

## Addictions, Human Rights and Professional Discipline – Will the SCC Wade In?

By Linda McKay-Panos

### Case Commented on:

*Wright v College and Association of Registered Nurses of Alberta (Appeals Committee)*,  
[2012 ABCA 267](#)

In this recent case, the majority (Justice Frans Slatter, concurred with by Justice Keith Ritter) and the dissent (Justice Ronald Berger) of the Alberta Court of Appeal fundamentally disagreed on the approach to be taken when there are human rights principles at issue in professional discipline matters. Genevieve Wright and Mona Helmer were nurses who were disciplined by the College and Association of Registered Nurses of Alberta (“CARNA”) for stealing narcotics and for falsifying related records. Both argued that their addiction to narcotics amounted to a disability under the *Alberta Human Rights Act*, RSA 2000, c A-25.5 (“AHRA”). Thus, they argued that their employer had a duty to accommodate such that a modified disciplinary procedure was required under the *Health Professions Act*, RSA 2000, c H-7 (“HPA”).

The AHRA addresses discrimination by professional associations in section 9:

- 9 No trade union, employers’ organization or occupational association shall
  - (a) exclude any person from membership in it,
  - (b) expel or suspend any member of it, or
  - (c) discriminate against any person or member,because of the race, religious beliefs, colour, gender, physical disability, mental disability, age, ancestry, place of origin, marital status, source of income, family status or sexual orientation of that person or member.

The HPA provides the following with respect to disability in section 1(s):

- (s) “incapacitated” means suffering from a physical, mental or emotional condition or disorder or an addiction to alcohol or drugs as defined in the *Pharmacy and Drug Act* or other chemicals that impairs the ability to provide professional services in a safe and competent manner;

It provides a mechanism for dealing with nurses who are believed to be incapacitated under section 118(1), via examination, treatment and rehabilitation. The HPA also provides for an Alternative Complaints Resolution procedure in section 58, under which different professional associations governed by the HPA can approve their own guidelines.

Both nurses admitted to falsifying records in order to obtain narcotics from their workplaces (although there was no evidence in either case that patient safety had been at risk as a result of the nurses' conduct). They were charged with several instances of unprofessional conduct by CARNA. Both argued that the conduct was not "unprofessional" (i.e., not culpable) due to disability based on addiction, and that the appropriate accommodation would be to proceed under CARNA's Alternative Complaints Resolution procedure, or on the basis of "incapacity" under section 118 of the *HPA*. CARNA convened a Hearing Tribunal for each nurse.

### **Hearing Tribunal Decisions**

At the hearing into Ms. Helmer's conduct, she led evidence from an addictions specialist, Dr. Els, indicating that Helmer had an opioid dependency and that her addiction "was the most likely explanation" for her conduct (para 9). She also sought to examine Dr. Els about how other professional bodies deal with members with additions, and applied to the Tribunal to have the President of CARNA testify as to CARNA's policy for dealing with nurses who suffer from a drug dependency. Both lines of evidence were disallowed by the Hearing Tribunal as irrelevant. While the Hearing Tribunal accepted that its decision must comport with equality rights (para 12), it concluded that Helmer was not being disciplined because of a disability; rather she was being disciplined "for her fraudulent and thieving behaviour" (para 12), the same way that any other nurse would be disciplined for such behaviour. The Hearing Tribunal also focused on the element of choice and volition in the conduct of Ms. Helmer. It followed the judgment of the majority of the British Columbia Court of Appeal in *British Columbia (Public Service Agency) v British Columbia Government and Service Employees' Union*, 2008 BCCA 357, leave refused [2009] 1 SCR vi (*Gooding*). In *Gooding*, the employee was an alcoholic who stole alcohol from his employer. *Gooding* disclosed for the first time that he was an alcoholic at the time of his dismissal. The BCCA held that *Gooding* was dismissed for theft and not because he was an alcoholic. The fact that his conduct may have been influenced by alcohol dependency was not relevant if it had played no part in the employer's decision to terminate him (para 63).

The Hearing Tribunal reprimanded Helmer and directed treatment for her addiction. It suspended her registration as a nurse, but she was able to apply immediately to practice under supervision, as she had already sought rehabilitation (para 14). Helmer was also ordered to pay \$39,000 in legal costs over four years.

At her hearing, Ms. Wright presented evidence that her conduct was caused by a medical condition which led to opioid dependence and that there was no indication her ability to perform her duties was affected. The opinion evidence of Dr. Hajela was that Wright's "uncharacteristic behaviour of stealing opioids was entirely due to her untreated Opioid Dependence" to address her chronic pain (para 20). The Hearing Tribunal held that Wright realized what she was doing was wrong and that while the *AHRA* applies to CARNA, Wright was not discriminated against due to her disability by the process of the discipline hearing. Again, she had been "treated the same as any other nurse who steals drugs," and her disability should only be considered in the sanction phase (para 23). Ms. Wright was also reprimanded and suspended, and conditions were placed on her future employment depending on whether she would have access to narcotics (para 24).

