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ABQB Upholds Arbitrator's Decision on Innocent Absenteeism, the Duty to Accommodate and Notice

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Case Commented On: *Canadian National Railway Company v Teamsters Canada Rail Conference*, 2018 ABQB 405 (CanLII) (*CNR*)

Canadian National Railway (CNR) applied unsuccessfully to the Alberta Court of Queen's Bench (ABQB) (per Justice W.N. Renke) for a review of the Arbitration Award made under Case No 4510, December 5, 2016 (the Award). Because CNR is a federal undertaking, the applicable legislation includes the *Canada Labour Code*, RSC 1985 c L-2 (*CLC*) and the *Canadian Human Rights Act*, RSC 1985 c H-6 (*CHRA*).

CNR terminated an employee (Grievor) for innocent absenteeism on January 30, 2015. The Teamsters Canada Rail Conference (Union) submitted a grievance opposing the termination. Because CNR declined the grievance, the matter went to Arbitration (before Arbitrator John Moreau) as provided for in the Memorandum of Agreement between CNR and the Union (*CNR* at paras 3 and 4). The Grievor was successful at the Arbitration, and Justice Renke upheld the Arbitrator's decision.

Facts

The Grievor commenced working with CNR on October 23, 2006 and was terminated in 2015. Although the Grievor was technically employed by CNR for eight years, he was only able to claim pensionable earnings for three years and eight months (*CNR* at paras 12, 13). The history of absences was set out as follows by Justice Renke (*CNR* at para 14):

> [14] The Grievor's absence history was as follows:
>
> (a) In 2007 he was off work because of illness from July 12 to September 4 and for periods in October and November.
>
> (b) From December 6, 2007 to May 10, 2010, the Grievor was off work for treatment for alcohol dependence. Following a medical assessment on December 5, 2007, he was declared temporarily unfit to work in a safety critical position. He was required to sign and participate in a Relapse Prevention Agreement. In October 2008, CN reported that the Grievor had violated this Agreement. On November 5, 2008, the Grievor was offered a Continuing Employment Contract signed on January 12, 2009 [a 'last chance agreement:' see D J M Brown, D M Beatty, A Beatty, *Canadian Labour Arbitration*, 4th ed at §7:6122]. The Grievor, however, did not commence the recommended treatment and failed to respond to

CN. Following notice from CN that it would conduct a formal investigation relating to his failure to comply with the Contract, in August 2009 the Grievor commenced the required treatment program, participating in it until April 6, 2010, when he was declared fit to return to his position as Conductor. He returned to work on May 10, 2010.

(c) In June, August, and October 2010 and January and February 2011, the Grievor booked off sick for various periods.

(d) The Grievor was injured in a motor vehicle accident on April 28, 2011. On April 30, he reported that he would be absent from work because of those injuries.

(e) The Grievor did not return to work after April 28, 2011.

(f) On February 27, 2012, the Grievor was injured in a second motor vehicle accident.

(g) Paragraph 18(i) of the CN Brief states that

> The medical information received from the Grievor and his physicians in relation to his claim for disability benefits related to a variety of medical issues such as bronchitis, soft tissue mediated pain in his neck and upper back, headaches, elevated CK levels [creatinine kinase, an enzyme found in muscle cells], depression, ulcerative colitis, anemia, post-traumatic stress disorder, insomnia, fatigue, gastrointestinal upset, bursitis and skin discolouration.

The Arbitrator noted that the Grievor 'has also been diagnosed with post-traumatic stress disorder, severe depression, ulcerative colitis and numerous other medical disabilities' (Award at p. 3).

(h) Following the first accident the Grievor had been on long-term disability, but that terminated on February 19, 2014. According to para 18(j) of the CN Brief,

> This reflects the change in the plan's definition of 'disabled' from the initial assessment period (approximately 2 years) which relates to the Grievor's inability to perform the duties he regularly performed for the employer, to the subsequent assessment period where the Grievor will only be considered disabled if he is prevented from being gainfully employed.

(i) On July 18, 2014, CN sent a letter to the Grievor advising that because he was in a safety critical position, his mental health condition would need to be verified by his treating physician before he could return to work. CN received no response.

