [2011] O.L.A.A. No. 378 (Stout), an employee was terminated for stealing copper wire from his employer and then selling it. The employee claimed that his cocaine addiction was the reason he stole, and therefore requested accommodation of a disability. The arbitrator, however, dismissed the grievance, finding that the theft was not the result of the addiction. Rather, the only connection between the theft and the addiction was that the money was used to buy cocaine. Given that there was no causal connection between the grounds for termination and the disability, there was no discrimination.

Also, although addiction is to be treated like any other disability on an ongoing basis, at a certain point an employer will reach the point of undue hardship, For instance, in *Moosehead Breweries*, [2009] N.B.L.A.A. No. 10 (Bladon), where an employee breached a last chance agreement by consuming marijuana, the arbitrator found that undue hardship had been reached. According to the arbitrator, the question is not always if *anything more* could be done, as there is always something more that can be done for an employee suffering from addiction. According to the arbitrator, the legislation does not require that an employee be given every conceivable opportunity to recover and resume normal employment.

Similarly in *Goldcorp Canada Ltd. v. USW Local 7580*, [2013] O.L.A.A. No. 496, the employer was able to demonstrate that it had reached the point of undue hardship when the facts indicated that the grievor had no reasonable prospect of recovery from his alcohol addiction. The grievor occupied a safety sensitive position, and had significant attendance problems due to his addiction. He had attempted recovery four times in the past, through programs paid for by his employer. In 2012, he breached a last chance agreement, and the company took the position that it had accommodated to the point of undue hardship and should not be required to reinstate the grievor. The arbitrator agreed, noting that there was simply not enough evidence showing that the grievor would overcome his addiction:

> “...in my view the Grievor's evidence that all his problems are behind him is inconsistent with the nature of alcoholism and the need for ongoing aftercare and support following the initial rehabilitation program...He is not attending Alcoholics Anonymous, a virtually universal requirement in cases of this nature...There has been no evidence whatsoever of any support, mechanisms which is a generally recognized requirement of successful rehabilitation. The

> Union's case rests solely on the evidence of the Grievor with no support from anyone else."

The arbitrator held that the limit of reasonable accommodation had been reached, and that the employer ought not to be required to assume any further risk where circumstances were unlikely to change:

> "It is sincerely to be hoped that the Grievor has conquered the problems but the legal requirement for reasonable accommodation up to the point of undue hardship does not make this a risk that the Company should be required to assume, in the absence of persuasive evidence that his situation has indeed changed."

However, it is important to remember that the onus is on the employer to show undue hardship. Thus, if the employer is unable to show that additional accommodative measures would be occasioned by some unbearable cost or inconvenience, the undue hardship may not have been reached and a case for discrimination might still be made out.

Last Chance Agreements

Last Chance Agreements (also referred to as Return to Work Agreements or Accommodation Agreements) should be drafted in a fashion that recognizes the nature of the employee's problem and which specifically recognizes that relapse is to be expected and further accommodated in a fashion that (hopefully) does not result in additional discipline.

Last Chance Agreements related to drug and alcohol addiction typically require employees to:

1. Abstain from the addictive behaviour (using drugs or alcohol or gambling);

2. To fully participate in rehabilitation programs such as attendance at the Addictions Foundation of Manitoba and to abide by conditions as recommended by the employee's doctor or treating counsellor;

3. (In some instances) provide medical information and undergo drug testing upon the request of the employer.

Unions should specifically avoid Last Chance Agreements that do not recognize that the employee is suffering from an addiction which may result in behaviour beyond the control of the employee. Further, there should always be reference to the likelihood that an employee is going to relapse and multiple instances of relapse should be expected and accommodated. Where a Last Chance Agreement does not allow for additional relapse it is very possible that it will be seen as violating human rights legislation and/or a collective

agreement. In those cases, a union exposes itself to Human Rights complaints and/or complaints under *The Labour Relations Act* that the union has failed to properly represent its member.

Generally speaking, parties cannot contract out of human rights legislation. Thus, if an employer has not reached the point of undue hardship in accommodating an addicted employee, continued accommodation may be required notwithstanding a possible breach of a last chance agreement.

For example, in one case, an employee that was on a last chance agreement for absenteeism, and then breached the agreement because he was required to undergo surgery to remove his remaining teeth. As a result of further absence, the employee was terminated. The arbitrator found that the employee’s condition was a disability, and therefore, terminating him pursuant to the last chance agreement was discrimination and violated the duty of accommodation: *Winpak Ltd. v. CEP Local 830*, [2006] M.G.A.D. No. 41 (Wood).

Last chance agreements involve a tension between the need to respect the settlements made by parties and the need to enforce the standards imposed by human rights legislation. Arbitrators will often show deference to a last chance agreement made freely between parties, but such agreements do not negate the employer's need to establish that it has satisfied the duty to accommodate.