### **Appeal Committee Decisions**

Both Helmer and Wright appealed the Hearing Tribunal decisions to the Appeals Committee of CARNA. In Helmer's case, the Appeals Committee agreed with the Hearing Tribunal that the

evidence of the President and Dr. Els regarding the policies of CARNA and other professional regulators was not relevant and thus properly excluded. The Appeals Committee also agreed that Helmer's conduct had an element of choice and was not entirely caused by her addiction, and that there was an insufficient link between her disability and the conduct that was being disciplined. In fact, even if there was *prima facie* discrimination, the College did not have a duty to accommodate her disability by "tolerating theft in a nursing setting" (para 18). The Appeals Committee affirmed the finding of professional misconduct, the sanctions and the cost award, and awarded an additional \$16,000 for costs of the appeal (para 19).

In Wright's case, the Appeals Committee accepted that she had an addiction but concluded that "the Hearing Tribunal had implicitly rejected the evidence that the addiction was the sole cause of her conduct" (para 25). The Appeals Committee held that there was no arbitrary treatment by the Hearing Committee justifying a finding of *prima facie* discrimination. The proper point to address addiction was in the sanction. Again, the Appeals Committee followed the *Gooding* case and found that no discrimination had been demonstrated (para 26). While the Hearing Tribunal had not made any order on costs, the Appeals Committee concluded that an order of costs of \$10,000 against Wright was reasonable, to be paid in installments (para 27).

### **Alberta Court of Appeal Decision**

For both nurses, the matter was next heard by the Alberta Court of Appeal, which provides for a direct appeal under the *HPA*, section 90.

The Alberta Court of Appeal determined that the combined issues for the appeal were:

- (a) Was evidence improperly excluded in the Helmer case?
- (b) Was the College required to use alternative procedures, rather than its disciplinary procedures?
- (c) Did the College correctly apply the Human Rights Act?
- (d) If the College did discriminate against the appellants, were its actions reasonable and justifiable in the circumstances?
- (e) Were the costs awards reasonable? (para 30)

With regard to standard of review, the Alberta Court of Appeal held that the admissibility of evidence was to be reviewed for fairness, the issue of the impact of the *AHRA* on the proceedings was largely a question of law to be reviewed on a standard of correctness, and the award of costs in a professional disciplinary matter was to be reviewed on a standard of reasonableness (paras 31- 35).

On the question of the admissibility of evidence, the majority found that "leaving out human rights issues," this decision was only reviewable "for something close to abuse of process" (at para 36). The majority did acknowledge that the evidence of how other professional bodies deal with members with addictions could be relevant to the issue of reasonable accommodation, but stated that "this case does not turn on accommodation," thus the exclusion of the evidence was not unreasonable or unjustified (at paras 39-40).

As for the second issue, the nurses argued that rather than lay professional disciplinary complaints against them, and in view of their disabilities, CARNA should have used either its Alternative Complaints Resolution procedure, or the procedures for dealing with incapacity under the *HPA* (para 41). These alternative procedures were argued to flow from CARNA's

obligation of reasonable accommodation under the *AHRA* (para 43). However, CARNA argued that the Alternative Complaint Resolution process was not available to the nurses because the complaints involved criminal conduct.

The majority held that decisions about professional discipline are akin to prosecutorial discretion, such that errors “must likely approach an abuse of process to invite judicial intervention” (at para 47). In the case at bar, there was no such abuse of process, and not even unreasonableness, as the Alternative Complaints Resolution Process adopted by CARNA under the *HPA* was excluded in cases where the conduct was criminal. Furthermore, the provisions relating to incapacity were not unreasonably rejected, as both nurses were able to perform their duties in spite of their addictions, “even if a more esoteric interpretation of that term might cover non-disabling addictions” (at para 48).

In relation to the third issue, the nurses argued that the professional discipline procedures resulted in adverse effect discrimination – there was a neutral rule which had a discriminatory effect on them based on their disability (para 54).

The majority of the ABCA found that there were a number of factors supporting the decisions below that CARNA’s invocation of the disciplinary proceedings did not amount to a *prima facie* case of discrimination. First, the discipline was based on the nurses’ criminal conduct rather than their personal characteristics; second, there was no indication that the thefts of narcotics were “predominantly caused by addictions”; third, CARNA showed “no discriminatory motivation” nor focus on disability in disciplining the nurses; fourth, CARNA’s decision was objective, and not based on stereotypical reasoning; fifth, there was no evidence of arbitrariness, as CARNA relied on the criminal nature of the nurses’ conduct (at para 58).

The ABCA followed the *Gooding* case in holding that “The fact that [the] criminal conduct was motivated (or caused) by ... addiction did not elevate the employer’s decision to the level of discrimination, because the decision to dismiss for theft was not arbitrary or based on preconceived stereotypes” (at para 63). To the nurses’ argument that discrimination was shown because the otherwise neutral standard had a greater impact on them because of their disability (para 64), the ABCA replied that “there are a great many addicts who do not commit criminal acts, and it is not discriminatory to hold those who do accountable for their actions” (para 67). Overall, there was seen to be an insufficient connection between the nurses’ actions and their disability to make out a case of *prima facie* discrimination.