(j) On September 11, 2014, CN requested updated medical information to permit assessment of his ongoing absence from work. The letter stated that without this medical information, 'OHS will not be able to support your ongoing medical leave' (Union Brief at para 9; see also Award at p. 3).

(k) On October 1, 2014, CN received a note from the Grievor's physician, Dr. Irene Chan. This note was handwritten. The whole of the note stated this:

> The above patient is unable to work indefinitely due to his car accidents x2 and depression/headaches.

(attached as tab 19 to the Company Submission/Book of Documents, tab 3 of the Certified Record of Proceedings)

(l) On January 30, 2015, CN sent a letter to the Grievor advising that his employment was terminated immediately due to his failure to maintain a satisfactory level of attendance at work.

(m) At the time of termination, the Grievor had been continuously absent for 3 years and 9 months.

(n) Dr. Chan subsequently provided three additional sets of information, received by CN after the termination date, shortly before the arbitration. Dr. Chan provided

> (i) a Medical Report on Mental Health form dated April 27, 2015, stating that the Grievor was not fit to occupy a safety critical position in the railway industry but "can try other light duties."
>
> (ii) a note dated April 28, 2015 stating that the Grievor 'cannot work safety sensitive job due to depression and PTSD. He can be accommodated light duties due to ulcerative colitis.'
>
> (iii) a note dated February 17, 2016 stating that the Grievor 'has recovered now and is fine to do physical jobs.'

(attached as tab 11 to the Brief of the Teamsters Canada Rail Conference, tab 4 of the Certified Record of Proceedings).

In its Brief before the ABQB, the Union pointed to several actions not taken by CNR following the Grievor's two motor vehicle accidents. CNR did not (*CNR* at para 15):

- warn the Grievor or the Union that the Grievor's employment was in jeopardy for innocent absenteeism or any other reason.
- initiate a process to consider accommodation of the Grievor's disabilities.

- invite or involve the Grievor or his Union representatives to participate in an individualized assessment of his circumstances, disabilities, and possible accommodations.
- involve the Grievor or his Union representatives in the decision-making process respecting the termination of his employment before terminating the Grievor.
- take any steps to accommodate the Grievor before his termination for innocent absenteeism.

CNR argued before Justice Renke, first, that the Arbitrator applied an incorrect legal test for innocent absenteeism (*CNR* at para 7). Second, CNR argued that the Arbitrator had considered inadmissible facts, leading to unreasonable findings (*CNR* at para 8).

Justice Renke noted that the applicable standard of review (as agreed by the parties) was reasonableness (*CNR* at para 16). He then went on to analyze whether the Arbitrator's award fell within "a range of possible, acceptable outcomes which are defensible in respect of the facts and the law" (citing *Dunsmuir v New Brunswick*, 2008 SCC 9 (CanLII) and *Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd*, 2016 SCC 47 (CanLII)) (*CNR* at para 18). Justice Renke also noted that while the reasonableness standard of review is deferential, "it does not preclude a finding of unreasonableness" (*CNR* at para 19).

Innocent Absenteeism

CNR relied on a two-part test for determining innocent absenteeism, which requires the employer to establish (*CNR* at para 26):

(a) the employee's record of absenteeism is excessive; and
(b) there is no reasonable likelihood that the employee's attendance will improve in the foreseeable future: *Hydro-Québec v Syndicat des employé-e-s de techniques professionnelles et de bureau d'Hydro-Québec, section locale 2000 (SCFP-FTQ)*, 2008 SCC 43 (CanLII) at paras 17 and 19.

CNR argued the Arbitrator had erroneously imported a (third) notice requirement to the innocent absenteeism test (*CNR* at para 24). In addition, CNR argued that even if obligated to give notice before terminating an employee for innocent absenteeism, an employer is not required to give notice in the circumstances where notice would be futile, because the medical information established that the employee could not return to work (*CNR* at para 24).