On the fourth issue, the majority held that while it was not necessary to look at the defence to discrimination (“reasonable and justifiable exceptions”) in *AHRA* s 11, the tribunals below had recognized that disability was relevant to the penalty imposed on the nurses. The sanctions imposed were based on rehabilitation, and this amounted to meaningful accommodation of the addiction (para 74). It rejected the nurses’ arguments that accommodation required the use of alternatives to the disciplinary proceedings; CARNA had a “very wide discretion” to choose which process to adopt in the case of misconduct, and to require it to abandon disciplinary proceedings would amount to undue hardship (at paras 71-3).

Finally, the majority held that the tribunals’ costs awards were reasonable (para 75). The nurses’ appeals were dismissed.

In his dissent, Justice Berger focused almost entirely on whether there had been a violation of *AHRA* section 9 (para 101). He noted that under *AHRA* s 1(1), every law of Alberta (unless the

legislature has expressly stated otherwise) is “inoperative to the extent that it authorizes or requires the doing of anything prohibited by this Act.” Thus, the *AHRA* trumps the provisions relied upon by CARNA (para 102). Justice Berger also noted that human rights legislation is quasi-constitutional law and must be interpreted in a “liberal and purposive manner, with a view towards broadly protecting the human rights of those to whom it applies” (para 103, citing *Tranchemontagne v Ontario (Director, Disability Support Program)*, 2006 SCC 14). Justice Berger cited with approval Beatty and Brown’s approach to addiction disability cases (at para 111):

... [A]rbitrators have for a long time treated alcoholism and drug abuse as an illness just like any other disability that falls within the protection of human rights legislation. Accordingly, before an employer will be allowed to terminate the services of afflicted employees, it must prove that their condition adversely affects their work, has not responded to efforts to accommodate and is not, in the foreseeable future, likely to improve.

After discussing the current jurisprudence on discrimination, Justice Berger stated that the issue at hand was “whether neutral performance standards have a disproportionately adverse impact on a nurse suffering from a disability, namely an addiction, which causes her to steal narcotics” (at para 116).

He disagreed with the majority that discrimination requires proof of arbitrariness or stereotyping, noting that this is a misinterpretation of Supreme Court case law (*McGill University Health Centre (Montreal General Hospital) v Syndicat des employés de L’Hôpital général de Montréal*, 2007 SCC 4 and *Honda Canada Inc. v Keays*, 2008 SCC 39). Justice Berger indicated that other courts have either continued to apply the traditional *prima facie* case approach, which requires only proof of adverse effects, or they have treated arbitrariness and stereotyping as an alternative way of proving discrimination (at para 117, citing *Armstrong v British Columbia (Ministry of Health)*, 2010 BCCA 56 at para 27; leave to appeal to SCC refused [2010] 2 SCR v; *Tranchemontagne, supra*; and *Baum v Calgary (City)*, 2008 ABQB 791 at para 36).

Also, Justice Berger reiterated the long standing principle that it is not necessary to establish that disability was the sole cause of the nurses’ failure to meet nursing standards in order to make out a *prima facie* case of discrimination. It is sufficient that the prohibited ground (disability) be a **factor** in the adverse treatment; it does not have to be the sole or overriding factor (para 121, citing e.g. *Kemess Mines Ltd. v International Union of Operating Engineers, Local 115*, 2006 BCCA 58 at para. 30).

Because in this case the medical evidence provided a nexus between the disability and the theft of narcotics, Justice Berger found that both tribunals “erred by not conducting a human rights analysis” (para 125). If they had done so, they should have found that CARNA’s decision to treat the nurses’ conduct as culpable and subject to disciplinary proceedings was *prima facie* discriminatory.

As to whether the accommodation for disability should occur at the penalty phase of the process as argued by CARNA and as held by the majority, Justice Berger found that this was too late and failed to remedy the discrimination. CARNA had an obligation to consider how to accommodate the nurses at the earlier stage of deciding what process to follow (paras 125-126). The fact that CARNA’s policy was to exclude nurses from the Alternative Complaint Resolution process if

they had engaged in criminal conduct was no answer – this policy was itself reviewable under human rights principles. Lastly, the evidence excluded by the Hearing Tribunal may have been relevant to the duty to accommodate issues. As a result, although Justice Berger would have allowed the nurses’ appeals, he would have remitted both matters to the Appeals Committee for “resolution in a manner consistent with this judgment” (at para 134).

### **Commentary**

It is interesting to note that Justice Berger does not seek to distinguish the *Gooding* case. Perhaps it could be distinguished on the facts. Narcotics, unlike alcohol, are not readily available to the public other than at the Appellants’ place of employment.

I am inclined to prefer the analysis by the dissent in this case. It follows a traditional human rights approach, whereas the majority’s perspective basically ignores the role of disability (addiction) in the behaviour of the nurses until the remedy stage.

CARNA has indicated that it will be seeking leave to appeal this case. I hope the SCC will grant it as this is an area of law requiring clarification.

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