The Arbitrator agreed that the employee's record of absenteeism was excessive (*CNR* at para 28). He also agreed that the Grievor was unlikely to improve his attendance in the future (*CNR* at para 29). However, the Arbitrator held that before terminating the Grievor, CNR had failed to take legally required steps (*CNR* at para 29). Justice Renke summarized the origin of these "legally-required steps" as:

- While the relationship between an employee and employer is contractual, the CHRA imposes a 'statutory human rights dimension' to the relationship such that discrimination by the employer on the basis of the employee's disability is discrimination on the face of it (*CNR* at para 32);

- The human rights aspect of the situation requires that an employer accommodate the employee's disability to the point of undue hardship (*CNR* at para 33);
- If reasonable accommodation to the point of undue hardship remains impossible, and there is no 'reasonable basis to believe that the employee will be able to return to meaningful service in the future (citation omitted)', termination can then occur (*CNR* at para 34);
- The duty to accommodate has both 'substantive and procedural aspects' (*CNR* at para 35). Substantively, the employer must take the individual circumstances of the employee into account when assessing the employee and possible accommodations, which must be 'flexible and creative' (*CNR* at para 35). Providing adequate notice to the employee and the Union promotes the employer's ability to provide individualized accommodation based on the best information (*CNR* at para 35);
- One procedural aspect of the duty to accommodate requires that there be effective communication between the employer, the employee, and the Union, where applicable; effective communication requires notice of the need to address issues of accommodation and to consult with the employee and the Union about ways to accommodate the employee. Thus, in this case, the employer was obligated to 'make all reasonable efforts to verify…whether the person…can be accommodated (citations omitted)' (*CNR* at para 36);
- Notice and consultation serve the following three purposes:
    1) provide information to the employers about potential ways to accommodate (from the employee and his or her representatives) (*CNR* at para 39),
    2) serve as a check and balance to prevent an employer from making accommodation decisions without consultation (*CNR* at para 40), and
    3) encourage out of court resolutions for accommodation issues because all parties are involved in the accommodation process (*CNR* at para 41).

Further, Justice Renke held that the formulation of the "innocent absenteeism test" relied on by CNR "inclined [it] towards error" (*CNR* at para 44). Justice Renke noted the preferred approach in situations requiring reasonable accommodation (*CNR* at para 44) is that set out by Arbitrator Ponak in *Shelter Regent Industries v IWA-Canada, Local 1-207*, 2003 CarswellAlta 1911, [2003] AGAA No. 114, at para 39:

> In the current case, the proper analytical approach is for the arbitrator to determine whether the tests for a non-culpable dismissal for excessive innocent absenteeism have been met. These tests, which are well supported by the authorities, are: 1) was the absenteeism excessive; 2) was the employee warned that his or her absence was excessive and failure to improve could result in discharge; 3) was there a positive prognosis for regular future attendance at the time of dismissal; and 4) if the absenteeism was caused by an illness or disability, did the employer attempt to accommodate the employee to the point of undue hardship prior to dismissal (citations omitted).

Also, the Arbitrator had found that the Grievor had suffered from disabilities recognized under the CHRA (alcohol addiction, depression and PTSD) and CNR had not disputed this finding (*CNR* at para 46). In this situation, Justice Renke held that CNR should have known the Grievor was disabled and that accommodation needed to be considered (citing *Re Rogers Cable and*

Unifor, Local 875, 2015 CarswellNat 76, 250 LAC (4th) 329) (*CNR* at para 47). Thus, CNR's duty to accommodate and not to discriminate were engaged. In order to discharge those duties, CNR was required to provide proper notice to the Grievor and his Union and to explore with them whether accommodation to the point of undue hardship was available (*CNR* at para 49). This duty was not discharged by CNR (*CNR* at para 51).

Justice Renke concluded that the Arbitrator had not been unreasonable when concluding that notice to the Grievor and Union was required in order to fulfill the employer's duty to accommodate. Failure to provide notice to these parties was a violation of CNR's duty to accommodate (unless there was an exception to this duty on the facts of the case) (*CNR* at para 52).

Did an Exception to the Notice Requirement Apply?

CNR submitted that the Arbitrator had erred in three respects by failing to find that CNR was not required to provide notice to and engage in consultation with the Grievor (*CNR* at para 55). CNR argued that the Arbitrator erred by:

- failing to find that the Grievor did not provide information to support a duty to accommodate,
- misunderstanding CNR's evidential basis for terminating the Grievor, and
- failing to recognize that in this case the duty to accommodate was not required because notice was futile (*CNR* at para 55).

Justice Renke noted that a Grievor does have obligations to cooperate with and participate in the accommodation process (*CNR* at para 56). CNR submitted that the Grievor had many chances to provide additional medical information, but he did not do so (at para 57). Further, CNR argued that it was entitled to rely on the information the Grievor provided, and thus entitled to conclude that he could not return to work, and this ended their duty to accommodate (*CNR* at para 57). Justice Renke dismissed this argument because it presupposes that CNR had taken accommodation measures, but neither the Grievor nor the Union was notified to participate in accommodation. Thus, CNR failed to take the required procedural measures for accommodation (*CNR* at para 57). Justice Renke also noted that CNR had sufficient information about the Grievor's medical condition to determine whether reasonable accommodation was feasible. This information was available in correspondence from Great West Life denying long term disability coverage that indicated the Grievor had some capacity to work (*CNR* at para 59).

Thus, it was not an error that the Arbitrator did not make any findings about the Grievor's failure to perform his own duties in the accommodation process; CNR could not fault the Grievor for failing to participate in a process that CNR did not pursue after it had notice of the termination of the Grievor's long term disability coverage (*CNR* at para 60).

Justice Renke found that "[t]he Arbitrator did not misunderstand CN's evidence for terminating the Grievor" (*CNR* at para 65). The Arbitrator did not state that CNR should not have relied on the doctor's handwritten note—which stated that the Grievor would be absent indefinitely; rather, this was a key factor in the decision to terminate. However, there was no follow-up request for additional information about whether the Grievor could perform modified duties or was capable of working in a different capacity (*CNR* at para 64). The Arbitrator drew no

conclusion on whether the Grievor was or was not able to return to work because the accommodation process that should have been followed by CNR did not occur (*CNR* at para 66). CNR had prematurely arrived at the conclusion that the Grievor was incapable of returning to work (*CNR* at para 66).

Justice Renke also found that "recognizing a 'futility' exception to the notice elements of the duty to accommodate would be contrary to the very purposes of the notice elements" (*CNR* at para 76). He noted that notice is essential so that the parties can explore all options and to ensure that an employer does not decide the issue without information provided by the employee and the Union (*CNR* at para 76). Further, it would not be proper after the fact to assert that the employee could not have been accommodated anyhow (*CNR* at para 77).

Justice Renke concluded that "there neither is nor should be a 'futility' based exception to the procedural elements of the duty to accommodate" (*CNR* at para 81). In fact, Justice Renke concluded that the Arbitrator's reasoning was not only reasonable but correct (at para 82). While the CNR's conduct was not "capricious or arbitrary", it had failed to perform its duties as required by human rights legislation (*CNR* at para 83).

There is also a discussion in the case about the Arbitrator's admission of evidence that arose after the termination (*CNR* at paras 84 to 102). The ABQB held that since the Arbitrator had not relied on the additional evidence in deciding that CNR had failed to discharge its duty to accommodate, no unfairness to CNR had occurred (*CNR* at para 99).

Commentary

This decision points out that when terminating an employee for innocent absenteeism, which is caused by disability or illness, human rights principles impose an obligation on the employer to ensure that accommodation to the point of undue hardship is no longer available. Human rights principles require employers to accept legitimate employee disabilities, and to modify duties and expectations with the goal of returning the employee to productive work. In order to determine if accommodation is feasible, communication between the employer and employee is critical.

While it may seem that employers can seldom terminate employees for innocent absenteeism caused by illness or disability, if the employer exercises reasonable attempts to accommodate the employee (e.g., by assisting the employee to seek rehabilitation, obtaining benefits and developing return to work programs), yet the employee is ultimately unsuccessful in returning to lighter work (etc.), and no other accommodation options are available without undue hardship, the employer can consider the employment relationship to be terminated (see *Teamsters Local, Union No 213 v Sun-Rype Products Ltd*, 2016 CanLII 7692 (BC LA); cited in *CNR* at paras 48 and 103).

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